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STANDARD
ENCYCLOPÆDIA *of*
PROCEDURE

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SUPERVISING EDITOR

VOL. XVII

LOS ANGELES
L. D. POWELL COMPANY
CHICAGO

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1911

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JURIES AND JURORS

By the Editorial Staff.

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For cross-references see 16 STANDARD PROC. 843, 844.

VII. SELECTING AND IMPANELING THE TRIAL JURY. — A.

IN GENERAL. — In a strict sense the jury is impaneled when the sheriff has entered their names into the panel,⁹ and the term "impaneled" simply means making a list of those who have been selected.¹⁰ In American practice the word "impaneled" is used of a jury drawn for the particular case as well as of the general list returned by the sheriff,¹¹ and has been applied to jurors accepted by both parties though the jury is not complete.¹² The use of the word in the record of the case does not imply that the jury has been sworn,¹³ and strictly

9. *State v. Potter*, 18 Conn. 166, citing Co. Litt. 158b and other common law authorities.

[a] **Common Law Practice as Indicating Meaning of Term.**—"The jury was originally formed by the selection of twelve men by the sheriff, their names were neither on a schedule and the jury was then said to be 'impaneled' and that of 'twelve men' was to try the case. Therefore a jury in the strict sense of the word, is said to be 'impaneled,' when it is ready to be charged with the case." *State v. Cardoza*, 11 S. C. 195, 258.

10. *Zapf v. State*, 35 Fla. 210, 17

So. 225. See *Rich v. State*, 1 Tex. App. 206.

[a] "'To empanel,' says Bouvier, is 'the writing the names of a jury on a schedule by the sheriff or other officer lawfully authorized.'" *Lyman v. People*, 7 Ill. App. 345.

11. *State v. Mitchell*, 199 Mo. 105, 97 S. W. 561; *Rich v. State*, 1 Tex. App. 206.

12. *Grissom v. State*, 4 Tex. App. 374.

13. **Conn.**—*State v. Potter*, 18 Conn. 166. **Fla.**—*Zapf v. State*, 35 Fla. 210, 17 So. 225. **Ill.**—*Lyman v. People*, 7 Ill. App. 345, applied grand jury. **Mo.**

the jury is impaneled before it is sworn.¹⁴ The general rule is that in the absence of any statutory regulation the manner of impaneling will be left to the trial court's discretion.¹⁵

It is not necessary that any foreman be appointed by the court.¹⁶

The names of the jurors need not be set out in the record,¹⁷ nor that there were twelve jurors,¹⁸ nor need it be recited that they were "good and lawful men."¹⁹

B. DRAWING AND SELECTING.²⁰ — 1. Drawing by Lot. — In many jurisdictions, the names of the jurors are written on separate slips of paper which are folded, or rolled up and then placed in a box, or some substitute therefor, are shaken together and the slips drawn out one by one until the jury is completed.²¹ Provisions of the statute

State v. Mitchell, 199 Mo. 105, 97 S. W. 561. *Tex.*—*Rich v. State*, 1 Tex. App. 206.

[a] "The word impaneled means the final formation by the court, of the jury. It is the act that precedes the swearing of the jury, and which ascertains who are to be sworn," *State v. Ostrander*, 18 Iowa 435, *quoted with approval in State v. Hurst*, 123 Mo. App. 39, 99 S. W. 820. Both cases are relative to grand juries but the discussion seems to apply the rule to petit juries also.

14. *State v. Potter*, 18 Conn. 166; *State v. Cardoza*, 11 S. C. 195.

[a] Under statute requiring jurors to be kept together after impanelment (1) it was held reversible error to permit them to separate, though only part of the jury had been selected and they had not been sworn in chief. *Grissom v. State*, 4 Tex. App. 374. (2) But compare *State v. Squaires*, 2 Nev. 226, which holds that under a statute forbidding such separation "after the impanelment of the jury shall be completed," the impanelment is not complete until the jury are sworn and charged with the case. To same effect is *Gerald v. State*, 128 Ala. 6, 29 So. 614. And see generally as to the right or duty to keep jurors together before and after they are sworn, *infra*, IX, D.

15. *Colo.*—*Denver City, etc. Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680. *N. H.*—*Walker v. Kennison*, 34 N. H. 257; *Watson v. Walker*, 33 N. H. 131. *Wis.*—*Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

Discretion of court to determine selection by lot, see *infra*, VII, B.

Discretion of court to determine as

to manner of peremptory challenges, see *infra*, VII, E, 5, b.

Discretion of court to determine as to order of interposing challenges, see *infra*, VII, E, 2.

16. *State v. Daniel*, 31 La. Ann. 91; *State v. Moore*, 8 Rob. (La.) 518; *State v. Nolan*, 8 Rob. (La.) 513.

17. *Clark v. Davis*, 7 Tex. 556; *O'Brien v. The Queen*, L. R. 26 (Ir.) 451.

18. *O'Brien v. The Queen*, L. R. 26 (Ir.) 451.

19. *State v. Kellison*, 56 W. Va. 690, 47 S. E. 166.

20. Failure to properly draw or select as ground for challenge to the array, see *infra*, VII, E, 3, b, (X); as ground for discharge of particular juror, see *infra*, X.

21. *Ala.*—*Brazier v. State*, 44 Ala. 387. But note Acts Special Session, 1909, §32, p. 318, which abolishes use of box in criminal cases. *Cal.*—*People v. Scoggins*, 37 Cal. 676. *Ill.*—*Walker v. Collier*, 37 Ill. 362. *Me.*—*Davis v. Bangor & P. R. Co.*, 60 Me. 303. *N. J.* *State v. Lapp*, 84 N. J. L. 19, 86 Atl. 62. *N. Y.*—*Becker v. Sitterly*, 58 How. Pr. 38. *S. C.*—*State v. Campbell*, 35 S. C. 28, 14 S. E. 292. *Tex.*—*Gulf C. & S. F. Ry. Co. v. Keith*, 74 Tex. 287, 11 S. W. 1117.

[a] Statute Does Not Apply to Sheriff's Jury.—*Davis v. Bangor & P. R. Co.*, 60 Me. 303.

[b] Where the statute provides for a panel of twenty-four from which sixteen competent jurors are to be selected, it is not contemplated that twenty-four competent jurors shall first be obtained and the sixteen then determined by lot. *Honesty v. Com.*, 81 Va. 283; *Richards v. Com.*, 81 Va. 110.

as to the folding and drawing of the ballots are merely directory,²² but it is reversible error to refuse to choose, or draw by lot, as the statute requires,²³ though by some authorities the complaining party must show some resulting prejudice.²⁴ The drawing should be in open court.²⁵ Names of additional jurors summoned on special order of the court, to serve for the term, should be drawn from the box the same as regular jurors,²⁶ but where jurors have been summoned to serve in the particular case they may be presented without resorting to lot.²⁷

22. *Cole v. Perry*, 6 Cow. (N. Y.) 584.

[a] **Preparation of Slips.**—A statutory requirement that the residence and occupation be noted on the slips is sufficiently complied with where the street and number of the juror's house is given and the word "Liquors" as indicating his occupation. *Com. v. Bacon*, 135 Mass. 521.

[b] **Two Jurors' Names on One Slip.** It was not a substantial compliance with the statute to write the name of two jurors on one slip. The slip was drawn and the name of one juror read. *Brazier v. State*, 44 Ala. 387.

[c] **An error in placing names on the box** which should not have been so placed, is harmless where none of those names were drawn. The result is just the same as if the slips upon which the names were written were blank pieces of paper. *Kimbrell v. State*, 130 Ala. 40, 30 So. 454.

Irregularity in drawing by lot as ground for challenge to the array, see *infra*, VII, E, 3, b, (X), (D).

23. Cal.—*People v. Johnson*, 104 Cal. 418, 38 Pac. 91, if properly objected to. *Miss.—Steele v. State*, 76 Miss. 387, 24 So. 910. N. Y.—*Becker v. Sitterly*, 58 How. Pr. 38.

[a] **Where statute requires first twelve to be taken as jurors**, the juror's place on the list, whether near the top or bottom, is important sometimes and so it is reversible error to fail to draw the names by lot. *Gulf, C. & S. F. R. Co. v. Keith*, 74 Tex. 287, 11 S. W. 1117.

[b] **The rule that the right to challenge is one of rejection and not of selection** does not go to the extent of doing away with the orderly procedure of drawing the individual jurors from the hat, wheel, or box. *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778.

[c] **Peremptory Challenges Exhausted.**—"No one as a right to say by

what particular jurors he shall be tried, but he has a right . . . to say by what particular jurors he shall not be tried, and this right is taken from him if after he has exhausted his challenges new names are for the first time put in and drawn out of the box." *State v. Lapp*, 84 N. J. L. 19, 86 Atl. 62.

24. *State v. Kennedy*, 11 La. Ann. 479.

[a] **Where the juryman was absent on the first call but appeared later**, defendant's attorney asked that he be called prior to the issuance of a special venire. This was refused but on the whole record the defendant was not harmed. *Steele v. State*, 76 Miss. 387, 24 So. 910.

25. *Walker v. Collier*, 37 Ill. 362.

Whether defendant must be present see the title "Trial."

26. *State v. Green*, 20 Iowa 424; *State v. Brooks*, 36 La. Ann. 334.

[a] **Right of defendant to see list of regular jurors** does not affect this rule. Defendant objected to the putting of the additional names in the box as it affected his right of peremptory challenge, based upon the knowledge he had gained from the publication of the list. But the court says that the publication is a purely statutory right and the operation of the statute is not to be extended by construction. *State v. Brooks*, 36 La. Ann. 334.

[b] **A distinction is made between jurors drawn by commissioners** under the court's order and talesman summoned directly under the judge's order without being so drawn. *State v. Bordelon*, 113 La. 690, 37 So. 603, *approving* *State v. Brooks*, 36 La. Ann. 334.

27. *State v. Ryan*, 70 Iowa 154, 30 N. W. 397; *State v. Green*, 20 Iowa 424; *State v. Dorsey*, 40 La. Ann. 739, 5 So. 26.

The statutory requirements as to the receptacle to be used are merely directory.²⁸ In the absence of a statutory requirement any method may be used which leaves the matter wholly to chance.²⁹ Where a juror's name has been inadvertently omitted the court may have the same placed in the box as soon as the mistake is discovered.³⁰ Jurors are, in some jurisdictions, called in the order in which their names appear on the list,³¹ and under this practice it has been held not necessary to call the names in the exact order in which they appear on the list.³² In other jurisdictions the names of jurors on special venire are placed in the box as they come in.³³

2. Drawing To Be From Regular Panels Generally. — Parties have

[a] Though the order is not to select from bystanders but from persons in any part of the parish remote from the scene of the crime. *State v. Bordelon*, 113 La. 690, 37 So. 603.

[b] Analogous to Summoning Bystanders.—Since the sheriff might have summoned bystanders to fill the jury he may after having summoned them from the body of the county under formal process call them in consecutive order or otherwise to make up the jury. *State v. Green*, 20 Iowa 424.

[c] Where names had been drawn from a talesman's box there was clearly no necessity for again drawing by lot and they are properly presented as they appear. *State v. Wolf*, 112 Iowa 458, 84 N. W. 536.

28. *State v. Montgomery*, 121 La. 1005, 46 So. 997.

[a] Drawing From Box Instead of Envelope.—The envelope containing the names was opened and slips shaken out into the box and drawing made therefrom. There is nothing objectionable in this. *State v. Montgomery*, 121 La. 1005, 46 So. 997.

[b] "A barrel is a 'box' within the purpose and requirement of the statute." *Com. v. Bacon*, 135 Mass. 521.

29. *Benaway v. Conyne*, 3 Pin. (Wis.) 196, 3 Chand. 214.

[a] "That clerk held slips in hand is a substantial compliance where it is clear that the names were 'drawn out fortuitously.'" *Benaway v. Conyne*, 3 Pin. (Wis.) 196, 3 Chand. 214.

[b] "While the statute is not clear as to the exact method to be pursued, its purpose is to provide for a chance drawing from the box, and since this was accomplished, no prejudice resulted to the appellant." *Mercereau v. Maughlin Mill Co.*, 53 Wash. 475, 102 Pac. 232.

30. *Stone v. State*, 137 Ala. 1, 34 So. 629; *Morrison v. State*, 84 Ala. 405, 4 So. 402.

[a] Where jurors were "accidentally omitted" their names may be restored after the drawing has commenced. The circuit court rule is merely directory as to the requirement that all names be in the receptacle before the drawing. Where prisoner's legal rights were not impaired he cannot complain. *State v. Campbell*, 35 S. C. 28, 14 S. E. 292.

31. *State v. Woodson*, 43 La. Ann. 905, 9 So. 903; following *State v. Kennedy*, 11 La. Ann. 479; and *distinguishing State v. Brooks*, 36 La. Ann. 335; *Code Crim. Proc. (Tex.) art. 677*; *Clark v. State*, 8 Tex. App. 350.

[a] English Practice.—Reg. v. Frost, 9 Car. & P. 129, 38 E. C. L. 87.

[b] Procedure Where Discrepancy Discovered.—The statute provides that the names be called "in the order in which they appear on the list furnished the defendant." There being found to be a discrepancy between the lists served and the original the court properly required the defendant to call off the names from his list or submit to their being called from the original. *Clark v. State*, 8 Tex. App. 350.

32. *Mansell v. Reg., Dears. & B.* 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52, 120 Eng. Reprint 20, they may be called in a different order where the convenience of the court requires.

[a] Need Not Begin With First Name on List.—There was no prejudice shown nor any pretense that the jury chosen was not fair and impartial. *State v. Kennedy*, 11 La. Ann. 479.

33. *State v. Kelley*, 46 S. C. 55, 24 S. E. 60.

a right to demand that they be tried by jurors selected from the regular list so far as it is practicable to do so,³⁴ and to that extent other persons should not be resorted to before the regular venire has been exhausted.³⁵ Also a panel regularly drawn and summoned for the trial of a particular case cannot be capriciously discharged and another panel summoned.³⁶ If successive special venires become necessary to complete the jury, each venire in turn must be exhausted before recourse can be had to the jurors summoned on another.³⁷

3. Number Present Before or During Impaneling.—The general rule is to draw twelve men before either side is obliged to examine the jurors.³⁸ Under the statutes of some states one is entitled to have a full panel of a specified number present before the impaneling of the jury is commenced,³⁹ but in the absence of such a statute this is not essential.⁴⁰ Except in so far as it may be necessary to have a full panel before requiring challenges,⁴¹ it is not necessary to keep the panel filled to any particular number by summoning new jurors to take the place of those excused,⁴² though it may be done as a matter of favor, in the court's discretion.⁴³

34. La.—State *v. Atkinson*, 29 La. Ann. 543. **Miss.**—Boles *v. State*, 24 Miss. 445. **N. C.**—State *v. Washington*, 90 N. C. 664; State *v. Lytle*, 27 N. C. 58. **N. D.**—State *v. Reilly*, 25 N. D. 339, 141 N. W. 720.

[a] **Rule Must Not Interfere With Dispatch of Business.**—The primary rule is that the juries must be selected from the panel selected by the commissioners, but this rule is subordinated to the necessity of disposing of business of the court with reasonable dispatch. Texas & N. O. Ry. Co. *v. Wright*, 31 Tex. Civ. App. 249, 71 S. W. 760.

35. State v. Atkinson, 29 La. Ann. 543; State *v. Washington*, 90 N. C. 664.

36. Ga.—Judge *v. State*, 8 Ga. 173. **Ind.**—Hight *v. Langdon*, 53 Ind. 81. **N. D.**—State *v. Reilly*, 25 N. D. 339, 141 N. W. 720.

37. Collins v. State, 31 Fla. 574, 12 So. 906.

38. Cal.—People *v. Scoggins*, 37 Cal. 676. **Ill.**—Sterling Bridge Co. *v. Pearl*, 80 Ill. 251; Strehmann *v. Chicago*, 93 Ill. App. 206. **Wis.**—Lamb *v. State*, 36 Wis. 424.

39. Wilks v. State, 7 Ala. App. 117, 61 So. 475; Trammell *v. State*, 1 Ala. App. 83, 55 So. 431 (See also Acts Spec. Sess., 1909, §32, p. 318); Dupont *v. McAdow*, 6 Mont. 226, 9 Pac. 925; Kennon *v. Gilmer*, 4 Mont. 433, 2 Pac. 21.

Failure to summon all jurors drawn as ground for challenge to the array, see VII, E, 3, b, (XI), (D).

That disqualified, incompetent or exempt jurors have been summoned as ground for challenge to the array, see VII, E, 3, b, (X).

40. Ala.—Whitsett *v. Belue*, 172 Ala. 256, 54 So. 677. **Cal.**—People *v. Lee*, 17 Cal. 76. **Ill.**—People *v. Gray*, 251 Ill. 431, 96 N. E. 268. **N. J.**—Patterson *v. State*, 48 N. J. L. 381, 4 Atl. 449. **Okla.**—Moore *v. State*, 9 Okla. Crim. 9, 130 Pac. 517. **Pa.**—Com. *v. Nye*, 240 Pa. 359, 87 Atl. 585. **P. R.**—People *v. Morales*, 14 Porto Rico 227. **S. C.**—State *v. Hallback*, 40 S. C. 298, 18 S. E. 919; State *v. Campbell*, 35 S. C. 28, 14 S. E. 292; State *v. Jackson*, 32 S. C. 27, 10 S. E. 769; State *v. Stephens*, 13 S. C. 285. **Tex.**—James *v. State*, 74 Tex. Crim. 139, 167 S. W. 727; Logan *v. State*, 55 Tex. Crim. 180, 115 S. W. 1192.

[a] **If a sufficient number are present to form a panel the court properly rules the defendant to trial though all the jurors summoned for the term have not appeared.** State *v. Hoozer*, 26 La. Ann. 599.

41. See infra, VII, E, 2, c.

42. Neb.—Clough *v. State*, 7 Neb. 320. **N. D.**—State *v. Reilly*, 25 N. D. 339, 141 N. W. 720. **Ohio.**—Martin *v. State*, 16 Ohio 364.

43. Martin v. State, 16 Ohio 364, holding that "it is not error to pursue

4. **Effect of Absence Generally.**—Defendants are not entitled to have the names of all the panel called over once in their presence before beginning to select the jury.⁴⁴ Where a juror's name is drawn, or called, and he fails to respond the party is not entitled to have the trial delayed until that juror is brought in,⁴⁵ nor need another juror be summoned to take the place of the one absent;⁴⁶ nor, when a special venire has been issued, need the trial be delayed until all those summoned have been brought in,⁴⁷ but the examination should not begin until after the sheriff has made his return showing who have in fact been summoned, where the practice entitles defendant to a copy of the list of those summoned.⁴⁸ The mere fact that jurors do not appear when called does not affect the legality of their being placed on the jury when they do appear, if they are in other respects qualified,⁴⁹ and their names may be put in the box as they appear,⁵⁰ but the mere failure so to do may be but a technical error where only one juror is involved,⁵¹ and it is at most a non-prejudicial error to order the names of absentees to be put in the box and again called.⁵²

When a juror's name is drawn and he is not present, it is a correct practice to go on with the call until the panel is exhausted before calling his name a second time,⁵³ or when the juror is brought in on

either course as convenience may require."

44. *State v. Hallback*, 40 S. C. 298, 18 S. E. 919, *distinguishing State v. Briggs*, 27 S. C. 80, 2 S. E. 854, and concluding: "This may have been demandable at one time, but it is certainly not now the established practice in this state."

45. *Ala.*—*Arp v. State*, 97 Ala. 5, 12 So. 301, 19 L. R. A. 357, 38 Am. St. Rep. 137; *Johnson v. State*, 94 Ala. 35, 10 So. 667. *Cal.*—*People v. Collins*, 105 Cal. 504, 39 Pac. 16. *Ill.*—*People v. Gray*, 251 Ill. 431, 96 N. E. 268. *La.*—*State v. Rountree*, 32 La. Ann. 1144. *Md.*—*Johns v. State*, 55 Md. 350. *Minn.* *State v. Brown*, 12 Minn. 538. *Miss.* *Boles v. State*, 24 Miss. 445. *Mo.*—*See State v. Gilmore*, 95 Mo. 554, 8 S. W. 912. *N. J.*—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449. *N. D.*—*State ex rel. Pepple v. Banik*, 21 N. D. 417, 131 N. W. 262.

[a] **Statutory Rule in Texas.**—"Article 640 of the Code of Criminal Procedure provides, that no cause shall be unreasonably delayed on account of the absence of those who have been summoned." *Mitchell v. State*, 36 Tex. Crim. 278, 33 S. W. 367, 36 S. W. 456. *See also Bizzell v. State*, 72 Tex. Crim. 442, 162 S. W. 861.

That it is not ground for challenge

to the array where jurors fail to appear, see *infra*, VII, E, 3, b, (E).

Right of court to excuse jurors generally see *supra*, VI; and *infra*, VIII, C.

That party has no vested right in any particular juror, see *infra*, VII, E, 1, b.

46. *Whitsett v. Belue*, 172 Ala. 256, 54 So. 256; *Johnson v. State*, 94 Ala. 35, 10 So. 667; *State v. Campbell*, 35 S. C. 28, 14 S. E. 292.

47. *State v. Warton*, 136 La. 516, 67 So. 350; *State v. Anderson*, 136 La. 261, 66 So. 966; *State v. Kelley*, 46 S. C. 55, 24 S. E. 60.

48. *Collins v. State*, 31 Fla. 574, 12 So. 906.

49. *Wormeley v. Com.*, 10 Gratt. (51 Va.) 658, they may be subject to punishment for their delinquency but that is no concern of party.

50. *People v. Collins*, 105 Cal. 504, 39 Pac. 16.

51. *People v. Rogers*, 13 Abb. Pr. N. S. (N. Y.) 370, after names in box were all drawn, clerk was ordered to again call names of absentees, whereupon juror responded. It would have been a mere idle act to put his name in the box and draw it out again.

52. *State v. Brown*, 12 Minn. 538.

53. *People v. Vermilyea*, 7 Cow. (N. Y.) 369, but it would not be re-

attachment he may be presented for examination at once.⁵⁴ It is a matter left largely to the discretion of the court.⁵⁵

5. Members of Panel Engaged in Another Case.—When members of the regular panel having been impaneled in another case are discharged or excused therefrom, their names should be immediately restored to the jury box, though the drawing therefrom has commenced,⁵⁶ and this is the rule even after the names in the box have been exhausted and the regular jurors come in while talesmen are being examined,⁵⁷ and, it seems, even after some of the talesmen have been sworn on voir dire.⁵⁸ However, the court is not required to suspend proceedings until the jury engaged in the other case shall so report and be discharged,⁵⁹ and there is authority for the proposition that the court having made a lawful order for a special venire is entitled to complete the jury therefrom, though the regular jurors come in during the drawing.⁶⁰ Also the talesmen called having been qualified and accepted by one side, the court has a discretion as to completing the jury without resorting to the jurors who have just returned.⁶¹

6. Waiver of Irregularities.—Unless the court's attention is called to an irregularity at the time, it will be deemed waived.⁶²

versible error to adopt the contrary method.

54. *State v. Forbes*, 111 La. 473, 35 So. 710.

55. *State v. Forbes*, 111 La. 473, 35 So. 710.

56. *Ala.*—*Thomas v. State*, 134 Ala. 126, 33 So. 130. *Cal.*—*People v. Edwards*, 101 Cal. 543, 36 Pac. 7. *La.*—*State v. Freeman*, 119 La. 663, 44 So. 334; *State v. Creech*, 38 La. Ann. 480; *State v. Atkinson*, 29 La. Ann. 543. *Ore.*—*State v. Houghton*, 45 Ore. 110, 75 Pac. 887. *S. C.*—*State v. Jackson*, 32 S. C. 27, 10 S. E. 769.

57. *State v. Creech*, 38 La. Ann. 480; *Tankersley v. State*, 51 Tex. Crim. 170, 101 S. W. 234.

58. *State v. Freeman*, 119 La. 663, 44 So. 334, following *State v. Creech*, 38 La. Ann. 480, but saying "the record does not show whether the administering of the voir dire oath was completed."

59. *Ala.*—*Wilks v. State*, 7 Ala. App. 117, 61 So. 475; *Trammell v. State*, 1 Ala. App. 83, 55 So. 431, holding that the same rule applies under Acts Spec. Sess., 1909, §32, p. 318, so long as the number is not reduced below the statutory number required before striking begins. *D. C.*—*United States v. Bowen*, 3 McArthur 64. *La.*—*State v. Cannon*, 15 So. 626. *Minn.*—*State v. Quirk*, 101 Minn. 334,

112 N. W. 409. *Pa.*—*Com. v. Weber*, 167 Pa. 153, 31 Atl. 481; *Com. v. Ramsey*, 42 Pa. Super. 25. *S. C.*—*State v. Campbell*, 35 S. C. 28, 14 S. E. 292; *State v. Jackson*, 32 S. C. 27, 10 S. E. 769. *Tex.*—*Thurmond v. State*, 37 Tex. Crim. 422, 35 S. W. 965; *Texas & N. O. Ry. Co. v. Wright*, 31 Tex. Civ. App. 249, 71 S. W. 760; *Gulf, C. & S. F. Ry. Co. v. Duvall*, 12 Tex. Civ. App. 343, 35 S. W. 699; *Thuston v. State*, 18 Tex. App. 26. *Utah.*—*Connor v. Salt Lake City*, 28 Utah 248, 78 Pac. 479.

[a] Statute so contemplates and that is the uniform practice in both civil and criminal cases. *People v. Craig*, 48 Mich. 502, 12 N. W. 675.

60. *Myers v. Moore*, 3 Ind. App. 226, 28 N. E. 724, no prejudice appeared.

61. *Texas & N. O. Ry. Co. v. Wright*, 31 Tex. Civ. App. 249, 71 S. W. 760.

62. *State v. Montgomery*, 121 La. 1005, 46 So. 997.

[a] That jurors are not called from box is waived unless objection made. *Wells v. State* (Ark.), 16 S. W. 577; *State v. Kennedy*, 11 La. Ann. 479.

[b] Drawing From Hat or Table Instead of From Box.—Correct practice is to draw from a box, but drawing from a hat or even from the table is not ground for new trial where not objected to at the time. *Birchard v. Booth*, 4 Wis. 67.

C. STANDING JURORS ASIDE. — 1. History and Nature of Practice. At common law there existed a practice of standing jurors aside, by which the prosecution reserved its challenge until the whole panel was gone through.⁶³ The right does not extend to private prosecutors in libel cases,⁶⁴ and is never permitted to the defendant.⁶⁵ This practice extends to prosecutions for misdemeanors as well as felonies,⁶⁶

[c] **That names are not being properly drawn from the box** must be called to the court's attention at the time. *Moss v. Appanoose*, 109 Iowa 671, 81 N. W. 159.

[d] **Names Improperly Written on Scrolls.**—One who fails to object to putting on the scrolls the surnames only of persons summoned on a special venire cannot subsequently challenge those persons when their names are drawn out, merely because their Christian names were not also written on the scrolls. *State v. Simmons*, 51 N. C. 309.

[e] **That clerk wrote out lists beforehand** to expedite business, is an irregularity, but is waived by failure to object. *McMahon v. State*, 17 Tex. App. 321.

[f] **That jurors were withdrawn from list and others substituted** by clerk without authority should be brought to court's attention as soon as learned. It cannot be raised after verdict where known before. *Kellam v. State*, 17 Ga. App. 401, 87 S. E. 158.

[g] **That jurors were not called in proper order** is waived unless objection was raised at the time. *State v. Minor*, 106 Iowa 642, 77 N. W. 330.

[h] **Jurors Examined Out of Regular Order.**—Assuming that it was error to permit examination of jurors on their voir dire out of their regular order on the list, the error is waived where no objection is made thereto until after the examination. *State v. Dipley*, 242 Mo. 461, 147 S. W. 111.

[i] **Failure To Follow Order of Names on List.**—*Rees v. Chicago*, B. & Q. R. Co., 156 Mo. App. 52, 135 S. W. 981.

63. **U. S.**—*Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. ed. 972; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. ed. 578; *United States v. Shackelford*, 18 How. 588, 15 L. ed. 495; *United States v. Marchant*, 12 Wheat. 480, 6 L. ed. 700. **Fla.**—*Mathis v. State*, 31 Fla. 291, 12 So. 681. **Ga.**—*Reynolds v. State*, 1 Ga.

222; *Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641. **Md.**—*Turpin v. State*, 55 Md. 462. **N. C.**—*State v. Bone*, 52 N. C. 121; *State v. Benton*, 19 N. C. 196. **Pa.**—*Com. v. O'Brien*, 140 Pa. 555, 21 Atl. 385; *Haines v. Com.*, 100 Pa. 317; *Zell v. Com.*, 94 Pa. 258. **Vt.**—*State v. Ward*, 61 Vt. 153, 17 Atl. 483. **Eng.**—*Mansell v. Reg., Dears. & B.* 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52, 120 Eng. Reprint 20; *Rex v. Parry*, 7 Car. & P. 836, 32 E. C. L. 898.

[a] **History of Practice.**—This practice grew out of the fact that under statute 33 Edw. I, the prosecution had no right to peremptory challenge. It then became the custom to permit the crown not to show cause until the whole panel was gone through with. There seems to be some doubt as to whether the crown had to interpose a formal challenge and then not assign the cause until later. But however this may have been, the practice, at least in Pennsylvania, did not require any challenge, the prosecuting attorney merely directing the juror to "stand aside." See *Com. v. Brown*, 23 Pa. Super. 470, citing 2 Bac. Abr. and other English authorities. See also *United States v. Marchant*, 12 Wheat. (U. S.) 480, 6 L. ed. 700; *Com. v. Todd*, 1 Pa. Co. Ct. 416; *Com. v. Llewellyn*, 14 Pa. Super. 214; *Com. v. Keenan*, 10 Phila. (Pa.) 194; *Com. v. Marra*, 8 Phila. (Pa.) 440.

[b] **Object of Practice.**—The crown put juror aside until the end of the panel that it might be seen whether the prisoner could not get a jury of his choice from persons unobjectionable to the crown. *State v. Bone*, 52 N. C. 121.

64. *Reg. v. Patteson*, 36 U. C. Q. B. 129.

65. *State v. Bone*, 52 N. C. 121.

66. *Com. v. O'Brien*, 140 Pa. 555, 21 Atl. 385; *Haines v. Com.*, 100 Pa. 317; *Smith v. Com.*, 100 Pa. 324; *Com. v. Brown*, 23 Pa. Super. 470; *Com. v. Llewellyn*, 14 Pa. Super. 214; *Com. v.*

and applies to jurors brought in on special venire, as well as to those of the regular panel.⁶⁷ The court may stand aside jurors of its own motion.⁶⁸

2. Present Status.—Standing aside has been in vogue in some jurisdictions,⁶⁹ and has been recognized even after the commonwealth has been given the right to peremptory challenges,⁷⁰ but it has been abolished in some states by construction, on the theory that the giving of peremptory challenges to the state, has done away with the reason for the right,⁷¹ and in other states it has been abrogated by direct legislation.⁷² Where the practice is allowed it is reversible error not to permit the commonwealth to stand jurors aside,⁷³ but it is harmless error to exclude the juror at once instead of standing him aside, where the complaining party had peremptories remaining when the jury was completed.⁷⁴ Where the practice is not permitted it is reversible error to allow the commonwealth to exercise the right

Noonan, 15 Phila. (Pa.) 372, 38 Leg. Int. 184; *Com. v. Keenan*, 10 Phila. (Pa.) 194; *Com. v. Marra*, 8 Phila. (Pa.) 440; *Reg. v. Fellowes*, 19 U. C. Q. B. 48, *following* *Reg. v. Benjamin*, 4 U. C. C. P. 179.

67. *Com. v. O'Brien*, 140 Pa. 555, 21 Atl. 385; *Rudy v. Com.*, 128 Pa. 500, 18 Atl. 344.

68. *Mansell v. Reg.*, *Dears. & B.* 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52, 120 Eng. Reprint 20.

Right of court to excuse jurors on own motion, see *infra*, VII, D.

69. *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. ed. 972; *Mansell v. Reg.*, *Dears. & B.* 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52, 120 Eng. Reprint 20.

[a] **North Carolina.**—"This right, after our political independence, was transferred to the state, and has been continually exercised by it since." *State v. Bone*, 52 N. C. 121. See also *State v. Craton*, 28 N. C. 164; *State v. Benton*, 19 N. C. 196.

[b] **In Pennsylvania** prior to statute abolishing it, it was upheld by an unbroken line of decisions. See *Com. v. Eisenhower*, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670; *Jewell v. Com.*, 22 Pa. 94; *Com. v. Brown*, 23 Pa. Super. 470; *Com. v. Llewellyn*, 14 Pa. Super. 214; *Com. v. Kay*, 14 Pa. Super. 376.

[c] **In South Carolina**, prior to the statute abolishing, the practice was "too well established to be disturbed

by this court, whatever may be our view as to its soundness in principle." *State v. Stephens*, 13 S. C. 285; *State v. McNinch*, 12 S. C. 89; *State v. Stal-maker*, 2 Brev. 1; *State v. Barrontine*, 2 Nott & McC. 553.

70. N. C.—*State v. Hensley*, 94 N. C. 1021; *State v. Mercer*, 67 N. C. 266; *State v. Benton*, 19 N. C. 196. **Pa.** *Com. v. O'Brien*, 140 Pa. 555, 21 Atl. 385; *Haines v. Com.*, 100 Pa. 317; *Zell v. Com.*, 94 Pa. 258; *Warren v. Com.*, 37 Pa. 45. **S. C.**—*State v. McNinch*, 12 S. C. 89. **Can.**—*Reg. v. Fellowes*, 19 U. C. Q. B. 48, *following* *Reg. v. Benjamin*, 4 U. C. C. P. 179.

[a] **Effect of Federal Statute Where State Practice Permits.**—The acts of congress granting peremptory challenges to the government has not taken away the right to stand jurors aside, where that practice is permitted in the state, and it has been adopted either by rule or by special order in the case. *Sawyer v. United States*, 202 U. S. 150, 26 Sup. Ct. 575, 50 L. ed. 972.

71. U. S.—*United States v. Butler*, 1 Hughes 457, 25 Fed. Cas. No. 14,700. **Fla.**—*Mathis v. State*, 31 Fla. 291, 12 So. 681. **Ga.**—*Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641.

72. *Acts*, March 16, 1901, P. L., 16; July 9, 1901, P. L. 629; *Com. v. Conroy*, 207 Pa. 212, 56 Atl. 427; *Com. v. Brown*, 23 Pa. Super. 470; S. C. Crim. Code, §55.

73. *Com. v. Llewellyn*, 14 Pa. Super. 214.

74. *State v. Hensley*, 94 N. C. 1021.

in a manner prejudicial to defendant's rights;⁷⁵ but harmless error to permit it, where the jury was completed without exhausting the panel and recalling the juror.⁷⁶

3. Procedure. — a. *In General.* — The orderly practice is to call the regular panel first, standing aside those challenged by the state, before turning them over to the prisoner for examination.⁷⁷ But the state's challenge for cause need not be first determined.⁷⁸ The prisoner must then be given an opportunity to accept, or challenge for cause or peremptorily, the jurors so turned over to him.⁷⁹ The jurors are stood aside only until the entire panel is so examined,⁸⁰ and are then recalled in the order in which they were stood aside.⁸¹

b. *Time To Exercise Right.* — Standing aside may be after the box is filled as well as before.⁸² The right may be exercised after the juror has been examined on his voir dire, and challenged by the commonwealth for cause,⁸³ or after the defendant has exhausted his peremptories.⁸⁴

c. *Number To Be Stood Aside.* — It is left to the court's discretion to determine the number of jurors to be stood aside,⁸⁵ but no reversal

75. *Mathis v. State*, 31 Fla. 291, 12 So. 681.

76. *Stoner v. State*, 4 Mo. 368.

77. *State v. Lytle*, 27 N. C. 58; *State v. Benton*, 19 N. C. 196.

[a] Calling regular panel and special venire together was not prejudicial, where prisoner had an opportunity to examine all the jurors and because of challenges allowed it became necessary to call another special venire. *State v. Lytle*, 27 N. C. 58.

78. *State v. Craton*, 28 N. C. 164; *State v. Lytle*, 27 N. C. 58; *State v. Benton*, 19 N. C. 196.

79. *State v. Hensley*, 94 N. C. 1021.

80. *State v. Hensley*, 94 N. C. 1021.

[a] A juror having been once ordered to stand aside and the panel of those present having been called over once, it was proper to order him to stand aside until twelve members of the panel who had been engaged or another twelve were examined, they coming into court just as the defendant moved that the prosecution show cause as to the jurors stood aside. *Mansell v. Reg., Dears. & B.* 375, 8 E. & B. 54, 4 Jur. N. S. 432, 27 L. J. M. C. 4, 92 E. C. L. 52, 120 Eng. Reprint 20.

81. *Com. v. Eisenhower*, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670.

[a] **Failure To Demand Recall as Waiver of Right.** — Failure to give the prisoner an opportunity to examine a

juror stood aside is not ground for a new trial where the juror remarked, as he was being stood aside, that he was called as a witness for the prisoner, and the clerk understanding that he was thereupon excused by consent, failed to recall him at the end of the panel. The prisoner and his counsel having heard the clerk state to the court that the panel was exhausted, acquiesced in that statement by failing to demand the juror's recall and waived the right to examine him. *State v. Lytle*, 27 N. C. 58.

82. *Com. v. Noonan*, 15 Phila. (Pa.) 372, 38 Leg. Int. 184.

83. *Zell v. Com.*, 94 Pa. 258; *Com. v. Mayland*, 29 Leg. Int. (Pa.) 150.

84. *Com. v. O'Brien*, 140 Pa. 555, 21 Atl. 385.

85. *State v. Sloan*, 97 N. C. 499, 2 S. E. 666; *State v. Benton*, 19 N. C. 196.

[a] Compare *State v. Ward*, 61 Vt. 153, 17 Atl. 483, where it is said that the court had unlimited power to return any number of jurors for the trial of a particular case, and so the crown practically was never deprived of the right to peremptories, since it could stand any number aside.

[b] The court should not indicate in advance the number which may be set aside, but to do so is not reversible error. *State v. Sloan*, 97 N. C. 499, 2 S. E. 666.

can be had unless the court abuses its discretion,⁸⁶ nor can the prisoner object to the number if he has not exhausted his peremptories on his acceptance of the jury.⁸⁷

D. REJECTION ON COURT'S OWN MOTION.⁸⁸ — 1. Power of Court Generally. — Excusing a juror on the court's own motion is largely a matter within the court's discretion.⁸⁹ Provisions of the statutes that the court may examine the jurors on the party's motion do not take away the court's right to excuse on its own motion,⁹⁰ nor does a provision that a certain number of jurors shall be selected and those not drawn as grand jurors shall form the petit jury panel.⁹¹ The court may summarily excuse talesmen not summoned according to his orders.⁹²

2. Grounds in General.⁹³ — Generally the court may excuse any juror who is found to be incompetent or disqualified,⁹⁴ or physically

86. *State v. Sloan*, 97 N. C. 499, 2 S. E. 666.

87. *State v. Jones*, 97 N. C. 469, 1 S. E. 680.

88. **Discharge of jury before verdict**, see *infra*, X.

Excuse of whole panel on court's own motion, see *infra*, VII, E, 3, a, (III).

Right of court to purge the panel by striking off names on own motion, see *infra*, VII, E, 3, a, (IV).

Preliminary examination by court, see *infra*, VII, E, 4, h, (II).

89. **Ark.**—*Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885. **Ind.**—*Pittsburgh, etc. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875; *Depew v. Robinson*, 95 Ind. 109. **Kan.**—*State v. Dickson*, 6 Kan. 209; *State v. York*, 7 Kan. App. 291, 53 Pac. 838. **Miss.**—*Jefferson v. State*, 52 Miss. 767; *McGuire v. State*, 37 Miss. 369. **Mo.**—*State v. Taylor*, 134 Mo. 109, 35 S. W. 92. **Nev.**—*State v. Vaughan*, 23 Nev. 103, 43 Pac. 193. **N. D.**—*State ex rel. Pepple v. Banik*, 27 N. D. 417, 131 N. W. 262. **Okla.**—*Boutcher v. State*, 4 Okla. Crim. 576, 111 Pac. 1006; *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672. **S. D.**—*State v. La Croix*, 8 S. D. 369, 66 N. W. 944. **Tenn.**—*Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262; *Boyd v. State*, 14 Lea 161; *Lewis v. State*, 3 Head 127. **Wis.**—*Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[a] **Especially in Misdemeanor**

Cases.—*McGuire v. State*, 37 Miss. 369.

[b] **In Capital Case.**—The court may "in the prudent exercise of a sound discretion, excuse a juror from attendance in a capital case, for a cause deemed good by him." *Coleman v. State*, 59 Miss. 484.

90. *State v. Williams*, 30 Me. 484.

[a] The provision is intended as a protection to the party, enabling him to secure impartial jurors. If the court has reason to believe the juror may not be impartial, it may excuse him though no motion be made. *State v. Williams*, 30 Me. 484.

91. *State v. Aspara*, 113 La. 940, 37 So. 883.

92. *State v. Thompson*, 116 La. 829, 41 So. 107.

[a] **Failure To Summon From Prescribed Locality.**—Under the statute the judge had the right to order talesmen to be summoned from localities other than the scene of the alleged crime. Upon its appearing that a talesman was from the forbidden locality the judge is within his right in excluding. *State v. Kennedy*, 133 La. 945, 63 So. 476; *State v. Thompson*, 116 La. 829, 41 So. 107.

93. Particular facts or circumstances which constitute disqualification, see *infra*, VII, F.

94. See generally the statutes and the following: **Ark.**—*Robinson v. State*, 33 Ark. 180. **Fla.**—*Mathis v. State*, 31 Fla. 291, 12 So. 681; *Metzger v. State*, 18 Fla. 481; *Keech v. State*, 15 Fla. 591. **Ill.**—*Thomas v. Leonard*, 5 Ill. 556; *Stone v. People*, 3 Ill. 326. **Ky.**—*Barnes v. Com.*, 110 Ky. 348, 61

unable to perform the duties of a juror,⁹⁵ or who is in mental distress unfitting him for service,⁹⁶ or who, for reasons of public policy,

S. W. 733. La.—State v. Hobgood, 46 La. Ann. 855, 15 So. 406. N. Y.—People v. Spiegel, 75 Hun 161, 26 N. Y. Supp. 1041, *affirmed* in 143 N. Y. 107, 28 N. E. 284. N. C.—State v. Benton, 19 N. C. 196. Va.—Montague v. Com., 10 Gratt. (51 Va.) 767.

[a] Person not a citizen who has never declared his intention to become such, may be excused on court's own motion. Colo.—Babeoek v. People, 13 Colo. 515, 22 Pac. 817. Fla.—Keech v. State, 15 Fla. 591. Mich.—People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

[b] Doubt as to juror's residence warrants his excuse. State v. Taylor, 134 Mo. 109, 35 S. W. 92.

[c] Non-resident may be excused. State v. Upton, 170 N. C. 769, 87 N. E. 328.

[d] Persons not freeholders or householders may be excused. State v. Marshall, 8 Ala. 302.

[e] Insufficient Knowledge of English.—Ala.—Long v. State, 86 Ala. 36, 5 So. 443; State v. Marshall, 8 Ala. 302. Cal.—People v. Arceo, 32 Cal. 40. Mich.—O'Neil v. Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162; Atlas Min. Co. v. Johnston, 23 Mich. 36. Minn.—State v. Ring, 29 Minn. 78, 11 N. W. 233. N. Y.—People v. Spiegel, 75 Hun 161, 26 N. Y. Supp. 1041, *affirmed* in 143 N. Y. 107, 28 N. E. 284. Wis.—Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[f] Duty To Discharge.—Mont. Rev. Code, §6339.

[g] Court's Duty To Excuse on Suspicion.—It is not only the right but the duty of the court to excuse on its own motion any juror when from his examination the court becomes convinced or even suspects that the juror is not fair or impartial or is otherwise disqualified. Boucher v. State, 4 Okla. Crim. 576, 111 Pac. 1006. See also Cochran v. United States, 14 Okla. 108, 76 Pac. 672.

95. Ala.—Parker v. State, 7 Ala. App. 9, 60 So. 995, *construing* Code, §7279. Tenn.—Fletcher v. State, 6 Humph. 249. Va.—Montague v. Com., 10 Gratt. (51 Va.) 767.

[a] Deafness.—Jesse v. State, 20 Ga. 156.

[b] Illness of Juror.—Ala.—Thomas v. State, 124 Ala. 48, 27 So. 315; Yarbrough v. State, 105 Ala. 43, 16 So. 758; Webb v. State, 100 Ala. 47, 14 So. 865. Ark.—Hamilton v. State, 62 Ark. 543, 36 S. W. 1054. Cal.—People v. Ziegler, 135 Cal. 462, 67 Pac. 754; People v. Brady, 72 Cal. 490, 14 Pac. 202; People v. Stewart, 64 Cal. 60, 28 Pac. 112. Kan.—State v. York, 7 Kan. App. 291, 53 Pac. 838. La.—State v. Johnson, 48 La. Ann. 437, 19 So. 476; State v. Madison, 47 La. Ann. 30, 16 So. 566; State v. Moncla, 39 La. Ann. 868, 2 So. 814. Mo.—State v. Baber, 74 Mo. 292. Tenn.—State v. Curtis, 5 Humph. 601. Tex.—Goodall v. State (Tex. Crim.), 47 S. W. 359; Heskew v. State, 17 Tex. App. 161.

[c] Intoxication.—Ga.—Thomas v. State, 27 Ga. 287. Mich.—Torrent v. Yager, 52 Mich. 506, 18 N. W. 239. Miss.—Guice v. State, 60 Miss. 714. N. Y.—Bullard v. Spoor, 2 Cow. 430.

96. See cases following.

[a] Illness in Juror's Family.—Ala. Hawes v. State, 88 Ala. 37, 7 So. 302. Cal.—Code Civ. Proc., §201. D. C. Code, §216. Haw.—Rev. Laws, §1773. Ia.—State v. Fielding, 135 Iowa 255, 112 N. W. 539. Mont.—Rev. Code, §6340. Utah.—Comp. Laws, §1300. Wyo.—Comp. Laws, §981.

[b] Juror's Brother Dying.—Coleman v. State, 59 Miss. 484.

[c] Death of Member of Family. Cal.—Code Civ. Proc., §201. D. C. Code, §216. Haw.—Rev. Laws, §1300. Mont.—Rev. Code, §6340. Utah.—Comp. Laws, §1300. Wyo.—Comp. Laws, §981.

[d] Death in Juror's Family.—See the statutes, and State v. Davis, 31 W. Va. 390, 7 S. E. 24.

[e] Juror Distracted by Condition of His Business.—People v. Spiegel, 75 Hun 161, 26 N. Y. Supp. 1041, *affirmed* in 143 N. Y. 107, 28 N. E. 284.

[f] Not permitted "for hardship or inconvenience to his business, but only when material injury or destruction to his property, or of property entrusted to him, is threatened." Cal.—Code Civ. Proc., §201. Haw.—Rev. Laws, §1773. Mont.—Rev. Code, §6340. Utah. Comp. Laws, §1300. Wyo.—Comp. Laws, §981.

ought not to be detained on jury duty,⁹⁷ or who is entitled to exemption,⁹⁸ or as the business of the court may require,⁹⁹ or for any reasonable cause which unfits him to serve in the case.¹ The statutes

[g] When juror's interests may be materially injured by his attendance. D. C. Code, §216.

97. See cases following.

[a] Police Officer.—*Pierson v. State*, 99 Ala. 148, 13 So. 550.

[b] Postmaster.—*Edwards v. State*, 39 Fla. 753, 23 So. 537.

[c] When interests of the public "may be materially injured by his attendance" he may be excused. D. C. Code, §216; Wyo. Comp. Laws, §981.

[d] Militiaman properly excused where his regiment was then in camp. *State v. Lang*, 75 N. J. L. 1, 66 Atl. 942, affirmed in 75 N. J. L. 502, 68 Atl. 210.

[e] Public assessors may be excused though neither disqualified nor exempt. *Ellis v. State*, 25 Fla. 702, 6 So. 768.

[f] Licensed pilot, though not legally exempt, may be excused. *State v. Hamilton*, 35 La. Ann. 1043.

[g] Jailor was properly excused both because of the inconvenience to the public service and because "it would be unseemly to have, as one of the triers of a person capitally charged, the individual who is his keeper." *Hale v. State*, 72 Miss. 140, 16 So. 387.

[h] Member of a regularly organized fire engine company in the city wherein the trial was being held, was properly excused. *State v. Ward*, 39 Vt. 225.

98. *Powell v. State*, 48 Ala. 154; *Cluverius v. Com.*, 81 Va. 787.

[a] Over Age.—*Doyal v. State*, 70 Ga. 134.

99. *Ware v. Ware*, 8 Me. 29.

[a] On granting continuance the court may discharge the jurors who had been accepted but not sworn. *Moore v. People*, 31 Colo. 336, 73 Pac. 30.

[b] Jurors engaged in the trial of another case may be excused. *Dorsey v. State*, 107 Ala. 157, 18 So. 199; *Guice v. State*, 60 Miss. 714.

[c] Jurors serving on grand jury may be excused. *Guice v. State*, 60 Miss. 714.

[d] May Excuse, Discharge and Transfer to Other Panels.—The trial

judge in the exercise of a sound discretion decides which jury shall hear a particular case, excuses and discharges and transfers from one jury to another as the business of the court requires. *Ware v. Ware*, 8 Me. 29.

1. *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[a] For Good Cause Shown.—*Ala. Ziniam v. State*, 186 Ala. 9, 65 So. 56; *Williams v. State*, 144 Ala. 14, 40 So. 405. *Compare Code*, §7280, "for any other reasonable or proper cause, to be determined by the court." *Ark. Kirby's Dig.*, §4521. *Me.—Rev. St.*, ch. 84, §89 ("for good reason any juror may be excused"); *Ware v. Ware*, 8 Me. 29.

[b] "In case of evident moral and physical necessity." *State v. Hobgood*, 46 La. Ann. 855, 15 So. 406; *State v. Nash*, 46 La. Ann. 194, 14 So. 607.

[c] Jurymen Who Had Been Discharged for Misconduct in Another Case.—*State v. Lartigue*, 29 La. Ann. 642.

[d] Wilful Disregard of Evidence in Prior Case.—The court is justified in discharging from further attendance veniremen whom he has reason to believe have wilfully disregarded the evidence in a case wherein they have just returned a verdict. *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

[e] Persons Present as Spectators. It was not an arbitrary exercise of discretion to discharge jurors who had been present in court during preceding days as mere spectators. The statute permitted summoning of bystanders, but the judge, desirous of obtaining impartial jurors, evidently thought that result could best be reached by taking persons who had not voluntarily come to the trial out of curiosity, interest, partizanship or excitement. *Savage v. State*, 18 Fla. 909.

[f] Party to Any Proceeding Then Pending.—D. C. Code, §216.

[g] Juror against whom a criminal case is pending in that court may be set aside. *State v. Jackson*, 35 La. Ann. 769; *Lewis v. State*, 85 Miss. 35, 37 So. 497.

[h] Juror Not Regularly in the

of some states specifically provide that excuse must not be for a slight or trivial cause.²

3. Jurors Subject to Challenge.—Jurors who are clearly subject to challenge for cause are properly excused,³ or where the juror is himself in doubt as to the facts on which a challenge might be based,⁴ or for a cause not within the challenge made.⁵ The court may excuse persons, on their application, for any reasonable cause.⁶ The court may discharge a juror who discloses that he has a disqualifying⁷ opin-

Box.—Toledo Railways, etc. Co. v. Ward, 2 Ohio Cir. Ct. (N. S.) 256.

[i] **Juror who lives at a distance,** may be excused. *State v. Gill*, 14 S. C. 410.

[j] **Juror who gave false answers** was properly excused. Had his answers been true his clear prejudice in prisoner's favor would have appeared. *State v. Duvall*, 135 La. 710, 65 So. 904.

[k] **Cousin of party indicted for the same offense** as the prisoner is properly set aside by the court in its discretion. *Smith v. State*, 61 Miss. 754.

[l] **First cousin to defendant's son-in-law** is properly excused as being under the circumstances "unsuitable" for a juror. *Williamson v. Mayer*, 117 Ala. 253, 23 So. 3.

2. See the statutes.

3. *Curtis v. State*, 118 Ala. 121, 24 So. 111.

[a] **Person on defendant's bail bond** is properly excused. *Scott v. State*, 133 Ala. 112, 32 So. 623.

[b] **One who was on the grand jury** which found the indictment is properly excused. *Ala.*—*Scott v. State*, 133 Ala. 112, 32 So. 623. *Miss.*—*Jefferson v. State*, 52 Miss. 767. *W. Va.*—*State v. Cooper*, 74 W. Va. 472, 82 S. E. 358.

[c] **Jurors who tried defendant for a similar transaction** are properly excused. *Curtis v. State*, 118 Ala. 125, 24 So. 111.

[d] **Bystander Who Is Witness.** Court properly excuses on its own motion a juror called as a bystander who discloses that he is in court as a character witness for the prisoner. *State v. Barber*, 113 N. C. 711, 18 S. E. 515.

[e] **Juror who is to be a witness in the cause,** may be excused. *Depew v. Robinson*, 95 Ind. 109.

[f] **Related to Party Within Prohibited Degree.**—*State v. Hobgood*, 46

La. Ann. 855, 15 So. 406; *State v. Hill*, 46 *La. Ann.* 736, 15 So. 145; *State v. Boon*, 80 N. C. 461; *State v. Cunningham*, 72 N. C. 469.

4. See cases following.

[a] **Juror Doubtful as to Being of Age.**—*Hines v. State*, 8 *Humph. (Tenn.)* 598.

[b] **Juror Not Sure He Had Been on Grand Jury.**—It was clearly within the court's discretion to excuse a juror who was not sure whether or not he had been one of the grand jury that found the indictment. *State v. Kelly*, 1 *Nev.* 224.

5. *State v. Ring*, 29 *Minn.* 78, 11 *N. W.* 233.

[a] **After Challenge for Actual Bias May Excuse for General Cause.** After a challenge for actual bias the court may excuse a juror for a general disqualification which becomes apparent upon the examination for actual bias. *State v. Ring*, 29 *Minn.* 78, 11 *N. W.* 233.

[b] **Though general challenge waived,** in a strict sense, it is the court's duty to excuse one who discloses on the voir dire examination that he is not fit for jury service. *People v. Sampo*, 17 *Cal. App.* 135, 118 *Pac.* 957.

6. *State v. Barber*, 113 N. C. 711, 18 S. E. 515; *State v. Craton*, 28 N. C. 164.

[a] **Police officer** may be excused at his request, and on court's own motion, he stating that he is on active duty. *Pierson v. State*, 99 Ala. 148, 13 So. 550.

7. *Ala.*—*Lore v. State*, 4 Ala. 173. *Ark.*—*Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054. *Miss.*—*Marsh v. State*, 30 Miss. 627. *Nev.*—*State v. Vaughan*, 23 Nev. 103, 43 *Pac.* 193. *N. C.*—*State v. Jones*, 80 N. C. 415. *S. C.*—*Rice v. Sims*, 3 Hill 5. *Tenn.*—*Ellis v. State*, 92 *Tenn.* 85, 20 S. W. 500.

[a] **Jurymen who lived in the vicinity of the alleged crime,** were

ion, or who the court thinks may have such an opinion,⁸ or who discloses that he does not stand indifferent between the parties,⁹ or whom the court has reason to believe is not indifferent,¹⁰ or who is

cognizant of all the facts and had publicly expressed the opinion that defendant was guilty were properly excused by the court on its own motion. *Watson v. State*, 63 Ind. 548.

[b] **Court's Duty To Excuse Under Some Statutes.**—Where on his voir dire the juror discloses that he has an established conclusion in his mind as to the guilt or innocence of defendant, it absolutely disqualifies him under the statute and hence it is the duty of the court to discharge him even though he is not challenged. *Spear v. State*, 16 Tex. App. 98.

When opinion and expressions thereof are disqualifying generally, see *infra*, VII, F.

8. See cases following.

[a] **Juror who came from the immediate vicinity of the crime may be excused.** *State v. McKinney*, 31 Kan. 570, 3 Pac. 356. Compare preceding note.

[b] **Juror Who Had Petitioned Court in Case.**—A juror who, with other citizens, had addressed a petition to the court, after a reversal on a former conviction, to accept the prisoner's plea of guilty of murder in the second degree, was properly excused. *Com. v. Cleary*, 148 Pa. 26, 23 Atl. 1110.

9. *Mich.*—*Atlas Min. Co. v. Johnston*, 23 Mich. 36. *N. Y.*—*People v. Decker*, 157 N. Y. 186, 51 N. E. 1018; *Corbett v. Troy*, 53 Hun 228, 6 N. Y. Supp. 381, 25 N. Y. St. 520. *S. C.* *State v. Cason*, 41 S. C. 531, 19 S. E. 918; *State v. Stephens*, 11 S. C. 319.

[a] **Actual bias warrants excusing juror.** *Robinson v. State*, 33 Ark. 180.

[b] **Statements That Will Not Convict.**—*State v. Duvall*, 135 La. 710, 65 So. 904.

[c] **Statement of Sympathy.**—Juror who acknowledged that "he had a sympathy for the boys" on trial, is properly set aside by the court in its discretion. *Smith v. State*, 61 Miss. 754.

[d] **Proper Exercise of Power Shown on Motion for New Trial.**—That the court's power was properly exercised appears on motion for new trial based on the impropriety of such discharge,

when the person says on oath he would have rendered a verdict for the party complaining of his exclusion had he been permitted to serve. *Burch v. Hylton*, 89 Va. 441, 16 S. E. 342.

10. *State v. Lartigue*, 29 La. Ann. 642.

[a] **Juror in Conference With Defendant's Friends in Court Room.** Court excused a juror who had been in the court room on previous day and apparently in conference with relatives and friends of the accused. The court had also been informed that the juror was a close personal friend of accused and his relatives. *State v. Kennedy*, 133 La. 945, 63 So. 476.

[b] **Inhabitant of Town Whose Books Involved.**—A juror was properly excused by the court who was an inhabitant of the town whose books defendant was charged with having secreted. If found guilty part of the penalty would go to the town, and the juror might be interested. *State v. Williams*, 30 Me. 484.

[c] **Juror who states he is hostile to all landlords, the case being one by a landlord for treble rent and restitution, is properly excused.** *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496.

[d] **Juror who has been by mistake bound as a witness for the defense, may be excused.** *State v. Malloy*, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053.

[e] **Shown by Actions Amounting to Misconduct.**—It was proper to discharge a juror who after being seated in the box "by motions of the head and other significant modes" indicated to a brother-in-law of prisoner's, seated beside counsel, what jurors to accept or reject. *Lewis v. State*, 3 Head (Tenn.) 127.

[f] **Indicted for Similar Offense.** That juror stood indicted and untried for a similar offense was sufficient to raise a reasonable suspicion that he would be biased and disinclined to find a verdict against accused, and hence is good reason for excusing after he had been sworn. *McGuire v. State*, 37 Miss. 369.

[g] **One who had been advised "not to cut himself off of the jury" be-**

found to have conscientious scruples against the death penalty, in a capital case,¹¹ or will not convict on circumstantial evidence.¹²

4. Jurors Not Subject to Challenge.—The general rule is that the court may excuse a juror, though strictly he would not be subject to challenge,¹³ and is qualified to act as a juror,¹⁴ and is not exempt

cause he could give the prisoner a fair trial, was properly excused. The exact status of the person giving the advice and why the advice was given does not appear. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

11. Ala.—*O'Rear v. State*, 188 Ala. 71, 66 So. 81, following *Griffin v. State*, 90 Ala. 596, 8 So. 670. See also *Waller v. State*, 40 Ala. 325; *State v. Marshall*, 8 Ala. 302. **Ariz.**—*Marquez v. Territory*, 13 Ariz. 135, 108 Pac. 258. **Ark.**—*Robinson v. State*, 33 Ark. 180. **Fla.**—*Metzger v. State*, 18 Fla. 481. **La.**—*State v. Nash*, 46 La. Ann. 194, 14 So. 607; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448; *State v. Reeves*, 11 La. Ann. 685. **Miss.** *Smith v. State*, 55 Miss. 410; *Russell v. State*, 53 Miss. 367; *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615; *Marsh v. State*, 30 Miss. 627; *Lewis v. State*, 9 Smed. & M. 115. **Nev.** *State v. Vaughan*, 23 Nev. 103, 43 Pac. 193; *State v. Pritchard*, 16 Nev. 101. **N. Y.**—*People v. Damon*, 13 Wend. 351. **N. C.**—*State v. Vick*, 132 N. C. 995, 45 S. E. 626. **Tex.**—*Gonzales v. State*, 31 Tex. Crim. 508, 21 S. W. 253. **Va.**—*Montague v. Com.*, 10 Gratt. (51 Va.) 767.

[a] **Quakers May Be Excused.**—It was proper to set aside jurors who were known to be Quakers and hence unable conscientiously to give their consent to a verdict carrying the death penalty in the case at bar. It is neither necessary to challenge nor to examine the jurors on oath, the facts being known. *United States v. Cornell*, 2 Mason 91, 25 Fed. Cas. No. 14,868.

12. State v. Pritchard, 16 Nev. 101.

[a] **Juror Who Will Not Convict on Circumstantial Evidence.**—Court may excuse on its own motion a juror who says, "I have no fixed opinion against capital or penitentiary punishment, or that a conviction should not be had on circumstantial evidence, but I would not hang a man on circumstantial evidence." *Griffin v. State*, 90 Ala. 596, 8 So. 670.

13. Atlas Min. Co. v. Johnston, 23 Mich. 36.

[a] **Persons Employed by Corporations Owned by Defendant.**—It having been ascertained that certain persons were employes of another mill and a certain store which were owned by distinct corporations but of which the president of the defendant corporation was president, there is no abuse of discretion in the court's excusing them, though strictly they are not subject to challenge therefor. *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957.

[b] **Juror whose brother has suit pending against the same defendant** is properly excused. This would not necessarily bias the juror but would have a tendency to do so. *Shellman v. Louisville Ry. Co.*, 147 Ky. 526, 144 S. W. 1060.

[c] **Statute prescribing causes does not deprive court of its power to excuse jurors who appear to the court to be unfit for jury service.** *Long v. State*, 86 Ala. 36, 5 So. 443; *State v. Marshall*, 8 Ala. 302.

14. People v. Lee, 1 Cal. App. 169, 81 Pac. 969.

[a] **Under a statute reading "if it shall appear to the court that the juror does not stand indifferent to the cause, or is otherwise incompetent, another shall be called in his stead for the trial of that cause,"** the court may exclude a qualified juror. *Walsingham v. State*, 61 Fla. 67, 56 So. 195. See also *Ellis v. State*, 25 Fla. 702, 6 So. 768, where an assessor, though qualified, was excused.

[b] **Relationship Not Within Prohibited Degree.**—The court might excuse juror because of embarrassment growing out of his relationship with defendant not within the prohibited degree. *Boyd v. State*, 14 Lea (Tenn.) 161.

[c] **Close acquaintanceship not within any disqualifying statute, but which might embarrass the juror, is good ground for excusing.** *Brennan v. O'Brien*, 121 Mich. 491, 80 N. W. 249.

from jury service.¹⁵ At the same time the rule is that the court cannot capriciously set aside jurors as incompetent whom the law declares are competent.¹⁶

5. Disclosure of Reason for Excusing.—The court need not disclose his reasons for excusing jurors prior to their acceptance on a particular jury,¹⁷ or even after acceptance according to some cases.¹⁸

6. Peremptory Challenges as Affecting Right.¹⁹—The court may discharge a juror, in his discretion, even when the complaining party's peremptories are exhausted.²⁰ or when the opposite party's are.²¹ The court in ordering a talesman to stand aside upon the coming in of the regular panel is not giving an additional peremptory to the party who requested that the regular panel be used.²² Nor is the court bound to restore defendant's peremptories on excusing a juror before the jury is completed,²³ but on excuse during the progress of

[d] **Unable To Read English.** Where the statute did not make a want of sufficient knowledge of the language in which the proceedings were had, an absolute disqualification in a certain county, it was a reasonable use of the court's discretion to excuse such jurors in that county to the end that all the jurors on the panel might understand the same language. *People v. Arceo*, 32 Cal. 40.

15. *Ellis v. State*, 25 Fla. 702, 6 So. 768 (public assessor); *State v. Hamilton*, 35 La. Ann. 1043, licensed pilot.

16. **Ga.**—*Cunneen v. State*, 96 Ga. 406, 23 S. E. 412. **Ky.**—*O'Brian v. Com.*, 9 Bush 333, 15 Am. Rep. 715. **La.**—*State v. Thomas*, 41 La. Ann. 1088, 6 So. 803. **Mich.**—*Welch v. Tribune Pub. Co.*, 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233. **Minn.**—*Morrison v. Lovejoy*, 6 Minn. 319. **N. Y.**—*Hildred v. Troy*, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686. **Tenn.**—*Hines v. State*, 8 Humph. 597. **Tex.**—*Pierson v. State*, 18 Tex. App. 524; *Hill v. State*, 10 Tex. App. 618. **Va.**—*Montague v. Com.*, 10 Gratt. (51 Va.) 767.

[a] **Not for Error in Christian Name.**—It was reversible error to excuse on the court's own motion and over the objection of defendant a juror who did not ask to be excused for any reason personal to himself, and who was in all respects qualified, merely because there was an error in his Christian name. *Sullivan v. State*, 102 Ala. 135, 15 So. 264, 48 Am. St. Rep. 22.

17. *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

[a] The trial judge may have good reason for not making his motives publicly known. *State v. Thomas*, 41 La. Ann. 1088, 6 So. 803.

[b] **May excuse juror for personal reasons** not disclosed and despite objection of party. *John D. C. v. State*, 16 Fla. 554.

18. *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672, at any time before juror is sworn.

19. **Right of party to complain** whose peremptories have not been exhausted, see *infra*, VII, E, 6, c, (III).

Permitting withdrawal of peremptory to one juror upon excusing another after he was sworn, see *infra*, VII, E, 5, c.

20. **Ala.**—*Jackson v. State*, 78 Ala. 471. **Mich.**—*O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560, 35 N. W. 162. **N. C.**—*State v. Vick*, 132 N. C. 995, 43 S. E. 626. **Okla.**—*Cochran v. United States*, 14 Okla. 108, 76 Pac. 672.

[a] **There Being Nothing To Show That a Fair and Impartial Jury Was Not Had.**—*State v. Hamilton*, 35 La. Ann. 1043.

21. *Lewis v. State*, 3 Head (Tenn.) 127.

[a] **Notwithstanding the claim** by the objecting party that since his opponent's peremptories were exhausted and his own were not, the arbitrary excusing by the court amounted to giving the opponent an additional peremptory. *Brennan v. O'Brien*, 121 Mich. 491, 80 N. W. 249.

22. *Toledo Railways, etc. Co. v. Ward*, 2 Ohio Cir. Ct. (N. S.) 256.

23. *Boyd v. State*, 14 Lea (Tenn.)

the trial, the peremptories should be restored,²⁴ though where defendant had exhausted his peremptories on the organization of the jury it has been held that to restore peremptories on beginning the trial anew amounts to increasing the number.²⁵ A party is clearly not prejudiced by the excusal where the court gave him an additional peremptory,²⁶ or restored his peremptories,²⁷ especially where he did not peremptorily challenge the substituted juror.²⁸

7. Time To Excuse.—a. *In General.*—The statute is not mandatory as to the time when the court may excuse jurors.²⁹

b. *Before Acceptance.*—Before a juror is accepted, the court may of its own motion excuse a juror at his request and as a favor to him.³⁰ And where jurors do not appear on call the court may expedite its business by proceeding to draw other jurors without compelling attendance of the absent jurors.³¹ For a sufficient cause appearing at the time the juror is called in regular order, he may be excused although he has not taken advantage of an earlier opportunity.³² For good cause the court may excuse a juror although he

161, court gave two peremptories, but he was not bound to restore all.

24. *People v. Stewart*, 64 Cal. 60, 28 Pac. 112.

[a] **Where Defendant Insists on Reimpanelment.**—On excusing juror after he was accepted and sworn but before the jury was completed, the defendant, insisting upon his right to have the jury impaneled anew, is entitled to his full number of peremptory challenges. *People v. Zeigler*, 135 Cal. 462, 67 Pac. 754, 56 L. R. A. 882, following *People v. Stewart*, 64 Cal. 60, 28 Pac. 112.

[b] **Reason for Rule.**—"Admitting that there may be challenges, there is no mode of proportioning the number so as to meet the case of the particular juror or jurors withdrawn; it ceases to become a matter of calculation; and as the right remains, it remains to the whole extent." *Garner v. State*, 5 Yerg. (Tenn.) 160.

25. *Jackson v. State*, 73 Ala. 471.

26. *State v. Fielding*, 135 Iowa 255, 112 N. W. 539.

As to right to object where one has not exhausted his peremptories, see *infra*, VII, E, 6, c, (III).

27. *State v. Linebarger*, 12 Mont. 292, 30 Pac. 140.

[a] **On Excusing Juror During Trial.** Where the right to challenge the jurors retained was expressly accorded to defendant, he is not prejudiced by the court's action in filling the jury by calling an additional juror rather

than by discharging those who had been selected and beginning *de novo*. *People v. Brady*, 72 Cal. 490, 14 Pac. 202.

28. *Heskey v. State*, 17 Tex. App. 161.

[a] **On Non-appearance of Juror After Acceptance.**—Defendant was clearly not prejudiced by the substitution of another juror on the non-appearance of a juror previously accepted, where the court gave him three additional peremptories, none of which he used on the selection of the substitute. *State v. LaCroix*, 8 S. D. 369, 66 N. W. 944.

29. *Goodall v. State* (Tex. Crim.), 47 S. W. 359.

[a] **Duty To Discharge as Soon as Discovered.**—Neb. Rev. St., §8158.

[b] **May Receive Excuse Prior to Call.**—That the judge received a juror's excuse outside the courthouse and before the juror is called is not error. The juror was accepted and sworn and then reminded the judge of the excuse previously offered. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

30. *State v. Barber*, 113 N. C. 711, 18 S. E. 515.

31. *State ex rel. Pepple v. Banik*, 27 N. D. 417, 131 N. W. 262.

32. *Goodall v. State* (Tex. Crim.), 47 S. W. 359.

[a] **May discharge person over age** who did not offer excuse till his name was called, in regular order, though an opportunity had been given him

has been called on a special venire to try that particular case,³³ but cannot so discharge, without cause, and over the defendant's objection.³⁴ Where it appears to the court that a juror may not be qualified he may be excused without being presented to the prisoner,³⁵ or after being presented but before the prisoner has completed his examination.³⁶

c. *After Acceptance*.—After a juror has been accepted some courts hold he may be excused, though he fails to appear after adjournment,³⁷ but others say that his attendance should be compelled and the party not forced to accept a substitute.³⁸ The court may discharge a juror for his persistent refusal to take the oath after he has been accepted.³⁹ Some courts hold that the court cannot, of its own motion, discharge a juror accepted by both parties, where the only ground of challenge is for favor,⁴⁰ but other courts permit it.⁴¹

previously, and though defendant objected on ground that he was acceptable and so only one peremptory had been saved. *Doyal v. State*, 70 Ga. 134.

33. *Maxwell v. State*, 89 Ala. 150, 7 So. 824; *Fariss v. State*, 85 Ala. 1, 4 So. 679, *overruling* so much of *Parsons v. State*, 22 Ala. 50, as is in conflict.

34. *Boles v. State*, 24 Miss. 445; *Boles v. State*, 13 Smed. & M. (Miss.) 398.

35. *State v. Murphy*, 48 S. C. 1, 25 S. E. 43.

[a] **Juror apparently related to prisoner** is properly excused though he is not sure in just what degree, but he says that it might affect his verdict. *State v. Murphy*, 48 S. C. 1, 25 S. E. 43.

36. *State v. Jones*, 80 N. C. 415; *State v. Cunningham*, 72 N. C. 469.

37. *Rice v. Sims*, 3 Hill (S. C.) 5; *State v. La Croix*, 8 S. D. 369, 66 N. W. 944.

[a] **Misconduct Amounting to Contempt**.—Where juror had been accepted but failed to appear on the next day and was found playing pool in a hotel the court not only fined him for contempt but discharged him from the case and panel. The supreme court held this a proper exercise of the court's discretion, as the juror had shown himself unfit. *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

[b] **Defendant Cannot Complain Unless He Can Show Some Prejudice**. *State v. La Croix*, 8 S. D. 369, 66 N. W. 944.

38. *Powell v. State*, 48 Ala. 154; *Standley v. State*, 10 Ga. 82.

39. *Isaac v. State*, 2 Head (Tenn.) 458.

40. *Montague v. Com.*, 10 Gratt. (51 Va.) 767.

[a] **Juror had expressed opinion as to guilt of defendant**. *Van Blaricum v. People*, 16 Ill. 364, 63 Am. Dec. 516.

[b] **Not Error Not To Excuse**. That jurors in their examination express opinion that accused is guilty furnishes no reason for their discharge where they are accepted by the parties. It was not error to fail to discharge the jury. *Penman v. Com.*, 141 Ky. 660, 133 S. W. 540.

[c] **Reason for Rule**.—"A juror has no right to challenge himself, and we have no power to reject him on account of an objection which the law allows a party to make for his own benefit, but which, if he refuses, no other can offer." *Den ex dem. Bickham v. Pissant*, 1 N. J. L. 220.

[d] **Error To Reject After Withdrawal of Challenge**.—Twelve jurors having been accepted, the district attorney over defendant's objection was permitted to ask whether any were biased or prejudiced in favor of or against defendant. Four said they were, and were stood aside on state's challenge, but, defendant objecting, the district attorney withdrew the challenge, the jurors were again placed on the panel and accepted by both parties. It was reversible error for the court to then excuse them on its own motion. *Greer v. State*, 14 Tex. App. 179.

41. *Robinson v. State*, 33 Ark. 180.

The mere fact that the parties might be willing to take an incompetent juror does not prevent the court from excusing him,⁴² even after defendant has exhausted his peremptories, and objected to taking a person called thereafter,⁴³ though a distinction has been drawn between jurors who are disqualified at common law and those who are not.⁴⁴ Some courts hold that after acceptance a juror who was entitled to an exemption cannot be excused;⁴⁵ others hold he can be excused at any time before he is sworn.⁴⁶

d. *Before Juror Sworn*.—After the juror is accepted, but before he is sworn, many courts hold he may be excused without challenge, for good cause shown,⁴⁷ and permit an excusal for good cause at any time

[a] **Bias by Business Relationship.** The court properly excused a juror after acceptance who stated that upon further reflection he had come to the conclusion he was biased because defendant had been trading with him. *Robinson v. State*, 33 Ark. 180.

42. *State v. Ring*, 29 Minn. 78, 11 N. W. 233; *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

[a] Where juror does not understand English and though the parties might desire, from different motives, to accept him, the judge did not have to assent, "nor to take part in such a trial." *State v. Ring*, 29 Minn. 78, 11 N. W. 233.

[b] **Juror Incompetent Because of Views on Capital Punishment.**—*State v. Vick*, 132 N. C. 995, 43 S. E. 626.

[c] **Juror Related to Defendant and Deceased.**—Juror who discloses, after he has been passed and accepted by both sides, that he is related to the prisoner and to deceased whom the prisoner is charged with killing, is properly stood aside by the judge under his duty to see that a fair and impartial jury is impaneled. *State v. Boon*, 80 N. C. 461.

43. *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

44. *Underwood v. State*, 179 Ala. 9, 60 So. 842; *Scott v. State*, 133 Ala. 112, 32 So. 623.

[a] **Juror With Fixed Opinion Distinguished From One Called as Witness.** At common law one who had a fixed opinion as to the merits of the controversy was considered unfit to be a juror. Hence in such a case the trial judge may excuse a juror though both parties consent to his serving. *Underwood v. State*, 179 Ala. 9, 60 So. 842, *distin-*

guishing Bell v. State, 115 Ala. 25, 22 So. 526, in which it was held error to so stand aside a juror who was to be a witness in the case, since that was not ground of incompetency at common law, nor did it follow that he was biased as between the parties, simply because he was to testify as to some fact.

[b] **If the parties withdraw their challenges and the cause is not one for which the juror is ipso facto disqualified to act, it is reversible error for the court to stand the juror aside on his own motion.** *Greer v. State*, 14 Tex. App. 179.

45. *Powell v. State*, 48 Ala. 154.

46. *Cluverius v. Com.*, 81 Va. 787.

47. *State v. Larkin*, 11 Nev. 314; *State v. Kelly*, 1 Nev. 224.

[a] **Even in a Capital Case.**—*Griffie v. State*, 1 Lea (Tenn.) 41; *Lewis v. State*, 3 Head (Tenn.) 127.

[b] **Illness of Juror.**—*Heskeu v. State*, 17 Tex. App. 161.

[c] **Conscientious Scruples Against Capital Punishment.**—*State v. Reeves*, 11 La. Ann. 685.

[d] **Members of the Grand Jury Who Found the Indictment.**—*State v. Cooper*, 74 W. Va. 472, 82 S. E. 358.

[e] **Member of an Unlawful ("White Cap") Organization.**—*Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

[f] **Juror Doubtful as to Being of Age.**—*Hines v. State*, 8 Humph. (Tenn.) 597.

[g] **Juror Who Has Expressed Disqualifying Opinion.**—*Ellis v. State*, 92 Tenn. 85, 20 S. W. 500.

[h] **Juror Was To Be Called as a Witness in the Next Case.**—*People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

before the jury is completed,⁴⁸ and charged with the case.⁴⁹ Some courts extend these rules to matters merely personal to the juror.⁵⁰

e. *After Juror Sworn*.—After swearing a juror some courts permit him to be excused before the jury has been completed, on good cause being shown therefor,⁵¹ or before further proceedings.⁵² Some authorities hold that the court may in its discretion excuse a juror who does not return after adjournment, where he has been sworn but has not heard evidence,⁵³ but others say the proper practice is not to excuse the juror but to permit the parties to show he has done nothing to disqualify himself.⁵⁴

f. *After Jury Sworn*.—After the jury has been sworn the court has sometimes been held to be without jurisdiction to excuse one juror and substitute another, though the ground of objection to him was not previously known to court or parties,⁵⁵ but other courts permit the juror to be excused for cause before the trial commences,⁵⁶ or before the indictment has been read,⁵⁷ or during the reading of the indict-

48. *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257.

[a] **Physical inability** is ground for excuse. *Fletcher v. State*, 6 Humph. (Tenn.) 249.

[b] **Illness of juror** is ground for excuse. *State v. Baber*, 74 Mo. 292.

[c] **Prejudgment of Case Is Sufficient Cause**.—It was proper to excuse two jurors before the jury was completed and sworn where the bailiff in charge reported that he overheard them conversing together about the case, and that they said they had made up their minds, notwithstanding they denied the holding of such conversation. *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262.

[d] **Sickness in Family Not Sufficient Cause**.—It was error for the court to discharge a juror for the insufficient cause that there was sickness in his family, after he had been accepted although the panel was not complete, but the court reversing on another ground did not decide whether this was reversible error, there being also some question as to waiver by failure to object. *Hill v. State*, 10 Tex. App. 618.

49. *State v. Vann*, 162 N. C. 534, 77 S. E. 295; *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

50. *People v. Carrier*, 46 Mich. 442, 9 N. W. 487.

[a] **Business Would Suffer if Juror Was Compelled To Act**.—*People v. Thacker*, 108 Mich. 652, 66 N. W. 562.

[b] **Juror preferred not to sit be-**

cause of acquaintanceship with party not amounting to a disqualification. *Brennan v. O'Brien*, 121 Mich. 491, 80 N. W. 249.

51. *State v. Willie*, 130 La. 454, 58 So. 147; *Welch v. Tribune Pub. Co.*, 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

[a] **Illness of Juror**.—*People v. Zeigler*, 135 Cal. 462, 67 Pac. 754, 56 L. R. A. 882.

[b] **Juror's Wife Discovered To Be Related to Accused**.—*State v. Hobgood*, 46 La. Ann. 855, 15 So. 406.

[c] **The code provision that "all peremptories by the state shall be made before the juror is presented to the prisoner"** does not prevent the court's excusing a juror after he has been sworn. *Jefferson v. State*, 52 Miss. 767.

52. *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501, alien may be discharged.

53. *Rice v. Sims*, 3 Hill (S. C.) 5.

54. *Standley v. State*, 10 Ga. 82.

55. *State v. Cason*, 41 S. C. 531, 19 S. E. 918, following *State v. Stephens*, 11 S. C. 319; *Greer v. Norvell*, 3 Hill (S. C.) 262.

56. *State v. Hill*, 46 La. Ann. 736, 15 So. 145.

[a] **Juror who discloses hostility to all landlords properly excused in case involving rent and restitution**. *Lawlor v. Linforth*, 72 Cal. 205, 13 Pac. 496.

57. *Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Webb v. State*, 100 Ala. 47, 14 So. 865, illness of juror.

ment,⁵⁸ or after it has been read,⁵⁹ or before evidence is received.⁶⁰

g. *After Evidence Received.*—After part of the evidence has been received a juror may be discharged for good cause.⁶¹

8. **Examination.**⁶²—a. *Right and Duty of Court.*—The court may make such examination as he sees fit to satisfy himself of the jurors' qualifications and competency,⁶³ and it has been said to be not

58. *Jefferson v. State*, 52 Miss. 767, juror member of grand jury.

59. See cases following.

[a] **Juror's wife seriously ill**, and requiring his personal attention. *Hawes v. State*, 88 Ala. 37, 7 So. 302.

[b] **Juror Found To Be a Non-resident.**—*State v. Upton*, 170 N. C. 769, 87 S. E. 328.

60. *State v. Pritchard*, 16 Nev. 101.

[a] **Illness of Juror.**—*People v. Brady*, 72 Cal. 490, 14 Pac. 262.

[b] **Doubt as to Competency of Juror.**—*Mabry v. State*, 71 Miss. 716, 14 So. 267.

[c] **Juror opposed to capital punishment** based on circumstantial evidence. *State v. Pritchard*, 16 Nev. 101.

[d] **Juror Member of Grand Jury.** *Jefferson v. State*, 52 Miss. 767.

[e] **Does Not Deprive of Any Legal Right.**—The setting aside of a juror, unchallenged by either party, or discharging from the panel a juror who has been sworn but before testimony taken, on discovery that he is incompetent to serve, does not deprive a party of any legal right and ought to be done in a proper case, in order to secure an impartial jury. *Gilliam v. Brown*, 43 Miss. 641; *McGuire v. State*, 37 Miss. 369; *Marsh v. State*, 30 Miss. 627; *Lewis v. State*, 9 Smed. & M. (Miss.) 115.

61. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

[a] "When his detention upon the jury would defeat the ends of public justice." *State v. Vaughan*, 23 Nev. 103, 43 Pac. 193.

[b] **Excuse is not a challenge** within the rule forbidding challenges after the trial has commenced, though it has the same effect as a challenge allowed by the court. *Stone v. People*, 3 Ill. 226.

[c] **Permitted Where Counsel Refused To Challenge, or Elect To Proceed.**—Upon refusal of counsel for defendant to either challenge the juror for cause, or go on with the trial, it

having been discovered that the juror is disqualified and under the circumstances neither the court nor the counsel are to blame for the discovery not having been made earlier, the court may of its own motion excuse the juror and impanel a new jury. *Stewart v. State*, 15 Ohio St. 155.

[d] **Illness of juror is good ground.** *People v. Stewart*, 64 Cal. 60, 28 Pac. 112; *State v. Curtis*, 5 Humph. (Tenn.) 601.

[e] **News of death of son communicated to juror is good ground.** *State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

[f] **Not for Mere Distress of Mind.** The right of the judge to discharge a juror and order the trial to proceed under the constitutional provision that such may be done when the juror is "disabled from sitting," does not apply to mere distress of mind occasional in the juror on hearing of illness in his family and the feeling that duty to the sick demanded his presence elsewhere. *Houston, etc. R. Co. v. Waller*, 56 Tex. 331.

[g] **Discharge Refused Though Juror Said He Could Not Serve in Capital Case.**—*United States v. Randall*, 2 Cranch C. C. 412, 27 Fed. Cas. No. 16,117.

[h] **Not for Misconduct.**—That an accepted and sworn juror during the progress of the trial announced to court and counsel that he had personal knowledge of the locality where an accident was alleged to have occurred, and that he did not believe certain witnesses, though possibly misconduct, does not warrant his discharge. *Mahoney v. San Francisco, etc. R. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518.

62. **Right or duty of court to make preliminary examination before juror challenged**, see *infra*, VII, E, 4, h, (II).

Examination by court on party's motion, see *infra*, VII, E, 4, i, (II); VII, E, 4, i, (III), (G).

63. **Colo.**—*Keady v. People*, 32 Colo.

only his right, but his duty, to question jurors in some cases,⁶⁴ but this right does not take away the party's right to further examine.⁶⁵ The examination may be had even after the juror has been accepted and sworn.⁶⁶

b. *Swearing Jurors.*—Jurors need not be sworn where no objection is made to their unsworn statement at the time it is given.⁶⁷

c. *Evidence.*—The juror is competent to testify on his own behalf,⁶⁸ and the court may decide on his testimony alone,⁶⁹ it being the duty of the party to object to the excuse, and to offer testimony in

57, 74 Pac. 892, 66 L. R. A. 353. Ill. *Donovan v. People*, 139 Ill. 412, 28 N. E. 964. Ky.—*Shellman v. Louisville Ry. Co.*, 147 Ky. 526, 144 S. W. 1060, following *London & L. F. Ins. Co. v. Rufer's Admr.*, 89 Ky. 525, 12 S. W. 948. Mass.—*Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884. Va. *Montague v. Com.*, 10 Gratt. (51 Va.) 767.

[a] Under a special statute aimed at certain unlawful organizations, as "white caps," the trial court is given express power to make such examination as he deems proper to determine whether a juror belongs to such an organization and is hence disqualified, "when he shall be informed or shall have reason to suspect" such a state of affairs. *Jenkins v. State*, 99 Tenn. 599, 42 S. W. 263.

64. *Clark v. Com.*, 123 Pa. 555, 16 Atl. 795, as where juror has disclosed an opinion and the court wishes to bring out its source and character. *Compare Republica v. Dennie*, 4 Yeates (Pa.) 267, 2 Am. Dec. 402, where the court refused to question the jurors as to prejudice or declared opinions, but urged the jurors to tell the court voluntarily.

65. *American Bridge Works v. Pereira*, 79 Ill. App. 90, even to the extent of asking the same questions of each individual juror where the court asked the questions of the whole jury collectively and the record showed only that there was "no response."

66. *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448 (juror voluntarily stated possible ground for exclusion); *Hines v. State*, 8 Humph. (Tenn.) 597.

[a] *Court's Duty To Question When He Discloses Statement of Opinion.* It is the court's duty as well as proper practice to question a juror after he has been sworn, where he makes a statement in open court that he has

formed and expressed an opinion. *Zimmerman v. State*, 56 Md. 536.

[b] Even after the jury have been impaneled and sworn, but before the trial has been entered upon, the court may, of its own motion, examine a juror as to his having expressed an opinion that the defendant should be either acquitted or convicted. *Robinson v. State*, 5 Ala. App. 45, 59 So. 321.

[c] *As to Effect of Association With Excused Jurors.*—On excusing part of the jury for having expressed a disqualifying opinion the court properly re-examined the other jurors to see whether they had been in any manner affected by their association with the excused jurors prior to the time they were excused. *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500.

67. *Riley v. State*, 88 Ala. 193, 7 So. 149.

[a] *Need Not Reswear Juror on Re-examination.*—Where the juror has once been sworn on his voir dire, the court need not again swear him after acceptance and on his re-examination by the court to determine whether he will excuse him on his own motion. *Hines v. State*, 8 Humph. (Tenn.) 597.

68. *Parker v. State*, 7 Ala. App. 9, 60 So. 995.

69. *Parker v. State*, 7 Ala. App. 9, 60 So. 995, juror's physical incapacity.

[a] *Need Not Produce Certificate.* Juror is properly excused on his own statement on voir dire that he is a member of the militia, without production of the certificate of his commanding officer as to his good standing, etc. *King v. State*, 90 Ala. 612, 8 So. 856.

[b] The juror's sworn statement of fact is sufficient prima facie to authorize the court to exclude him. *State v. Larkin*, 11 Nev. 314.

contradiction to the juror's statement.⁷⁰ The court may consider other evidence than the juror's statements.⁷¹

9. Effect of Error.—a. *In General.*⁷²—Where the decision of the trial court only involves a question of fact as to the sufficiency of the excuse offered, there is nothing to review.⁷³ The presumption always being that the trial court acted from sufficient reasons,⁷⁴ it will be presumed that the power to excuse was not exercised arbitrarily, but only upon the facts having been properly ascertained by the court.⁷⁵ Reversal cannot be based on the court's action in excusing a juror unless it appears that there was an abuse of discretion,⁷⁶ and some showing of prejudice arising out of that abuse.⁷⁷ It follows that

70. *Steele v. State*, 83 Ala. 20, 3 So. 547, question as to juror's residence.

[a] **Party should ask permission to propound questions** where he wishes to controvert the juror's sworn statement of fact. *State v. Larkin*, 11 Nev. 314.

71. *Barnes v. Com.*, 110 Ky. 348, 61 S. W. 733.

[a] **May Hear Witnesses.**—On investigation as to juror's membership in white cap organization the court may hear witnesses whose information is based merely upon rumor. *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

[b] **Affidavit Filed.**—Though permitting the filing of an affidavit showing a juror's disqualification "was out of the ordinary," the court was within its power in considering the matters therein set forth, and in discharging the juror in reliance thereupon. *Barnes v. Com.*, 110 Ky. 348, 61 S. W. 733.

72. **Where party did not exhaust his peremptories**, see *infra*, VII, E, 6, c, (III).

73. *State v. Ward*, 39 Vt. 225.

74. *Moseley v. State*, 107 Ala. 74, 17 So. 932; *State v. Switzer*, 38 Nev. 108, 145 Pac. 925.

75. *Thomas v. Leonard*, 5 Ill. 556.

[a] **It not appearing why the court excused a juror**, but that the court had information from which it appeared to it that justice would be best subserved by so doing, it will be presumed that there was no arbitrary exercise of the court's power. *Barden v. State*, 141 Ala. 1, 40 So. 948.

[b] **It is impossible to put upon the record the manner, hesitancy, etc.**, which might show juror's lack of understanding, etc. *People v. Spiegel*, 75 Hun 161, 26 N. Y. Supp. 104, *affirmed* in 143 N. Y. 107, 38 N. E. 284.

76. *Ala.*—*Williamson v. Mayer*, 117 Ala. 253, 23 So. 3. *Kan.*—*State v. Dick-*

son, 6 Kan. 209; *State v. York*, 7 Kan. App. 291, 53 Pac. 838. *Miss.*—*Jefferson v. State*, 52 Miss. 767; *Marsh v. State*, 30 Miss. 627. *Mo.*—*State v. Taylor*, 134 Mo. 109, 35 S. W. 92. *Nev.* *State v. Vaughan*, 23 Nev. 103, 43 Pac. 193. *N. Y.*—*People v. Spiegel*, 75 Hun 161, 26 N. Y. Supp. 1041, *affirmed* in 143 N. Y. 107, 38 N. E. 284. *N. D.* *State ex rel. Pepple v. Banik*, 27 N. D. 417, 131 N. W. 262. *Okla.*—*Bouteher v. State*, 4 Okla. Crim. 576, 111 Pac. 1006; *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672. *S. C.*—*State v. Murphy*, 48 S. C. 1, 25 S. E. 43. *S. D.*—*State v. La Croix*, 8 S. D. 369, 66 N. W. 944. *Tenn.*—*Boyd v. State*, 14 Lea 161; *Lewis v. State*, 3 Head 127. *Wis.*—*Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[a] **Power Not Likely To Be Abused.** "Of all the discretionary powers of the court this would seem to be least liable to abuse, as it is altogether conservative." *State v. Marshall*, 8 Ala. 302.

[b] **Reversal For Abuse Is Rare.** "There are but few cases reported where the judgment of the court has ever been disturbed on this ground." *State v. Larkin*, 11 Nev. 314.

[c] **Especially Where Excuse Was Before Tender.**—Where on his examination on voir dire the court excuses a juror before he is tendered to either party, "the case would be very extraordinary that would justify a complaint." *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262.

77. *Ind.*—*Pittsburgh, etc. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 71 Am. St. Rep. 301, 69 L. R. A. 875; *Depew v. Robinson*, 95 Ind. 109. *Mich.* *Commercial Bank v. Chatfield*, 121 Mich. 641, 80 N. W. 712; *Brennan v. O'Brien*,

there is not generally sufficient ground for a reversal provided the jury finally obtained was unimpeachable,⁷⁸ nor can there be a reversal for the mere technical omission to require a challenge when the party was not prejudiced thereby,⁷⁹ nor for insisting that the party challenge the juror for cause.⁸⁰ Where, under the circumstances, the court

121 Mich. 491, 80 N. W. 249. *Miss. Jefferson v. State*, 52 Miss. 767; *Marsh v. State*, 30 Miss. 627. *Nev.*—*State v. Kelly*, 1 Nev. 224. *N. J.*—*State v. Lang*, 75 N. J. L. 1, 66 Atl. 942, *affirmed* in 75 N. J. L. 502, 68 Atl. 210.

[a] **At most, it was harmless error** to excuse jurors who had publicly declared their belief that defendant was guilty. *Watson v. State*, 63 Ind. 548.

[b] **Where Parties Entitled to Full Competent Panel Before Peremptory Challenge.**—No possible prejudice could result where the practice requires a full panel of competent jurors to be presented before defendant must challenge peremptorily, and the juror was excused before the panel was complete. *State v. Baber*, 74 Mo. 292.

[c] **Bill of Exceptions Must Show.** One cannot complain of the court's action in excusing a juror on its own motion unless he excepts to the action, and shows by his bill of exceptions there was no proper reason for the court's action. *State v. Williams*, 49 W. Va. 220, 38 S. E. 495.

78. *Kan.*—*State v. McKinney*, 31 Kan. 570, 3 Pac. 356; *Atchison, etc. R. Co. v. Franklin*, 23 Kan. 74; *Stout v. Hyatt*, 13 Kan. 232; *State v. Dickson*, 6 Kan. 209. *Mich.*—*Atlas Min. Co. v. Johnston*, 23 Mich. 36. *Minn.*—*Morrison v. Lovejoy*, 6 Minn. 319. *Miss.*—*McGuire v. State*, 37 Miss. 369. *S. C.*—*State v. Gill*, 14 S. C. 410.

[a] **"The court always has power to impanel an impartial jury, and when it is clearly seen that such only was the effect of the ruling it will be sustained."** *Smith v. State*, 61 Miss. 754.

[b] **That the court exceeded its discretion** in excusing jurors is no ground for complaint by the defendant so long as he is tried by twelve competent jurors. *People v. Searcy*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157. See also *People v. Hickman*, 113 Cal. 80, 45 Pac. 175.

[c] **Cannot Amount to Legal Injury.** The judge may excuse a juror when there is no real and substantial cause for that cannot legally injure the objecting party so long as an unobjec-

tionable jury is finally obtained. *Snow v. Weeks*, 75 Me. 105.

[d] **Qualified and Disqualified Jurors Distinguished.**—If the court rejects a person qualified to sit as a juror, how is the prisoner prejudiced? If disqualified juror sits the case is different. But if he is tried by an impartial jury he has sustained no injury. *State v. Marshall*, 8 Ala. 302.

[e] **Unimpeachable Juror Chosen as Substitute.**—Where it is not claimed that the juror selected in the place of one excused on the court's motion was not qualified, was not selected as provided by law, or was biased or prejudiced, the defendant cannot complain. *Cochran v. United States*, 14 Okla. 108, 76 Pac. 672.

[f] **Juror Set Aside on Counsel's Misrepresentation.**—In *Walker v. Kenison*, 34 N. H. 257, reversal was sought because the opposing counsel had induced the judge to set aside a juror drawn on the regular panel, and to substitute a talesman, on the false assertion that such juror was an important witness in the case. The supreme court held that the formation of the jury is under the direction of, and within the discretion of, the trial judge; and no change he may think proper to make in such formation is ground for reversal so long as the jury appears to have been fair and impartial.

79. *Keady v. People*, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353; *People v. Spiegel*, 75 Hun 161, 26 N. Y. Supp. 1041, *affirmed* in 143 N. Y. 107, 38 N. E. 284.

[a] **Is a Mere Technical Error.**—To reverse under such circumstances would contravene Code Crim. Proc., §542, forbidding reversals for mere technical errors or defects. *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018.

80. *State v. Coleman*, 8 S. C. 237.

[a] **Juror Excluded on Challenge.** A juror properly subject to challenge for cause having been excluded on defendant's challenge, defendant cannot complain of the court's refusal to exclude him unless he was challenged.

has no power to excuse a juror reversal will follow.⁸¹

b. *Exhaustion of Panel.*—Where the regular panel was exhausted and the juror excused was a member of that panel it has been held that prejudicial error appears,⁸² but other courts say the matter is one within the court's discretion and the exhaustion of the regular panel does not affect the rule.⁸³

c. *Waiver of Error.*—There is clearly no error where the parties consented to the court's action,⁸⁴ even in criminal cases.⁸⁵ One who

Jackson v. State, 94 Ala. 85, 10 So. 509.

81. Van Blaricum v. People, 16 Ill. 364, 63 Am. Dec. 316; Thomas v. Leonard, 5 Ill. 556; State v. Willie, 130 La. 454, 58 So. 147.

[a] *Error Is Presumed.*—Where juror was not subject to challenge nor any good ground existed for his discharge, it was held that error would be presumed. Montague v. Com., 10 Gratt. (51 Va.) 767.

82. Welsh v. Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

As to effect of erroneous exclusion where panel becomes exhausted, see *infra*, VII, E, 2, c.

83. Mooney v. People, 7 Colo. 218, 3 Pac. 235; Stratton v. People, 5 Colo. 276. Compare Keady v. People, 32 Colo. 57, 74 Pac. 892, 66 L. R. A. 353, where it was held not prejudicial error for the court to excuse a juror, where the district attorney had not exhausted his peremptories, and the panel was not depleted.

84. Atlas Min. Co. v. Johnston, 23 Mich. 36; State v. Baber, 74 Mo. 292.

[a] *Where defendant's counsel consented to the excusing of a juror* "it would be trifling with the administration of the law to undo the work of the court and jury, on the bare supposition that" the substituted juror was less favorable to defendant than the one excused. State v. Thornton, 108 Mo. 640, 18 S. W. 841.

[b] *Consent to Excuse After Jury Sworn.*—Where counsel consented to the excusing of a juror, because of sickness in his family, after the jury had been sworn but before evidence taken, and another juror served in his place without objection, the court said it could conjecture no prejudicial error. Catron v. State, 52 Neb. 389, 72 N. W. 354.

[c] *Sick Juror Excused by Consent of Both Parties.*—There was no error in excusing a juror who had been accepted by both parties, but who asked to be excused because he was suffering from a headache and was physically unable to sit on the jury, where he had not been sworn and both parties consented. Collins v. State, 47 Tex. Crim. 303, 83 S. W. 806.

[d] *Objection waived (1) where none made on court's question if there was any objection to excusing a sick juror, after the jury was partially completed. State v. Johnson, 48 La. Ann. 437, 19 So. 476. (2) Even where the cause for which the court discharged the juror was not sufficient, prisoner cannot complain, the court having asked counsel "what step they proposed to take," and they replying that they "had nothing to say." This amounted to leaving the matter to the court's discretion, and it would be trifling with the court to permit defendant to subsequently question the discharge. Norfleet v. State, 4 Sneed (Tenn.) 340. See also Pierson v. State, 21 Tex. App. 14, 17 S. W. 468.*

[e] *Where counsel previously had agreed that jurors should not be summoned from the immediate vicinity of the crime, one such juror was inadvertently summoned and the court excused him. No objection can be made after verdict. State v. McKinney, 31 Kan. 570, 3 Pac. 356.*

[f] *Right to demand challenge is waived where one does not object to the court's excusing a juror without challenge. It is obvious that on such objection the other party would challenge for cause. People v. Decker, 157 N. Y. 186, 51 N. E. 1018.*

85. Kan.—State v. McKinney, 31 Kan. 570, 3 Pac. 356. N. C.—State v. Craton, 28 N. C. 164. Tenn.—Norfleet v. State, 4 Sneed 340. Tex.—Code Crim. Proc., art. 658, person summoned

has objected to the discharge of a juror does not lose his exception by going on after his objection is overruled,⁸⁶ unless, under the circumstances, proceeding with the trial indicates a waiver of the objection;⁸⁷ and it has been held that one waives the unwarranted withdrawal of a juror by not objecting to the substituted juror.⁸⁸

d. *Curing Error by Recall of Juror.*—Error in excusing may be cured by the recall of the juror,⁸⁹ especially if thereafter the restored juror is peremptorily challenged.⁹⁰ The proper practice on so recalling the juror is to retain on the panel those who were called before the juror was excused.⁹¹

E. CHALLENGES. — 1. Nature, Definitions and Classification.

a. *In General.*—The right to challenge has always been considered essential to the fairness of trial by jury.⁹²

b. *Is a Right To Reject, Not Select.*—The fundamental principle is that the right to challenge is a right to reject and not a right to select.⁹³ The rule applies to all challenges whether to the array or

on special venire in capital case may be excused by consent.

[a] **Before Jury Complete.**—Court properly excused, both sides consenting, where one juror was intoxicated and another's wife was taken seriously ill. *Nolen v. State*, 2 Head (Tenn.) 520.

86. *Mahoney v. San Francisco*, etc. R. Co., 110 Cal. 471, 42 Pac. 968, 43 Pac. 518.

87. *Corbett v. Troy*, 53 Hun 228, 6 N. Y. Supp. 381, 25 N. Y. St. 520.

[a] **Must Ask for Continuance, or Right To Rechallenge.**—Accused cannot complain of a juror's having been excused where he consented to go on with the trial without asking either for a continuance or that he be given the privilege of rechallenging the other jurors or for any other benefit. *Jefferson v. State*, 52 Miss. 767.

88. *Cook v. Ritter*, 4 E. D. Smith (N. Y.) 253.

89. *Coleman v. State*, 59 Miss. 484.

[a] **Cured by Recall, Reexamination and Restoration of Peremptories.**—The court having inadvertently excused jurors, cured the error by recalling them, examining as to whether, meanwhile, they had talked with anyone about the case; and restoring the parties' peremptories. *State v. Linebarger*, 12 Mont. 292, 30 Pac. 140.

[b] **Over Objection.**—But a discharged juror becomes in effect a mere bystander and cannot be replaced on the jury over objection. *Isaac v. State*, 2 Head (Tenn.) 458.

90. *Coleman v. State*, 59 Miss. 484.

91. *Coleman v. State*, 59 Miss. 484.

[a] **Harmless error to fail to do so**, where the same jurors are retendered to defendant. *Coleman v. State*, 59 Miss. 484.

92. *Lamb v. State*, 36 Wis. 424.

93. **U. S.**—*Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. ed. 578; *United States v. Marchant*, 12 Wheat. 480, 6 L. ed. 700; *Pearce v. United States*, 192 Fed. 561, 113 C. C. A. 33. **Ala.**—*Hawkins v. State*, 9 Ala. 137, 44 Am. Dec. 431; *State v. Marshall*, 8 Ala. 302. **Ark.**—*Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Wright v. State*, 35 Ark. 639. **Colo.**—*Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. **Fla.**—*Ammons v. State*, 65 Fla. 166, 61 So. 496; *Colson v. State*, 51 Fla. 19, 40 So. 183. **Idaho.**—*United States v. Alexander*, 2 Idaho 386, 17 Pac. 746. **Ill.**—*Fitzpatrick v. Joliet*, 87 Ill. 58; *Maton v. People*, 15 Ill. 536. **Ky.**—*Walston v. Com.*, 16 B. Mon. 15. **La.**—*State v. Kennedy*, 133 La. 945, 63 So. 476, following *State v. Thompson*, 116 La. 829, 41 So. 107. See also *State v. Kellogg*, 104 La. 580, 29 So. 285; *State v. Aarons*, 43 La. Ann. 406, 9 So. 114; *State v. Thomas*, 41 La. Ann. 1088, 6 So. 803; *State v. Carries*, 39 La. Ann. 931, 3 So. 56; *State v. Durr*, 39 La. Ann. 751, 2 So. 546; *State v. Creech*, 38 La. Ann. 480; *State v. Cazeau*, 8 La. Ann. 109. **Me.**—*State v. Cady*, 80 Me. 413, 14 Atl. 940. **Md.**—*Rogers v. State*, 89 Md. 424, 43 Atl. 922; *Biddle v. State*, 67 Md. 304, 10 Atl. 794; *Turpin v. State*, 55 Md. 462. **Mich.**—*O'Neil*

to individual jurors,⁹⁴ and the right to a particular number of peremptory challenges is not a right to select that or any other number of jurors.⁹⁵ The right to have a cause tried by an impartial jury does not give the right to select any particular jurymen.⁹⁶ So neither

v. Lake Superior Iron Co., 67 Mich. 560, 35 N. W. 162. **Minn.**—*State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741. **Miss.**—*Cook v. State*, 90 Miss. 137, 43 So. 618; *Posey v. State*, 86 Miss. 141, 38 So. 324; *Lewis v. State*, 85 Miss. 35, 37 So. 497; *State ex rel. Barnett v. Dalton*, 69 Miss. 611, 10 So. 578. **Mo.**—*State v. Hays*, 23 Mo. 287; *Rees v. Chicago, B. & Q. Ry. Co.*, 156 Mo. App. 52, 135 S. W. 981; *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257. **Mont.**—*State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132. **N. H.**—*State v. Doolittle*, 58 N. H. 92. **N. J.**—*State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218; *Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527. **N. Y.**—*People v. Ransom*, 7 Wend. 417. **N. C.**—*State v. Vann*, 162 N. C. 534, 77 S. E. 295; *Blevins v. Erwin Cotton Mills*, 150 N. C. 493, 64 S. E. 428; *State v. Banner*, 149 N. C. 519, 63 S. E. 84; *Ives v. Atlantic, etc. R. Co.*, 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732; *State v. Jacobs*, 106 N. C. 695, 10 S. E. 1031; *Capehart v. Stewart*, 80 N. C. 101. **Okla.** *Boucher v. State*, 4 Okla. Crim. 576, 111 Pac. 1006. **S. C.**—*State v. Pendarvis*, 88 S. C. 548, 71 S. E. 45; *State v. Weaver*, 58 S. C. 106, 36 S. E. 499; *State v. Campbell*, 35 S. C. 28, 14 S. E. 292; *State v. Jacob*, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897; *State v. Prater*, 26 S. C. 198, 2 S. E. 108; *State v. Wise*, 7 Rich. 412. **Tenn.** *Mahan v. State*, 127 Tenn. 535, 156 S. W. 458. **Tex.**—*Heskey v. State*, 17 Tex. App. 161; *Loggins v. State*, 12 Tex. App. 65. **Vt.**—*State v. Fournier*, 68 Vt. 262, 35 Atl. 178; *State v. Meaker*, 54 Vt. 112.

[a] "The thing which the law especially seeks to guard is the right to reject, not to select." *Com. v. Henderson*, 242 Pa. 372, 89 Atl. 567.

[b] "It is no part of this or any other system of trial known to our law (unless it be that of arbitration) that a person shall say by what particular jurors, he, or his cause shall be tried." *State v. Deliso*, 75 N. J. L. 808, 69 Atl.

218. See also *Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527.

94. *State v. Sloan*, 97 N. C. 499, 2 S. E. 666.

95. *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

96. **Minn.**—*State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741. **Miss.** *Posey v. State*, 86 Miss. 141, 38 So. 324. **Mo.**—*O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257. **Nev.**—*Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287; *State v. Buralli*, 27 Nev. 41, 71 Pac. 532; *State v. Vaughan*, 22 Nev. 285, 39 Pac. 733. **N. C.**—*State v. Smith*, 24 N. C. 402. **S. D.**—*State v. La Croix*, 8 S. D. 369, 66 N. W. 944.

[a] "Neither party has the right to the services of any particular juror." *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824.

[b] "The law is concerned rather with the fairness of the trial and the impartiality of the jurors than with the particular jurors who compose the jury and render the verdict." *Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465.

[c] **Not Entitled to First Juror Called.**—The defendant is not entitled as a matter of absolute right, to be tried by the first juror called who is competent. *People v. Arceo*, 32 Cal. 40.

[d] **Rule Applied Where Juror Did Not Respond to Call.**—The defendant cannot complain of the action of the court in substituting other competent jurors for jurors who do not respond on the call of their names. *State ex rel. Pepple v. Banik*, 27 N. D. 417, 131 N. W. 262. See *supra*, VII, B, 4.

[e] **Cannot Object to Manner of Procuring Jurors.**—Applying this rule it was held that the prisoner could not object to the manner adopted by the court, to procure jurors, it appearing that they were impartially selected. *State v. McDowell*, 123 N. C. 764, 31 S. E. 839. See also *State v. Jones*, 97 N. C. 469, 1 S. E. 680.

party has any "vested right" in any juror,⁹⁷ at least until he is accepted and sworn,⁹⁸ nor can one object because a particular jurymen has been excused on challenge by other parties,⁹⁹ or has been excused by the court on its own motion.¹ One is not entitled to have any particular set of men from whom to select the jury.² These rules must not be so applied as to deprive a party of his right to have the names drawn from the hat, wheel, or box, in an orderly manner,³ nor do they excuse the arbitrary refusal to exhaust the regular panel before resorting to talesmen.⁴

c. *Definitions.*—A challenge is an objection made to the trial jurors.⁵

Challenge to the array is one to the whole body of jurors returned

97. **D. C.**—Horton v. United States, 15 App. Cas. 310. **Idaho.**—United States v. Alexander, 2 Idaho 386, 17 Pac. 746. **Miss.**—Cook v. State, 90 Miss. 137, 43 So. 618; Lewis v. State, 85 Miss. 35, 37 So. 497; Steele v. State, 76 Miss. 387, 24 So. 910; State to use of Barnett v. Dalton, 69 Miss. 611, 10 So. 578. **Mo.** Rees v. Chicago, B. & Q. Ry. Co., 156 Mo. App. 52, 135 S. W. 981. **N. H.** State v. Wilson, 48 N. H. 398. **Okla.** Blankenship v. State, 10 Okla. Crim. 551, 139 Pac. 840; Boutcher v. State, 4 Okla. Crim. 576, 111 Pac. 1006; Cochran v. United States, 14 Okla. 108, 76 Pac. 672; City of Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698. **Wash.**—Creech v. Aberdeen, 44 Wash. 72, 87 Pac. 44.

98. Horton v. United States, 15 App. Cas. (D. C.) 310; Blankenship v. State, 10 Okla. Crim. 551, 139 Pac. 840; Boutcher v. State, 4 Okla. Crim. 576, 111 Pac. 1006; Cochran v. United States, 14 Okla. 108, 76 Pac. 672; City of Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698.

[a] **Rule Applied Where Accepted Juror Failed To Return.**—A juror having failed to appear after an adjournment, and having been discharged and another substituted, defendant cannot claim the right to have the juror serve upon his subsequently returning to the trial. State v. La Croix, 8 S. D. 369, 66 N. W. 944.

99. Maton v. People, 15 Ill. 536; Com. v. Brown, 23 Pa. Super. 470.

[a] **Applied in a Condemnation Case.** Fitzpatrick v. Joliet, 87 Ill. 58.

1. People v. Murray, 85 Cal. 350, 24 Pac. 666. See *supra*, VII, D.

2. **Mo.**—O'Brien v. Vulcan Iron Works, 7 Mo. App. 257. **Ohio.**—Bix-

bee v. State, 6 Ohio 86. **Pa.**—Com. v. Nye, 240 Pa. 359, 87 Atl. 585, *quoting* with approval, Com. v. Payne, 205 Pa. 101, 54 Atl. 489.

[a] "A prisoner does not acquire a vested interest in any individual as one of the jury to try him, merely because that individual is returned upon the panel at that term of court." State v. Wilson, 48 N. H. 398.

[b] **No Right to Jurors From a Particular Panel.**—The presumption is that all the names selected under the law are fit generally and one cannot insist upon being tried by jurors from a particular panel. Ammons v. State, 65 Fla. 166, 61 So. 496.

[c] **Where Order of Names Was Changed on List.**—One cannot urge as ground for reversal that the opposite party, by inadvertence, changed the order of names on the jury list, thus depriving him of particular jurors. Rees v. Chicago, B. & Q. Ry. Co., 156 Mo. App. 52, 135 S. W. 981.

3. State v. Tidwell, 100 S. C. 248, 84 S. E. 778.

4. Steele v. State, 76 Miss. 387, 24 So. 910.

5. **Ariz.**—Penal Code, §1013. **Ark.** Kirby's Dig., §2354. **Cal.**—Penal Code, §1055. **Mont.**—Rev. Code, §9234. **Nev.** Rev. Laws, §7129. **N. D.**—Rev. Code, §9951. **Okla.**—Rev. Laws, §5838. **Ore.** Lord's Laws, §117. **S. D.**—Code Crim. Proc., §317. **Utah.**—Comp. Laws, §§3136, 4816.

[a] **Definition.**—"Challenges are exceptions to jurors returned, when about to be impaneled for the trial of the case." State v. Howard, 17 N. H. 171.

from the county,⁶ and raises the question of the regularity, or proper organization, of the panel.⁷

"Challenge to the panel" is the name given by many statutes to an objection to all the jurors returned,⁸ but, under such statutes, there is no distinction between a "challenge to the panel," and a "challenge to the array."⁹

An "objection to the venire" is, also, in effect the same as a challenge to the panel.¹⁰

Challenge to the poll is an objection to a particular juror,¹¹ and is called in some statutes "challenge to individual juror."¹²

A challenge for cause is one based upon some ground of objection created by statute or otherwise.¹³

6. Conn.—*State v. Hogan*, 67 Conn. 581, 35 Atl. 508. D. C.—*United States v. McBride*, 7 Mackey 371. Ga.—*Bryan v. State*, 124 Ga. 79, 52 S. E. 298; *Nixon v. State*, 121 Ga. 144, 48 S. E. 966. Me.—*State v. Knight*, 43 Me. 11. Md.—*Young v. State*, 90 Md. 579, 45 Atl. 531. Mass.—*Com. v. Walsh*, 124 Mass. 32.

[a] **Definitions of Challenge to the Array.**—"A challenge to the array is an exception to the whole body of jurors upon the panel summoned and returned for service at the term, and is grounded upon some default of the sheriff or other officer making the return, in drawing or returning the jurors, or for partiality or misconduct in performing the duties." *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30. See also *State v. Wright*, 45 Kan. 136, 25 Pac. 631; *Durrah v. State*, 44 Miss. 789.

[b] "Challenges to the array are exceptions to the whole panel." *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547. See also *State v. Howard*, 17 N. H. 171; *State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513.

7. Idaho.—*Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225. Ill.—*St. Louis, etc. R. Co. v. Union Trust, etc. Bank*, 209 Ill. 457, 70 N. E. 651; *Mueller v. Rebhan*, 94 Ill. 142; *St. Louis, etc. R. Co. v. Casner*, 72 Ill. 384; *Clears v. Stanley*, 34 Ill. App. 338. Kan.—*State v. Wright*, 45 Kan. 136, 25 Pac. 631. N. J.—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30.

[a] The statutory words "or ought not to be put upon him," do not add any new rule. The "challenge ques-

tions the legality of the panel as organized, and for some cause which extends to the illegal arrangement of the jurors put upon him." *Thompson v. State*, 109 Ga. 272, 34 S. E. 579.

8. Ariz.—Penal Code, §1016. Cal. Penal Code, §1058. Mont.—Rev. Code, §9246. Nev.—Rev. Laws, §7132. N. D. Rev. Code, §9954. Okla.—Rev. Laws, §5841. S. D.—Code Crim. Proc., §320. Utah.—Comp. Laws, §§3138, 4819.

9. *State v. Davis*, 41 Iowa 311.

[a] **Merely Another Name.**—"A 'challenge to the array' under the statute is known as a 'challenge to the panel.'" *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003.

10. *People v. Welch*, 49 Cal. 174.

11. D. C.—*United States v. McBride*, 7 Mackey 371. Ill.—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. Me.—*State v. Knight*, 43 Me. 11. Md.—*Young v. State*, 90 Md. 579, 45 Atl. 531. Ore.—*State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513. Pa. *Harrisburg Bank v. Forster*, 8 Watts 304.

[a] "Challenges to the polls are objections to individual jurors, operating, if successful, as a rejection of a particular juror against whom the objection is taken." *State v. Howard*, 17 N. H. 171.

[b] **Distinguished From Challenge to Array.**—"Challenges to the poll are such as are made to individual jurors, as distinguished from the array." *Cooley v. State*, 38 Tex. 636.

12. See the statutes.

13. *Crider v. Lifsey*, 10 Heisk. (Tenn.) 456. See also *Greer v. State*, 14 Tex. App. 179, and *infra*, VII, F.

Peremptory challenges are challenges to particular jurors for which no reason need be assigned.¹⁴

d. *Common Law Classification Generally.*—At common law challenges to jurors were of two kinds—to the array, or panel; and to the poll.¹⁵ Challenges to the poll were either for cause, or peremptory,¹⁶ or, as it is sometimes stated, they were for “principal cause,” “for favor,” and “peremptory.”¹⁷ There were also certain technical classifications which retain little more than their historical interest, but which are nevertheless not infrequently referred to by modern cases.¹⁸

e. “*Principal Challenge*” and “*Challenge to Favor.*”—(I.) In **General.**—Challenges to juries, based upon an allegation of bias, favor, or partiality, were, at common law, divided in two classes: “principal challenges,” and “challenges to the favor.”¹⁹ The distinction be-

14. **Ill.**—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964. **Me.**—*State v. Knight*, 43 Me. 11. **Md.**—*Rogers v. State*, 89 Md. 424, 43 Atl. 922. **N. J.**—*Leary v. North Jersey Street Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527. **N. Y.**—*Carnal v. People*, 1 Park. Crim. 272. **Pa.**—*Com. v. Evans*, 212 Pa. 369, 61 Atl. 989. **Tex.**—See *Cooley v. State*, 38 Tex. 636.

[a] **Definition.**—“A peremptory challenge is one which may be exercised by the accused upon his own volition, and for which he need not give any reason, and which is not subject to the control of the court.” *Thurman v. State*, 27 Neb. 628, 43 N. W. 404.

[b] **Statutory Definition.**—“It is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.” **Ariz.**—Penal Code, §1028. With slight changes in wording, the same definition is found in **Cal.**—Penal Code, §1069. **Mont.**—Rev. Code, §9256. **Nev.**—Rev. Laws, §7143. **N. D.**—Rev. Code, §9966. **Okla.**—Rev. Laws, §5853. **S. D.**—Code Crim. Proc., §332. **Utah.**—Comp. Laws, §4829. **Wash.**—Rem. & Bal. Code, §325.

15. *State v. Howard*, 17 N. H. 171; *State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513.

For definitions, see *supra*, VII, E, 1, c.

16. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

17. *Shoeffler v. State*, 3 Wis. 823.

Distinction between “principal cause” and “for favor,” see *infra*, VII, E, 1, c.

18. **Common Law Classification.**—Ac-

cording to Sir Edward Coke, 1 Inst. 156, there were four classes. 1. *Propter honoris respectum* (from regard to rank). 2. *Propter defectum* (personal objections, such as alienage, infancy, lack of statutory requirements). 3. *Propter affectum* (bias or partiality). 4. *Propter delictum* (on account of crime).

[a] These common-law distinctions are found in the cases, but the first class manifestly does not exist in the United States. For a further discussion consult the law dictionaries. And see: **Ga.**—*Lee v. State*, 69 Ga. 705; *Burroughs v. State*, 33 Ga. 403, 407; *Gormley v. Laramore*, 40 Ga. 253; *Robinson v. State*, 1 Ga. 563. **La.**—*State v. Push*, 23 La. Ann. 14. **Me.**—*State v. Knight*, 43 Me. 11. **Nev.**—*State v. McClear*, 11 Nev. 39. **N. H.**—*State v. Howard*, 17 N. H. 171. **N. J.**—*Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50; *State v. Fox*, 25 N. J. L. 566; *State v. Spencer*, 21 N. J. L. 196. **N. Y.**—*Carnal v. People*, 1 Park. Crim. 272. **Pa.**—*Harrisburg Bank v. Forster*, 8 Watts 304. **S. C.**—*State v. Baldwin*, 3 Brev. 309, 1 Tread. 289.

19. **Colo.**—*Solander v. People*, 2 Colo. 48. **Conn.**—*State v. Potter*, 18 Conn. 166. **Ga.**—*Turner v. State*, 114 Ga. 421, 40 S. E. 308. **Me.**—*State v. Knight*, 43 Me. 11. **Mich.**—*Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317; *People v. Mol*, 137 Mich. 692, 100 N. W. 913. **Nev.**—*State v. McClear*, 11 Nev. 39. **N. H.**—*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *State v. Howard*, 17 N. H. 171. **N. J.**—*State v. Spencer*, 21 N. J. L. 196. **N. Y.**—*Carnal v. People*, 1 Park. Crim. 272. **N. C.**

tween the grounds for challenge for principal cause and to the favor, as they anciently existed, is hard to mark,²⁰ and in most instances the difference is purely technical and arbitrary.²¹ A principal challenge was grounded on such manifest presumption of partiality, that if the fact alleged was proved to be true, the disqualification followed as a legal conclusion, incapable of being rebutted.²² In a challenge to the favor, the disqualification arises as a conclusion of fact to be determined, the evidence in support of the challenge leading to no presumption which may not be overcome by other evidence.²³

State v. Benton, 19 N. C. 196. *W. Va.* *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

20. *East St. Louis Electric R. Co. v. Snow*, 88 Ill. App. 660.

[a] **Sometimes Hardly Distinguishable.**—"Many cases of the one class approach those of the other so nearly, as to be hardly distinguishable." *Baker v. Harris*, 60 N. C. 271.

[b] **But There Is a Line of Discrimination.**—"These two sorts sometimes approach each other so closely, that it is difficult to draw the line between them; but in contemplation of law, a distinct line of discrimination does exist." *State v. Benton*, 19 N. C. 196.

21. *East St. Louis Electric R. Co. v. Snow*, 88 Ill. App. 660.

[a] **"Principal Challenge" and "Challenge to Favor Apparent."**—At common law where the challenge is based upon relationship to a person not a party to the record, but interested in the result, the challenge was not principal, but the favor being *apparent*, the matter though referred to triers, they were instructed that the juror did not stand indifferent. This is a mere technical distinction of no practical importance where triers have been abolished. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690.

22. *U. S.*—*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. *Ark.* *Milan v. State*, 24 Ark. 346. *Colo.* *Solander v. People*, 2 Colo. 48. *Conn.* *State v. Potter*, 18 Conn. 166. *Ga.* *Turner v. State*, 114 Ga. 421, 40 S. E. 308. *Ill.*—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. *La.* *State v. Porter*, 45 La. Ann. 661, 12 So. 832. *Me.*—*State v. Knight*, 43 Me. 11. *Mich.*—*Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317; *People v. Mol*, 137 Mich. 692, 100 N. W. 913. *Mo.*—*State v. Mann*, 83 Mo. 589. *Nev.*

State v. McClear, 11 Nev. 39. *N. H.* *State v. Howard*, 17 N. H. 171. *N. J.* *State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398; *State v. Spencer*, 21 N. J. L. 196. *N. Y.*—*People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1. *Pa.*—*Harrisburg Bank v. Forster*, 8 Watts 304. *Va.* *Jaques v. Com.*, 10 Gratt. (51 Va.) 690; *Hunter v. Matthews*, 12 Leigh (39 Va.) 228. *W. Va.*—*Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015. *Wis.*—*Shoeffler v. State*, 3 Wis. 823.

[a] **"A challenge is called principal"** because if it be found true it standeth sufficient of itself without leaving anything to the conscience or discretion of the triers.' *Coke Lit.* 156b." *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

[b] **"A principal challenge under the head propter affectum, is where there is express malice or express favor, and is a judgment of law, either without act on the part of the proffered juror, or a judgment of law upon his act."** *Baker v. Harris*, 60 N. C. 271.

23. *Ark.*—*Milan v. State*, 24 Ark. 346. *Colo.*—*Solander v. People*, 2 Colo. 48. *Conn.*—*State v. Potter*, 18 Conn. 166. *Ga.*—*Turner v. State*, 114 Ga. 421, 40 S. E. 308. *Ill.*—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. *La.*—*State v. Porter*, 45 La. Ann. 661, 12 So. 832. *Me.*—*State v. Knight*, 43 Me. 11. *Mich.*—*Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317; *People v. Mol*, 137 Mich. 692, 100 N. W. 913. *Mo.*—*State v. Mann*, 83 Mo. 589. *Nev.*—*State v. McClear*, 11 Nev. 29. *N. H.*—*State v. Howard*, 17 N. H. 171. *N. J.*—*State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398. *N. Y.*—*People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1. *N. C.* *State v. Benton*, 19 N. C. 196. *Va.* *Jaques v. Com.*, 10 Gratt. (51 Va.)

Applied to Challenge to Array. — Technically there may be a division of challenges to the array into principal challenges and challenges to the favor, but both challenges go to the partiality or defect of the officer summoning the jury.²⁴

(II.) How Far Abolished by Modern Legislation. — While the common-law refinements between principal challenges, and challenges to the favor, have not been kept up,²⁵ and the distinction has lost most of its importance where triers have been abolished,²⁶ the distinction is still met with.²⁷ Some courts hold that their statutes have abolished the distinction,²⁸ but generally modern legislation has not changed the real distinction between the two classes of challenges,²⁹ and changing the mode of trial is only abolishing the form and not the substance.³⁰ For the distinct and wholly different nature of the two grounds of challenge still exists, and is not only of importance in de-

690; *Hunter v. Matthews*, 12 Leigh (39 Va.) 228. **W. Va.**—*Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015. **Wis.**—*Shoeffler v. State*, 3 Wis. 823.

[a] **"A challenge to the favor"** sheweth causes of favour which must be left to the conscience and discretion of the triors upon hearing their evidence to find him favourable or not favourable.' Co. Lit. 157b." *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

[b] A challenge to the favor at common law was "where a party objected to some probable circumstances of suspicion, as acquaintance and the like, the validity of which was left to the determination of triors." *Ruff v. Rader*, 2 Mont. 211.

24. **Ga.**—*Thompson v. State*, 109 Ga. 272, 34 S. E. 579. **N. H.**—*State v. Howard*, 17 N. H. 171. **N. C.**—*State v. Benton*, 19 N. C. 196.

25. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690.

[a] **Principal Challenge Grounds Now Absolute Disqualification.**—The common-law grounds for principal challenge are for the most part those held with us to be absolute disqualifications. *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

26. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690.

[a] While different modes of trial prevailed it was important to keep the distinction but now the distinction has become unimportant. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

27. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

[a] **In New Jersey the challenge should state** whether it is for principal cause or to the favor. *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747. But see also *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

28. *Stephens v. People*, 38 Mich. 739.

[a] "In this state we have no technical challenges for favor. If one summoned as a juror does not fall within any of the classes of persons declared incompetent by the statute, the accused has no challenge but the peremptory challenges, and under this, he must make his challenge for favor." *State v. Mann*, 83 Mo. 589.

[b] **Superseded by Code.**—"The common-law niceties of challenge for principal cause and challenge to the favor have been superseded by the provisions of the code." *Healer v. Inkman*, 94 Kan. 594, 146 Pac. 1172.

[c] **Abolished by Peremptory Challenge.**—"Our statute . . . provides for peremptory challenges and it has been held that, therefore, the distinction between challenges for principal cause and to the favor is practically abolished. *Holt v. People*, 13 Mich. 224." *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317.

29. *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1; *Thomas v. People*, 67 N. Y. 218.

[a] Even where held to be abolished the court says: "The sufficiency of the cause will still be determined by common-law rules." *Holt v. People*, 13 Mich. 224.

30. *Milan v. State*, 24 Ark. 346; *Stewart v. State*, 13 Ark. 720; *State v. Howard*, 17 N. H. 171.

termining questions arising upon review,³¹ but both statutes and cases clearly keep the distinction between those causes which disqualify as a matter of law, and hence cannot be rebutted,³² and those which leave the determination to the discretion of the court.³³

f. *Statutory Classification.*—By the statutes of many states challenges are classified as being either "to the panel" or "to an individual juror."³⁴ Challenges to individual jurors are, by the statutes, again classified as being either "peremptory" or "for cause."³⁵ Challenges "for cause" are again subdivided into "general" and "particular cause," the former applying to disqualifications which preclude the juror from serving in any case, the latter to disqualifications applying to the case then on trial.³⁶ "Particular cause" is still further divided into "implied" and "actual bias."³⁷ In some

31. *Conn.*—State v. Potter, 18 Conn. 166. *Ga.*—Turner v. State, 114 Ga. 421, 40 S. E. 308. *N. Y.*—Butler v. Glen Falls, etc. R. R. Co., 121 N. Y. 112, 118, 24 N. E. 187; People v. McQuade, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 90. *Wis.*—Shoeffler v. State, 3 Wis. 823.

32. *Ill.*—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. *N. J.*—Moschell v. State, 53 N. J. L. 498, 22 Atl. 50; State v. Fox, 25 N. J. L. 566. *N. Y.*—Carnal v. People, 1 Park. Crim. 272.

[a] "In the case of a principal challenge, the court, like the courts in England, have only to inquire into the truth of the fact alleged. If the truth of the fact be shown, the challenge is well taken, without any inquiry whether the juror stands indifferent." State v. Howard, 17 N. H. 171.

33. *Ill.*—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. *N. J.*—Moschell v. State, 53 N. J. L. 498, 22 Atl. 50; State v. Fox, 25 N. J. L. 566. *N. Y.*—Carnal v. People, 1 Park. Crim. 272.

[a] "In the challenge to the favor, the court are to ascertain, not merely the truth of the fact upon which the challenge is founded, which raises no conclusive presumption of partiality, but, like the triers in England, they are to determine whether the juror stands indifferent." State v. Howard, 17 N. H. 171.

34. *Ariz.*—Penal Code, §1013. *Ark.*—Kirby's Dig., §2354. *Cal.*—Penal Code, §1055. *Idaho.*—Rev. Codes, §7815. *Ia.*—Code, §3677. *Ky.*—Code Crim. Proc., §197. *Minn.*—Rev. Laws, 1905, §5382. *Mont.*—Rev. Code, §86740, 9243. *Nev.*—Rev. Laws, §71⁹⁰. *N. Y.*—Code Crim.

Proc., §359. *N. D.*—Rev. Code, §9951. *Okla.*—Rev. Laws, §5838. *S. D.*—Code Crim. Proc., §317. *Utah.*—Comp. Laws, §§3136, 4816.

35. *Ariz.*—Civ. Code, §3557. *Ark.*—Kirby's Dig., §2356. *Cal.*—Penal Code, §1067, Code Civ. Proc., §601. *Fla.*—Gen. St., §1492. *Idaho.*—Rev. Codes, §7827; Code Civ. Proc., §4379. *Ia.*—Code, §§3683, 5359. *Ky.*—Code Crim. Proc., §201. *Minn.*—Rev. Laws, 1905, §5386. *Mont.*—Rev. Code, §86740, 9253. *Nev.*—Rev. Laws, §5205, 7141. *N. Y.*—Code Crim. Proc., §370. See People v. Thayer, 61 Misc. 573, 115 N. Y. Supp. 855, affirmed in 132 App. Div. 593, 116 N. Y. Supp. 821. *N. D.*—Rev. Code, §77016, 9964. *Okla.*—Rev. Laws, §5851. *Ore.*—Lord's Laws, §117. *S. D.*—Code Civ. Proc., §251; Code Crim. Proc., §330. *Tex.*—Vernon Sayles' Civ. St., art. 5193; Code Crim. Proc., art. 670. *Utah.*—Comp. Laws, §§3143, 4827. *Wash.*—Rem. & Bal. Code, §324. *Wyo.*—Comp. Laws, §4495.

36. *Ark.*—Kirby's Dig., §2359. *Cal.*—Penal Code, §1071. See People v. Fong Ah Sing, 70 Cal. 8, 11 Pac. 323. *Idaho.*—Penal Code, §7831. *Ky.*—Code Crim. Proc., §206. *Minn.*—Rev. Laws, 1905, §5388. *Mont.*—Rev. Code, §9259. *Nev.*—Rev. Laws, §7145. *N. Y.*—Code Crim. Proc., §374. See People v. Thayer, 61 Misc. 573, 115 N. Y. Supp. 855, affirmed in 132 App. Div. 593, 116 N. Y. Supp. 821. *N. D.*—Rev. Code, §9970. *Okla.*—Rev. Laws, §5856. *Ore.*—Lord's Laws, §119. *S. D.*—Code Crim. Proc., §336. *Tex.*—Vernon Sayles' Civ. St., arts. 5115, 5116, 5194. *Utah.*—Comp. Laws, §4831. *Wash.*—Rem. & Bal. Code, §326.

37. *Ark.*—Kirby's Dig., §2361. *Cal.*—Penal Code, §1073. *Idaho.*—Rev. Codes,

jurisdictions there is no statutory definition of either "implied" or "actual" bias.³⁸ In others "implied bias" is defined as the existence of a state of facts which, when ascertained, disqualifies the juror in judgment of law,³⁹ while "actual bias" is the existence of a state of mind which leads to an inference that the juror is not impartial.⁴⁰ In other words "implied" bias is the same as "principal cause" at common law;⁴¹ while "actual bias" is substantially what was known at common law as a cause for challenge to the polls for favor.⁴²

2. Order of Interposing.—a. *In Absence of Statute.*—The common-law rule was that all challenges of the same class must be taken at one time.⁴³ In the absence of some statutory regulation the order in which challenges shall be interposed is a matter within the discretion of the trial court,⁴⁴ but that discretion must not be exercised

§7833. **Ky.**—Code Crim. Proc., §208. **Minn.**—Rev. Laws, 1905, §5390. **Mont.**—Rev. Code, §9261. **Nev.**—Rev. Laws, §7147. **N. Y.**—Code Crim. Proc., §376. **N. D.**—Rev. Code, §9972. **Okla.**—Rev. Laws, §5858. **Ore.**—Lord's Laws, §121. **S. D.**—Code Crim. Proc., §338. **Utah.**—Comp. Laws, §4833.

38. *Dow Wire Works Co. v. Morgan*, 29 Ky. L. Rep. 854, 96 S. W. 530.

39. **Cal.**—Penal Code, §1073. **Idaho.**—Rev. Codes, §7833, subd. 1. **Minn.**—Rev. Laws, 1905, §5390, subd. 1. **Mont.**—Rev. Code, §9261, subd. 1. **Nev.**—Rev. Laws, §7147. **N. Y.**—Code Crim. Proc., §376, subd. 1. **N. D.**—Rev. Code, §9972. **Okla.**—Rev. Laws, §5858. **Ore.**—Lord's Laws, §121. **S. D.**—Code Crim. Proc., §338. **Utah.**—Comp. Laws, §4833. **Wash.**—Rem. & Bal. Code, §329.

[a] This statute does not leave the question of bias open to investigation. *State v. Jordon*, 19 Idaho 192, 112 Pac. 1049.

40. See statutes and cases following.

[a] **Actual Bias Defined.**—(1) "Existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that such juror cannot try the issue impartially, and without prejudice to the substantial rights of the party challenging." **N. Y.** Code Crim. Proc., §376, subd. 2. See *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. (2) With slight changes in the wording the same definition appears in: **Ark.**—Kirby's Dig., §2362. **Cal.**—Penal Code, §1073. **Idaho.**—Penal Code, §7833, subd. 2. **Ky.**—Code Crim. Proc., §209. **Minn.**—Rev. Laws, 1905, §5390, subd. 2. **Mont.**—Rev. Code, §9261, subd. 2. **Nev.**—Rev.

Laws, §7147. **N. D.**—Rev. Code, §9972. **Okla.**—Rev. Laws, §5858. **Ore.**—Lord's Laws, §121. **S. D.**—Code Crim. Proc., §338. **Utah.**—Comp. Laws, §4833. **Wash.**—Rem. & Bal. Code, §329.

[b] **Further Provisions Defining.** **N. Y.** Code Crim. Proc., §378, says that cause mentioned in subd. 2 of §376 is only cause for challenge for actual bias. Similar provisions are found in **Minn.** Rev. Laws, 1905, §5392 (referring to "subd. 2 of §5390"); **Rem. & Bal. Code** (Wash.), §331. "The effect of this is merely to refer to section 5390, sub. div. 2 for the definition of 'actual bias.'" *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

41. **Mont.**—*Ruff v. Rader*, 2 Mont. 211. **Nev.**—*State v. McClear*, 11 Nev. 39.

39. **S. D.**—*State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

42. *State v. McClear*, 11 Nev. 39; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

[a] "Actual bias" as defined by the code is practically what was formerly known as "a challenge to the polls for favor, the question being as to the indifference of the juror, as a matter of fact, as distinguished from challenge for principal cause." *State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

[b] The statute providing for challenges for having formed or expressed an opinion, or for having a state of mind evincing bias, are but common-law challenges to the favor enacted into the statute. *Ruff v. Rader*, 2 Mont. 211.

43. *Carnal v. People*, 1 Park. Crim. (N. Y.) 272.

44. **Ala.**—*Whitsett v. Belue*, 172 Ala. 256, 54 So. 677. **Colo.**—*Denver City*

in an arbitrary manner and so as to deprive a party of his right to challenge by compelling him to challenge at a time when he could not do so.⁴⁵ Ordinarily a challenge for favor is presented after the court has decided that there is no ground for principal challenge.⁴⁶ The peremptory challenge may be either before or after the challenge for cause has been made or overruled.⁴⁷

b. *Statutory Rules Generally.*—The statutes usually provide for alternating the challenges between the parties, prescribing which party shall challenge first.⁴⁸ The precise order in which the various challenges shall be made is regulated by statute in many states,⁴⁹ often with a provision that "each party must exhaust all his challenges before the other begins,"⁵⁰ or that each party "shall complete

Tramway Co. v. Carson, 21 Colo. App. 604, 123 Pac. 680. **Mass.**—*Com. v. Piper*, 120 Mass. 185. **Mich.**—*In re Hamper's Appeal*, 51 Mich. 71, 16 N. W. 236. **N. J.**—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449.

45. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680.

[a] **Requiring Separate Challenges.** It is proper to require a challenge for cause to be interposed to each juror separately as his examination is concluded. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680.

46. *State v. Porter*, 45 La. Ann. 661, 12 So. 832.

47. *Hunter v. Parsons*, 22 Mich. 96. As to order of peremptory challenges, see *infra*, VII, E, 5, b.

48. See the statutes following.

[a] **First by State and Then by Defendant.**—**Ariz.**—Penal Code, §1031. **Ark.**—Kirby's Dig., §2367. **Haw.**—Rev. Laws, §1792. **Ia.**—Code, §§3686, 5364, state first and alternate unless parties agree to, or court orders some other manner. **Ky.**—Code Crim. Proc., §215. **Mont.**—Rev. Code, §§6743, 9270. **N. Y.** Code Crim. Proc., §385. **Pa.**—Acts July 9, 1901, P. L. 629; March 31, 1860, §§36-38, P. L. 427.

[b] **First by Defendant Then by State.**—**Minn.** Rev. Laws, 1905, §5399; **Okla.** Rev. Laws, §5867.

[c] **First by Defendant and Then by State, Except as to Peremptories.** **Cal.**—Penal Code, §§1086, 1088. **Idaho.** Penal Code, §7846, 7848. **Mo.**—Rev. St., 1909, §5228. **Nev.**—Rev. Laws, §§7156, 7158. **N. D.**—Rev. Code, §§9981, 9983. **Okla.**—Rev. Laws, §5869. **S. D.** Code Crim. Proc., §§347, 349. **Tex.**

Code Crim. Proc., art. 669. **Utah.** Comp. Laws, §§4842, 4844.

[d] **In Civil Suits First Plaintiff Then Defendant.**—**Colo.**—*Mills' Ann. Code*, §184. **Haw.**—Rev. Laws, §1792. **Ia.**—Code, §3686 (unless parties agree to or court orders some other manner); *Davenport Gas Light & C. Co. v. Davenport*, 13 Iowa 229; *State v. Pierce*, 8 Iowa 231; *State v. Shelledy*, 8 Iowa 477. **Kan.**—Gen. St., §5877. **Mont.**—Rev. Code, §6743. **Okla.**—Rev. Laws, §4998. **Wash.**—Rem. & Bal. Code, §333.

[e] **In Civil Suits First Defendant Then Plaintiff.**—**Minn.** Rev. Laws, 1905, §4170 (unless the court shall otherwise direct); **Lord's Ore. Laws**, §126.

49. [a] **The Usual Order Is.**—(1) First, to the panel. Second, to the individual juror for general disqualification. Third, to the individual juror for implied bias. Fourth, to the individual juror for actual bias. Fifth, peremptory. See the following: **Ark.**—Kirby's Dig., §2368. **Ky.**—Code Crim. Proc., §216. **N. Y.**—Code Crim. Proc., §386. (2) Same except as to peremptories, see the following: **Cal.**—Penal Code, §1087. **Idaho.**—Penal Code, §7847. **Minn.**—Rev. Laws, 1905, §5399. **Nev.**—Rev. Laws, §7157. **N. D.**—Rev. Code, §9982. **Okla.** Rev. Laws, §5867. **S. D.**—Code Crim. Proc., §348. **Utah.**—Comp. Laws, §4843. (3) Same, omitting challenge to panel, see the following: **Lord's Ore. Laws**, §127; **Rem. & Bal. Code (Wash.)**, §334.

[b] **In three classes,**—to panel; to individual for cause; peremptory. **Ia.** Code, §5367; **Mont.** Rev. Code, §6740.

50. **Ark.**—Kirby's Dig., §2367, limiting rule to the state. **Cal.**—Penal Code, §1086. **Minn.**—Rev. Laws, 1905, §5399. **Nev.**—Rev. Laws, §7156. **N. D.**

his challenges for cause.⁵¹ The statute is mandatory as to the order of interposing so far as it can be made applicable without actually invading the substantial rights of the parties,⁵² but the provisions, read together, only prescribe that the different classes be taken up in the order specified, and each party be required to exhaust challenges as to that class.⁵³

c. *Number of Jurors Presented.*⁵⁴—(I.) **In Criminal Cases.**—At the common law each juror was presented to the prisoner for acceptance or rejection as he was called.⁵⁵ In criminal cases in some jurisdictions, as each juror is called, he is examined, passed first by one party and then by the other for cause, and then each party either exercises a peremptory or accepts him.⁵⁶ In other jurisdictions the challenges of both kinds are exhausted by one side or the other as to each juror

Rev. Code, §9981. **S. D.**—Code Crim. Proc., §347. **Utah.**—Comp. Laws, §4842.

51. **Colo.**—Mills' Ann. Code, §184. **Haw.**—Rev. Laws, §1792. **Mont.**—Rev. Code, §6743. **Okla.**—Rev. Laws, §4998.

52. *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

53. *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616.

[a] "The juror is first challenged for cause, either actual or implied bias; then peremptorily." *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093. See also *State v. Armington*, 25 Minn. 29; *State v. Smith*, 20 Minn. 376.

[b] **Proper To Permit Challenges for Cause To Be Exhausted.**—It is the proper practice to permit the district attorney to exhaust his challenges for cause to each juror before passing him to the defense. *State v. Gordon*, 5 Idaho 297, 48 Pac. 1061.

[c] **General Cause Waived.**—A disqualification not going to the juror's mental capacity is clearly waived where called to the defendant's counsel's attention, and he refuses to interpose a challenge for general cause, and subsequently challenges for actual bias. *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

54. **Necessity of full panel being present** during impaneling generally, see *supra*, VII, B, 3.

Right to quash incomplete panel, see *infra*, VII, E, 3, b, (X), (I).

55. *State v. Freeman*, 119 La. 563, 44 So. 334; *Lamb v. State*, 36 Wis. 424.

[a] The court would on request call over the panel for the accused to know and see those who were present as an

aid to him in taking his challenges. *Lamb v. State*, 36 Wis. 424.

56. *Allen v. State*, 70 Ark. 337, 68 S. W. 28; *Lackey v. State*, 67 Ark. 416, 55 S. W. 213; *Williams v. State*, 63 Ark. 527, 39 S. W. 709. See *Me. Rev. St.*, ch. 84, §88; ch. 135, §12.

[a] In the absence of a statute the supreme court refused to say that the alternating rule compelling each side to complete its challenges before another juror was called, was not reasonable. *Schufflin v. State*, 20 Ohio St. 233, *followed in Thurman v. State*, 4 Ohio Cir. Ct. 141.

[b] **Discretionary With Court To Require.**—The court might in a criminal case require all challenges to be taken by both parties as to each juror before another was drawn from the box, or he may in his discretion permit them to make peremptory challenges to particular jurors after others were examined. The statute, *Lord's Laws*, §126, applies only to civil cases. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

[c] **Further Examination.**—It is discretionary with the court whether he will compel the prosecuting officer to determine finally as to acceptance of the juror on conclusion of voir dire, or permit further examination after defendant's counsel has examined. So long as defendant was allowed a re-examination after the state's re-examination he could not have been prejudiced. *State v. Posey*, 137 La. 871, 69 So. 494.

[d] **In Capital Cases in Texas.** *Horbach v. State*, 43 Tex. 242; *Black v. State*, 46 Tex. Crim. 590, 81 S. W. 302; *Baker v. State*, 3 Tex. App. 525;

as he is called and before he is passed to the other side.⁵⁷ In some jurisdictions the peremptory challenge may be made either before or after examination of the juror, and before or after one's challenge for cause has been made or overruled.⁵⁸ Some statutes provide that a full panel of lawful men must be in the jury box before either party is called upon to exercise any challenge for cause or peremptory.⁵⁹ In other jurisdictions a full panel of twelve being drawn the parties examine all and challenge any for cause; and then, either accept those who have not been excused for cause, or exercise peremptories against any of them,⁶⁰ and the panel is then filled by substituting

Wasson v. State, 3 Tex. App. 474; *Taylor v. State*, 3 Tex. App. 169.

[e] After examination by the state and the answering of the statutory questions so as to qualify *prima facie* the court may in its discretion require the defendant to cross-examine before the state accepts or rejects. *Grissom v. State*, 4 Tex. App. 374; *Hardin v. State*, 4 Tex. App. 355.

[f] **Rule Under Minnesota Statute.** See Rev. Laws, 1905, §§5386, 5399, as construed in *State v. Armington*, 25 Minn. 29; *State v. Smith*, 20 Minn. 376.

57. See Ga. Penal Code, §1003; *Duncan v. State*, 141 Ga. 4, 80 S. E. 317.

[a] In Pennsylvania practice has been sanctioned, but is not always followed. After the first juror is examined by defendant he is turned over to the commonwealth who may accept or reject. If accepted, defendant may challenge peremptorily. As to the second juror the defendant must first challenge for cause or peremptorily after examination. If accepted the commonwealth may challenge peremptorily. As to the third juror the commonwealth again first exercises its right to accept or challenge peremptorily, and so on alternately, until the jury is made up. The word "respectively" as used in Act of July 9, 1901, P. L. 629, is synonymous with the word "alternately," as used in the Act of March 31, 1860, P. L. 427. *Com. v. Conroy*, 207 Pa. 212, 56 Atl. 427. See also *Com. v. Brown*, 23 Pa. Super. 470. But compare *Com. v. Marion*, 232 Pa. 413, 81 Atl. 423, which states the act of 1901 has not fixed any established rule as to the order of challenging.

58. U. S.—*United States v. Butler*, 1 Hughes 457, 25 Fed. Cas. No. 14,700. Fla.—*Barber v. State*, 13 Fla. 675. Pa. *Com. v. Ware*, 137 Pa. 465, 20 Atl.

806; *Zell v. Com.*, 94 Pa. 258; and compare cases in preceding note.

[a] This was the common-law rule and the statute has only changed the number allowed and not the mode of exercising. It was reversible error to compel the defendant to first exhaust his peremptories before challenging for cause. *State v. Fuller*, 39 Vt. 74.

[b] **The Right May Be Reserved Until After the Challenge for Cause Has Been Decided.**—The very overruling of the challenge for cause may be the reason for exercising the peremptory where the party fears the juror may be prejudiced because he was challenged for cause. *Hooker v. State*, 4 Ohio 348.

[c] At any time before the right to challenge ceases, that is, it may be as soon as the juror is called to the box and before examination, or the order of examination may be interrupted and the challenge interposed before the examination is completed, or for good cause the court may permit challenge afterwards, and before the number of the jury has been completed. *Hawkins v. United States*, 116 Fed. 569, construing Alaska Crim. Code, §130, prescribing the order of challenges and providing "either party may take peremptory challenges at any time before his right of challenge ceases."

59. Ariz. Penal Code, §1032.

60. *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Riley*, 65 Cal. 107, 3 Pac. 413; *People v. Iams*, 57 Cal. 115; *People v. Russell*, 46 Cal. 121.

[a] Rule arises out of statutory construction of clauses in the Practice Act now carried into the codes which in effect provide (Penal Code, §1046) that trial juries in criminal actions shall be "formed in the same manner" as in

a number equal to those excused, before any more peremptories are required,⁶¹ but upon one of the substituted jurors being excused for cause the panel may be again filled without first examining the other substituted jurors.⁶² By still another practice the peremptory challenges are not required to be made by either party until the jury box is filled with competent jurors,⁶³ the rule applying more particularly to defendants in some states.⁶⁴ As each new juror is introduced he may be challenged for cause or peremptorily under some statutes,⁶⁵ and some statutes require the panel to be kept filled on request before

civil actions (Code Civ. Proc., §600), requiring the clerk to draw names "until the jury is completed;" and (Penal Code, §1068), requiring the challenge to an individual juror to be taken before the juror is sworn, but permitting the court to allow "after the juror is sworn but before the jury is completed." See *People v. Scoggins*, 37 Cal. 676.

[b] **Similar rule in Utah** construing Comp. Laws, §§4826, 4828, and specifically following the California rule. *State v. Riley*, 41 Utah 225, 126 Pac. 294; *State v. Thorne*, 41 Utah 414, 126 Pac. 286, Ann. Cas. 1915D, 90; *People v. Callaghan*, 4 Utah 49, 6 Pac. 49.

61. *People v. Hickman*, 113 Cal. 80, 45 Pac. 175; *People v. Riley*, 65 Cal. 107, 3 Pac. 413; *People v. Iams*, 57 Cal. 115; *People v. Russell*, 46 Cal. 121; *People v. Scoggins*, 37 Cal. 676; *State v. Riley*, 41 Utah 225, 126 Pac. 294; *State v. Thorne*, 41 Utah 414, 126 Pac. 286, Ann. Cas. 1915D, 90; *People v. Callaghan*, 4 Utah 49, 6 Pac. 49.

[a] **May Be Filled by Jurors Drawn for Another Department.**—The rule that the defendant is entitled to a full jury in the box before being compelled to make his peremptory challenges justifies the court in filling the box from the panel of jurors drawn for another department. *People v. Loomer*, 13 Cal. App. 654, 110 Pac. 466.

62. *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969.

[a] Eight jurors having been accepted and sworn and four others drawn from the box, one was examined and excused on challenge for cause. It was proper practice to then fill the box by drawing another juror without first examining the remaining three. All that is required is that the panel be completed before the defendant is required to exercise his peremptories. *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969.

63. *Wiggins v. Com.*, 104 Ky. 765, 47 S. W. 1063; *Shelby v. Com.*, 91 Ky. 563, 16 S. W. 461; *Munday v. Com.*, 81 Ky. 233; *Lamb v. State*, 36 Wis. 424.

[a] **Reason for Rule.**—There is a certain advantage to him in having all the jurors before him when he challenges. This was the common-law rule and usage and statute in this state have continued it in force. *Lamb v. State*, 36 Wis. 424.

[b] **Specifically Required by Some Statutes.**—*Idaho.*—Penal Code, §7848. *Ia.*—Code, §5363. *Mont.*—Rev. Code, §§6743, 9270. *Tex.*—Code Crim. Proc., arts. 686, 688, 692, as to criminal cases, not capital.

64. *Gammons v. State*, 85 Miss. 103, 37 So. 609; *Territory v. Barrett*, 8 N. M. 70, 42 Pac. 66; *Territory v. Lermo*, 8 N. M. 566, 46 Pac. 16.

[a] The defendant is not only entitled to have a full panel tendered him in the first instance before being required to exercise any of his peremptories but after he has challenged all that he may desire he is entitled to have a full panel tendered, and this course repeated until the jury is finally secured. *Gammons v. State*, 85 Miss. 103, 37 So. 609; *Tunderburk v. State*, 75 Miss. 20, 21 So. 658; *Gibson v. State*, 70 Miss. 554, 12 So. 582; *State v. Mitchel* (Miss.), 12 So. 710.

[b] **This has been the custom** "from the earliest history of this state," and the practice promotes the constitutional guaranty of a fair trial before an impartial jury, since the mere searching questions of counsel on the voir dire examination may have the effect of arousing a feeling of resentment on the part of a juror which can only be relieved against by the use of peremptories." *Rutherford v. State*, 32 Neb. 714, 49 N. W. 701.

65. *Ia.* Code, §5366; *Mont.* Rev. Code, §§6744, 9270.

any further challenge is made,⁶⁶ but others have been construed not to contemplate that the panel must be filled as each substituted juror is excused for cause.⁶⁷

In some states the "full panel" rule is further extended and neither party is required to challenge peremptorily until there shall be in the jury box qualified men to the number of twelve plus the number of peremptory challenges allowed to both sides.⁶⁸ Under this statute the right to the complete panel usually applies to both defendant⁶⁹ and the prosecution.⁷⁰ Generally reversal will follow the failure to present defendant with a full panel in the statutory manner, the defendant having made timely objection.⁷¹ Compelling the defendant to exercise his peremptories before the panel was filled, he having exhausted his peremptories, is reversible error,⁷² but if it appears that defendant was in no manner prejudiced, reversal will not follow,⁷³ nor can there be any reversal where he has voluntarily challenged without a full panel being present.⁷⁴

66. Ia. Code, §5366.

67. *Gammons v. State*, 85 Miss. 103, 37 So. 609; *Funderburk v. State*, 75 Miss. 20, 21 So. 658.

[a] The court commends the practice in capital and other cases exciting great public interest, of the trial judge after having conducted a searching inquiry with questions suggested by counsel, to pass on all challenges for cause before the juror takes his seat. When a full panel of qualified jurors is thus found, present to the state for peremptory challenge. When full panel has been accepted by the state, present to defendant for peremptory challenge. So repeat until the challenges are exhausted or both sides announce themselves content. *Gammons v. State*, 85 Miss. 103, 37 So. 609. Compare *Story v. State*, 68 Miss. 609, 16 So. 47.

68. *Ariz.*—Penal Code, §1032. *Mo.* Rev. Stats., 1909, §5226. *Va.*—Code, 1904, §4023. *W. Va.*—Code, §§5579, 5580.

[a] All Must Be Competent and Impartial.—"Under the law the defendants are entitled to a panel of twenty jurors wholly free from bias or prejudice, whose minds are in condition to hear, consider and properly weigh the evidence as it is presented to them at the trial uninfluenced by what they have heard or read of the case before the trial." *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665.

[b] Where the practice is to have sixteen competent jurors from which

the defendant strikes four, it is not proper practice to examine the whole venire but as soon as sixteen are obtained the court must stop and permit the prisoner to exercise his peremptory rights. *Honesty v. Com.*, 81 Va. 283; *Richards v. Com.*, 81 Va. 110.

69. *State v. May*, 168 Mo. 122, 67 S. W. 566; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Waters*, 62 Mo. 196; *State v. McCarron*, 51 Mo. 27.

70. *State v. McCarron*, 51 Mo. 27.

[a] In Virginia, however, the prosecution is not entitled to any peremptories. See Code, 1909, §4023.

71. *Gibson v. State*, 70 Miss. 554, 12 So. 582; *State v. Waters*, 62 Mo. 196.

72. *Rutherford v. State*, 32 Neb. 714, 49 N. W. 701.

73. *Emanuel v. United States*, 196 Fed. 317, 116 C. C. A. 137; *Hughes v. State*, 109 Wis. 397, 85 N. W. 333.

[a] No prejudicial error occurs where but seven of the regular panel appeared and the court having over defendant's objection, compelled him to examine before the full number of twelve had been drawn, four of the seven were excused on defendant's challenge for cause and three on the state's peremptories. The defendant lost no challenges and so was not harmed. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

74. *Radford v. United States*, 129 Fed. 49, 63 C. C. A. 491; *Gammons v. State*, 85 Miss. 103, 37 So. 609.

(II.) In Civil Cases.—The same rules are prescribed in civil, as in criminal, cases in some states,⁷⁵ but in others a distinct procedure is provided,⁷⁶ and that a rule is provided less liberal in criminal than in civil suits is no reason for construing the statutes to mean the same thing.⁷⁷

The practice in some states requires that a full jury be present before the parties are required to exercise their peremptories,⁷⁸ and the proper practice is to fill the panel each time a juror is excused.⁷⁹ In other states there must be a full panel of competent jurors before either party need exercise a peremptory,⁸⁰ and as jurors are called to fill the panel they are subject to challenge either peremptorily or for cause.⁸¹ In still others the panel must consist of twelve plus the total number of peremptories.⁸² In some states the party is not entitled to a full jury when exercising his peremptories.⁸³

In close cases it has been held reversible error to compel a party to challenge when the box was not filled in the statutory manner.⁸⁴

3. Challenge to the Array. — a. *Right to and Nature of Challenge.*

(I.) In General.—Challenge to the array is a common-law right⁸⁵ which the court may entertain though there be no express statutory provisions giving it the power,⁸⁶ even in a civil case.⁸⁷ The statutes some-

75. Haw.—Rev. Laws, §1792. Ia. Code, §§3686, 3687, 5363, 5364. Me. Rev. St., ch. 84, §88; ch. 135, §12. Mont.—Rev. Code, §9270.

76. Cal.—Vance v. Richardson, 110 Cal. 414, 42 Pac. 909; People v. Scoggins, 37 Cal. 676. Kan.—State v. McCorkle, 74 Kan. 280, 86 Pac. 134. Ore. State v. Caseday, 58 Ore. 429, 115 Pac. 287.

77. Hawkins v. United States, 116 Fed. 569, 53 C. C. A. 663; People v. Scoggins, 37 Cal. 676.

78. Vance v. Richardson, 110 Cal. 414, 42 Pac. 909; Silcox v. Lang, 78 Cal. 118, 20 Pac. 297; Taylor v. Western Pacific R. Co., 45 Cal. 323; People v. Scoggins, 37 Cal. 676.

79. Vance v. Richardson, 110 Cal. 414, 42 Pac. 909; Silcox v. Lang, 78 Cal. 118, 20 Pac. 297; Taylor v. Western Pacific R. Co., 45 Cal. 323; People v. Scoggins, 37 Cal. 676.

80. Haw.—Rev. Laws, §1792. Kan. Gen. St., §5877. Okla.—Rev. Laws, §4998. Ore.—Lord's Laws, §126. Tex. Vernon Sayles' Civ. St., arts. 5207-5209.

81. Kan. Gen. St., §5877; Okla. Rev. Laws, §4999.

82. S. C. Civ. Code, §2940; Wis. St., 1915, §2851.

83. Schieffelin v. Schieffelin, 127 Ala. 14, 28 So. 687.

84. Sterling Bridge Co. v. Pearl, 80 Ill. 251; Chicago City Ry. Co. v. Fetzner, 113 Ill. App. 280; Strehmann v. City of Chicago, 93 Ill. App. 206, under a former statute.

85. Jones v. Woodworth, 24 S. D. 583, 124 N. W. 844; Ullman v. State, 124 Wis. 602, 103 N. W. 6; Lamb v. State, 36 Wis. 424.

86. Ullman v. State, 124 Wis. 602, 103 N. W. 6.

[a] Though the statutes do not specifically provide for a challenge to the array in the common law sense, trial courts have inherent authority, and it is their duty, to consider objections seasonably and properly made to the entire panel of jurors for departure from the statutory method of selecting the jurors. This objection has commonly been denominated in this state a "challenge to the array," but it may be made not only in the form of that set phrase, but in the form of an objection to the entire panel, or a motion to quash the return thereof. Ullman v. State, 124 Wis. 602, 103 N. W. 6.

87. Jones v. Woodworth, 24 S. D. 583, 124 N. W. 844, construing Civ. Code, §6, providing that the common law is in force "except where it conflicts with the Codes or the Constitution."

times provide that the challenge may be taken by either party,⁸⁸ but the further provision is also sometimes added, that there can be but one such challenge on a side.⁸⁹ Where the objection is to the regularity of the petit jury, the statutory challenge to the panel is the proper method, and not plea in abatement, or motion to quash the indictment.⁹⁰

Failure to properly draw the jurors can only be raised by challenge to the array,⁹¹ or a motion to quash or set aside the whole panel or venire.⁹² Even where the validity of the statute under which the drawing is made is in issue, the question cannot be raised by habeas corpus to determine the legality of the imprisonment.⁹³ Irregularity in mode of summoning jurors can only be questioned by a challenge to the array,⁹⁴ and where the defect appears on the face of the writ

[a] **Right Questioned in Absence of Statute.**—In the absence of a statute expressly giving the right to challenge the array in a civil case the right has been questioned, on the theory that the statutes were merely directory to the officers charged with the duty of selecting and returning jurors, and the right to challenge individual jurors for cause, is unlimited. *Settle v. Batie*, 1 Iowa 141.

88. *Ariz.*—Pen. Code, §1016. *Cal.* Pen. Code, §1058. *Mont.*—Rev. Code, §9246. *Nev.*—Rev. Laws, §7132. *N. D.* Rev. Code, §9954. *Okla.*—Rev. Laws, §5841. *S. D.*—Code Crim. Proc., §320. *Utah.*—Comp. Laws, §4819.

89. *Mont.* Rev. Code, §6740.

90. *Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225; *State v. Thomas*, 19 Minn. 484.

[a] **Raises Question That Jurors Were Called for Another Department.** Challenge to the panel, if conceded not to be the technically proper method, sufficiently raises the question that the jurors were drawn from a panel called to attend another department. There is a substantial departure from the statute, and the verdict must be set aside although the jurors were individually qualified. *People v. Wong Bin*, 139 Cal. 60, 72 Pac. 505. See also *People v. Compton*, 132 Cal. 484, 64 Pac. 849.

91. *People v. Duncan*, 261 Ill. 339, 103 N. E. 1043; *People v. Connors*, 246 Ill. 9, 92 N. E. 567; *State v. Moore*, 120 N. C. 570, 26 S. E. 697.

[a] **A mere objection to the jury not being sufficient.** *Borrelli v. People*, 164 Ill. 549, 45 N. E. 1024.

[b] **Objection to manner of select-**

ing struck jury may be made by formal challenge to the array. *Gallagher v. State*, 26 Wis. 423.

92. *State v. Moore*, 120 N. C. 570, 26 S. E. 697.

[a] **Qualifications Determined as Names Drawn.**—Assuming that it was an error for the trial court to determine the qualifications of persons drawn on special venire, at the time they were drawn, and to reject from the venire facias such as he then found disqualified, the only way to raise the question is "by a challenge to the array or motion to quash and set aside the entire panel." *State v. Moore*, 120 N. C. 570, 26 S. E. 697.

[b] **By Motion To Quash Venire.** The proper way to reach a venire not drawn in accordance with law, is by a motion to quash the venire. *Hornsby v. State*, 94 Ala. 55, 10 So. 522.

[c] **But a mere ex parte motion to quash may not be made.** *Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225, no case was on trial, or called, or set for trial but the prosecuting attorney moved to quash the panel. The court had no jurisdiction.

93. *Younger v. Hehn*, 12 Wyo. 289, 75 Pac. 443, 109 Am. St. Rep. 986, question should be properly raised in lower court and if there be any error in the court's ruling it can be reviewed as in other cases. See 10 STANDARD PROC. 943.

94. *Bruen v. People*, 206 Ill. 417, 69 N. E. 24; *Mueller v. Rebhan*, 94 Ill. 142 (following *Gropp v. People*, 67 Ill. 154, 160 and *Stone v. People*, 3 Ill. 326, and *distinguishing Bissell v. Ryan*, 23 Ill. 566, and *Brooks v. Bruyn*, 35 Ill. 392); *McDermott v. Hoffman*, 70 Pa. 31.

of venire facias the proper mode of taking advantage thereof is by motion to quash the writ.⁹⁵

Where the practice requires the service of a list of the jurors, or a copy of the venire, upon the defendant before trial,⁹⁶ the proper practice on service of an incorrect list is to move to quash the venire.⁹⁷ Objections to a special venire are properly raised by challenge to the array.⁹⁸

(II.) **Abolished by Statute.**—The right to challenge the array has been specifically abolished, in whole or in part, in some jurisdictions.⁹⁹ The right to challenge is abrogated, though the ground alleged be clearly one for which the challenge would lie at common law,¹ nor can a challenge be made to the individual jurors on a ground which amounts to a challenge to the array.² The party's right to a fair and impartial jury is preserved by examination and challenge of individual jurors for cause.³ But a statute providing that challenges are to

95. *Wash v. Com.*, 16 Gratt. (57 Va.) 530.

96. See *supra*, V.

97. *State v. Campbell*, 134 La. 828, 64 So. 765, it is not ground for continuance.

98. *Tarrance v. State*, 43 Fla. 446, 30 So. 685; *State v. Owen*, 61 N. C. 425.

[a] **Statutory Rule in New York.** Code Civ. Proc., §1174, talesmen notified to appear forthwith are "subject to the same exceptions and challenges as any other trial juror." See *People v. Damron*, 212 N. Y. 256, 106 N. E. 67, *affirming* 160 App. Div. 424, 145 N. Y. Supp. 239, *citing* *People v. Hall*, 169 N. Y. 184, 62 N. E. 170, and *People v. Ebelt*, 180 N. Y. 470, 73 N. E. 235, as instances where such challenge was considered.

99. Lord's Ore. Laws, §116.

[a] **In Texas** has been abolished where jurors have been selected by jury commissioners. *Forrester v. State*, 73 Tex. Crim. 61, 163 S. W. 87; *Columbo v. State*, 65 Tex. Crim. 608, 145 S. W. 910; *Williams v. State*, 24 Tex. App. 32, 5 S. W. 658; *O'Bryan v. State*, 12 Tex. App. 118; *Woodard v. State*, 9 Tex. App. 412.

[b] **Statute Is Constitutional.**—The provision is not contrary to the 14th Amendment to the federal constitution. The rule is only one of procedure. *Cavitt v. State*, 15 Tex. App. 190.

1. *State v. Savage*, 36 Ore. 199, 60 Pac. 610; *Columbo v. State*, 65 Tex. Crim. 608, 145 S. W. 910; *Woodard v. State*, 9 Tex. App. 412.

2. *State v. Caseday*, 58 Ore. 429, 115

Pac. 287; *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

[a] **Variance between names on list** furnished defendant and the return cannot be taken advantage of by motion to quash the venire. *Swofford v. State*, 3 Tex. App. 76.

[b] **Statute Unconstitutional Under Which Drawn.**—To object to each juror individually as his name is drawn from the box on the ground that the law under which the jury was drawn was unconstitutional, is in effect a challenge to the panel and not to the poll and such challenge has been abolished by statute. *State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513.

[c] **Irregularities in Drawing, Listing and Summoning.**—A motion to quash the panel for alleged irregularities in drawing names and in listing same and in summoning the jurors is in effect a challenge to the array. *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

[d] **Service by Person Not an Officer.**—It is not a cause for challenge that individual jurors were served by some other person than the sheriff. That amounts to a challenge to the array which is forbidden by the statute. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

3. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

[a] **Where no constitutional or substantial right of defendant was affected** by the manner in which the jurors were drawn, and the particular jurors were competent and qualified, the

individual jurors and are either peremptory or for cause, does not take away the common-law right of challenge to the array.⁴ And it seems that if a jury were selected in an unlawful manner the correct practice is to move for a proper jury when the improper one is presented, and to except to the ruling,⁵ and it has also been held that the court has inherent power to revise and control the selection of jurors where there is some fraud or corruption or some great wrong committed.⁶ In such cases a motion to quash the venire may be entertained.⁷

(III.) **Discharging Panel on Court's Own Motion.**—The court may discharge the entire panel on its own motion, where it discovers that the panel is illegal,⁸ or that irregularities have been committed which may affect the legality of the panel,⁹ or where, under the circumstances, it believes another panel would be more free from bias or prejudice.¹⁰

litigant has no cause to complain. *State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513.

4. *Jones v. Woodworth*, 24 S. D. 583, 124 N. W. 844.

[a] For similar statutory provisions, see *Ariz.*—Civ. Code, §3557. *Wash.* Rem. & Bal. Code, §324. *Wyo.*—Comp. Laws, §4495.

5. *Gay v. City of Eugene*, 53 Ore. 289, 100 Pac. 306.

[a] **Distinguishing Between "De Facto" and "De Jure" Jury.**—"It may be that, if persons were called or summoned as jurors wholly without color of law, an objection on that ground would be available to a litigant, for in such a case the persons so called or summoned would not be a jury either de facto or de jure. . . . Where however, the drawing and summoning is under color of law and semblance of legal authority, and the jurors are accepted and treated by the court as legal jurors, they are at least such de facto; and it is not open to a litigant to object to their serving in a particular case on the ground that the law under which they were drawn is unconstitutional." *State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513.

6. *Cavitt v. State*, 15 Tex. App. 190. But compare *infra*, VII, E, 3, b, (V).

7. *Cavitt v. State*, 15 Tex. App. 190.

[a] **Where Court Has Refused To Appoint Commissioners.**—Notwithstanding these provisions of the statute the panel will be quashed on motion where it appears that the court has intentionally failed to appoint jury commissioners. Technically he has not a right to challenge the array. But

this does not mean he is without remedy where he has been deprived of a right given by law. *White v. State*, 45 Tex. Crim. 597, 78 S. W. 1066.

[b] **Where Court Has Refused To Permit Commissioners To Act.**—Though the statute authorizes the selection of talesmen if the jury commissioners have through accident or inadvertence not selected jurors, a motion to quash the panel was proper where the county judge had refused to permit a jury to be selected by the jury commission. *Bickham v. State*, 51 Tex. Crim. 150, 101 S. W. 210, following *White v. State*, 45 Tex. Crim. 597, 78 S. W. 1066. See also *Hurt v. State*, 51 Tex. Crim. 338, 101 S. W. 806.

[c] **Where Commissioners Not Selected as Law Directs.**—*Ray v. State*, 46 Tex. Crim. 176, 79 S. W. 535.

[d] **Jury commissioners selected persons known not to be defendant's equals but his superiors.** *Cavitt v. State*, 15 Tex. App. 190.

8. *Perry v. State* (Ala.), 59 So. 150. Excusing juror on court's own motion, see *supra*, VII, D.

9. *State v. Kellogg*, 104 La. 580, 29 So. 285.

10. *State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377.

[a] **Policemen on Panel in Criminal Case.**—Court found that some of the panel were policemen and believed another panel would be better in the particular case. *Ammons v. State*, 65 Fla. 166, 61 So. 496.

[b] **Jurors Believed To Have Too Much Knowledge of Facts.**—Properly exercised where there were a large

The matter is one largely within the trial court's discretion.¹¹ But the court must not arbitrarily discharge the entire panel by a mere journal entry and without any investigation.¹²

(IV.) **Purging the Panel.**—Where the objection is to individual jurors who are clearly incompetent or disqualified the court may purge the panel by striking off the names on his own motion.¹³ This, in effect, cures the error and it is then proper to disallow the challenge to the array.¹⁴

(V.) **Must Be to Whole Panel.**—A challenge to the array must be based upon an objection to all the jurors composing the panel.¹⁵

number of cases involving the same subject matter about to be tried, and the jurors in attendance were thought by the judge to have too much knowledge of the facts to make them competent. *State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377.

[c] **Jurors Having Passed on Similar Case.**—Where in the opinion of the court a previously tried case was so nearly parallel to the case on trial that jurors who had passed thereon could not be free from bias, it may excuse such jurors in a body and without a separate examination. *King v. Macfarlane*, 7 Hawaii 352.

11. *Ammons v. State*, 65 Fla. 166, 61 So. 496; *State v. Kellogg*, 104 La. 580, 29 So. 285.

[a] **No express statutory authority** is necessary. *State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377.

12. *Deiter v. State*, 12 Ohio Cir. Ct. (N. S.) 97.

[a] **Reasons for Rule.**—To permit this might lead to the judge selecting a panel satisfactory to himself on account of some political reason, and in effect nullifies the law requiring jurymen to be selected by a non-partisan board. *Deiter v. State*, 12 Ohio Cir. Ct. (N. S.) 97.

13. *Ala.*—*Roberts v. State*, 68 Ala. 515; *Commander v. State*, 60 Ala. 1. *Kan.*—*State v. Whisner*, 35 Kan. 271, 10 Pac. 852; *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 199, 8 Pac. 146. *N. C.* *State v. Hensley*, 94 N. C. 1021, applied also to name of juror who had died.

Compare supra, VII, D.

[a] **Examples of Application of Rule.**—That one person named on venire was a minor, another a female, a third was dead and a fourth was a

non-resident is no ground for quashing. The proper practice in such case is for the court to strike off the names. *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

[b] **No prejudice, and Not Ground for Challenge to Array.**—That names of two persons not on the assessment roll were on the list, and were removed by the court cannot possibly prejudice the defendant and is no ground to challenge the panel. *People v. Young*, 108 Cal. 8, 41 Pac. 281.

14. *State v. Whisner*, 35 Kan. 271, 10 Pac. 852.

[a] **Jurors Subjected to Improper Influence Removed.**—Where a prejudicial statement was made in a newspaper account which appeared while the jury was being empaneled, the court on motion to quash the panel, properly re-examined all who had been accepted, and dismissed those who had read the article, and denied the motion to quash. *State v. Hottman*, 196 Mo. 110, 94 S. W. 237.

15. *Ala.*—*Burton v. State*, 194 Ala. 2, 69 So. 913; *Fields v. State*, 52 Ala. 348. *Conn.*—*State v. Hogan*, 67 Conn. 581, 35 Atl. 508. *Fla.*—*Presley v. State*, 61 Fla. 46, 54 So. 367; *Green v. State*, 40 Fla. 191, 23 So. 851. *Ga.*—*Carter v. State*, 143 Ga. 632, 85 S. E. 884. *Ill.* *Clears v. Stanley*, 34 Ill. App. 338. *Ia.* *Buford & Co. v. McGetchie*, 60 Iowa 298, 14 N. W. 790. *Kan.*—*State v. Wright*, 45 Kan. 136, 25 Pac. 631; *State v. Whisner*, 35 Kan. 271, 10 Pac. 852. *Ky.*—*Thurman v. Com.*, 154 Ky. 555, 157 S. W. 919. *La.*—*State v. Aspara*, 113 La. 940, 37 So. 883. *Minn.*—*State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377. *Mo.*—*State v. Crane*, 202 Mo. 54, 100 S. W. 422. *N. J.*—*State v. Barker*, 68 N. J. L. 19, 52 Atl. 284; *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30; *Smith v. Smith*, 52 N.

This is the rule both at common law and under the statutes providing a different method for choosing jurors.¹⁶ The mere presence on the panel of names of persons who should not be thereon is no ground for the challenge, where only accident or oversight is involved,¹⁷ and not fraud or misconduct on the part of the officials charged with selecting and summoning,¹⁸ and where the effect is not to reduce the number drawn below that required by the statute.¹⁹ That one or more of the individual jurors are disqualified in the particular case is no ground for challenge to the array,²⁰ nor can the general dis-

J. L. 207, 19 Atl. 255. **N. Y.**—*People v. Damron*, 160 App. Div. 424, 145 N. Y. S. 239, affirmed in 212 N. Y. 256, 106 N. E. 67. **N. C.**—*State v. Hensley*, 94 N. C. 1021; *State v. Murph*, 60 N. C. 129. **S. D.**—*State v. Morse*, 35 S. D. 18, 150 N. W. 293. **W. Va.**—*State v. Cartright*, 20 W. Va. 32. **Can.**—*Dow v. Dibblee*, 12 N. Bruns. 55.

See also *supra*, VII, E, 3, a, (I).

[a] Where juror's disqualifications could have been reached by challenge for cause there is no necessity for a challenge to the array. *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932.

[b] Statutes So Provide.—See *Idaho*.—Pen. Code, §7818. *La.*—Act 135, 1898, §15. *Minn.*—Rev. Laws, 1905, §5383. **N. Y.**—Code Crim. Proc., §361.

16. *Carter v. State*, 143 Ga. 632, 85 S. E. 884, list made up by jury commission.

17. *Ala.*—*Gray v. State*, 55 Ala. 86; *Fields v. State*, 52 Ala. 348; *Hall v. State*, 40 Ala. 698. *La.*—*State v. Aspara*, 113 La. 940, 37 So. 883. **N. C.** *State v. Hensley*, 94 N. C. 1021.

18. *Birdsong v. State*, 47 Ala. 68; *People v. Ah Chung*, 54 Cal. 398.

As to effect of such fraud or misconduct, see *infra*, VII, E, 3, b, (V).

19. *Hooten v. State*, 9 Ala. App. 9, 64 So. 200.

[a] Even Where Known to the Sheriff.—Mere disqualification of individual jurors even if known to the sheriff is not ground for quashing the panel, unless it appeared from the record that there was not without them a sufficient number of good and lawful men, from whom an impartial jury could be selected. *Roberts v. State*, 68 Ala. 515; *Commander v. State*, 60 Ala. 1.

Reduction below lawful number as ground for challenge to the panel, see *infra*, VII, E, 3, b, (X), (I).

20. *Burton v. State*, 194 Ala. 2, 69 So. 913.

[a] Prejudice of individual jurors

(1) cannot be inquired into on challenge to the panel. *Wadsworth v. State*, 9 Okla. Crim. 84, 130 Pac. 808; *Remer v. State*, 3 Okla. Crim. 706, 109 Pac. 247. (2) That must be reached by challenge to the individual for bias. *State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377.

[b] Prejudicial Opinions Not Ground for Challenge.—(1) An objection directed against the bias of jurors on account of their opinions must

be raised by challenge to the individual jurors and not by challenge to the panel (*State v. Raymond*, 11 Nev. 98); (2) unless it appear that the officer summoning them has acted in bad faith. *United States v. Callender*, 25 Fed. Cas. No. 14,709.

[c] Persons Who Served on Former Trial.—It is not ground for challenge to the array that the list put upon prisoner contains names of persons stricken or discharged for cause upon defendant's former trial. *Johnson v. State*, 130 Ga. 22, 60 S. E. 158; *Nixon v. State*, 121 Ga. 144, 48 S. E. 966; *Blackman v. State*, 80 Ga. 785, 7 S. E. 626.

[d] Persons Who Served on Trial of Another for Same Offense.—That certain of the jurors served on a jury which found another person guilty of playing in the same game involved in the prosecution of defendant for gaming is not ground of challenge to the array but to the polls. *Bryan v. State*, 124 Ga. 79, 52 S. E. 298.

[e] Persons Who Served on Trial of Codefendant.—*Schnell v. State*, 92 Ga. 459, 17 S. E. 966; *Paulk v. State*, 2 Ga. App. 662, 58 S. E. 1109.

[f] Juror Residing Near Locus of Crime.—*Prince v. Com.*, 89 Va. 330, 15 S. E. 863; *Lawrence v. Com.*, 81 Va.

qualification of individual jurors to serve in any case be raised except by a challenge to the poll.²¹ Objections to several of the panel at one time on the same or various grounds, is not properly raised by challenge to the panel,²² and for disqualifications personal to each juror, the challenge to the array is not proper though every juror might be subject to challenge to the poll.²³

484; *Craft v. Com.*, 24 Gratt. (65 Va.) 602.

[g] **Contra, Where Ten Out of Twelve Were so Disqualified.**—Where ten of the jurors out of twelve called had sat in two previous cases against the same defendant, in which they had heard and passed upon the greater portion of the evidence in the case at bar, it was reversible error to refuse to grant a motion for a new panel. *Apperson v. Logwood*, 12 Heisk. (Tenn.) 262.

21. **Ala.**—*Burton v. State*, 194 Ala. 2, 69 So. 913; *Birdsong v. State*, 47 Ala. 68. **Cal.**—*People v. Richards*, 1 Cal. App. 566, 82 Pac. 691. **Fla.**—*Presley v. State*, 61 Fla. 46, 54 So. 367. **Ga.**—*Taylor v. State*, 121 Ga. 348, 49 S. E. 303; *Teal v. State*, 119 Ga. 102, 45 S. E. 964; *Eberhart v. State*, 47 Ga. 598.

[a] **That juror not a freeholder is not ground for challenge to array but disqualifies particular juror in condemnation proceedings.** *Trustees of Schools v. Griffith*, 263 Ill. 550, 105 N. E. 760.

[b] **Names of deceased persons on list is not ground for the challenge.** Proper practice is to strike off the list. *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; *State v. Hensley*, 94 N. C. 1021.

[c] **Service on Juries Within the Time Prescribed by Statute.**—*Ala.*—*Jones v. State*, 104 Ala. 30, 16 So. 135; *Arp v. State*, 97 Ala. 5, 12 So. 301, 38 Am. St. Rep. 137. **Neb.**—*Kerr v. State*, 63 Neb. 115, 88 N. W. 240. **Wis.**—*Conkey v. Northern Bank*, 6 Wis. 447.

[d] **Juror Not a Citizen.**—It is no ground for quashing the venire that one of the jurors named in it was not a citizen of the United States. That would be a good cause of personal challenge—to the poll—but is not a defect in the writ. *Durrah v. State*, 44 Miss. 789.

[e] **Non-residents.**—*Ala.*—*Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96; *Gray v. State*, 55 Ala. 86; *Hall v. State*, 49 Ala. 658. **Cal.**—*People*

v. Ah Chung, 54 Cal. 398. **N. C.**—*State v. Hensley*, 94 N. C. 1021.

[f] **Juror a Female.**—*Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

[g] **Juror Over Age Limit.**—*People v. Baumann*, 52 Mich. 584, 18 N. W. 369; *State v. Clark*, 121 Mo. 500, 26 S. W. 562.

[h] **Juror a Minor.**—*Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96.

22. **Ala.**—*Jones v. State*, 104 Ala. 30, 16 So. 135 (objection to two on same ground); *Gibson v. State*, 89 Ala. 121, 8 So. 98, 18 Am. St. Rep. 96 (to four on four distinct grounds). **Ga.**—*Blackman v. State*, 80 Ga. 785, 7 S. E. 626, to four. **Mo.**—*State v. Clark*, 121 Mo. 500, 26 S. W. 562, to four on same ground. **Neb.**—*Kerr v. State*, 63 Neb. 115, 88 N. W. 240, to five on same ground.

[a] **That some of the jurors were not properly on the list is not ground to quash the array where the court offered to excuse all such.** *Eberhart v. State*, 47 Ga. 598.

[b] **Objection to Bystanders Not Applicable to Regular Jurors.**—Where bystanders were called and the party thought illegally, the objection should be to each individual juror so called and not to the whole panel, since that challenged the regularity of all the panel. *Buford & Co. v. McGetchie*, 60 Iowa 298, 14 N. W. 790.

[c] **Objection to All From One Certain Locality.**—Under a statute whereby the venires are addressed to different towns and cities in the county, it is no ground for challenge to the array that the list from which the jurors were drawn in a particular city was prepared and posted by the city clerk and aldermen. *Com. v. Walsh*, 124 Mass. 32.

23. *Baker v. Harris*, 60 N. C. 271.

[a] **Jurors All Examined on Separate Trial of Codefendant.**—That all the members of the panel have been examined touching their qualifications as

b. *Grounds.*—(I.) *In General.*—At common law any unfairness in selecting the jury panel may be met by a challenge to the array,²⁴ and by statute in some states it lies for any unfairness,²⁵ or for failure to proceed as prescribed by law.²⁶ But by other statutes the right to challenge is limited to certain specified grounds,²⁷ which are exclusive of all others.²⁸ That the regular panel has been discharged on challenge to the array is not ground for challenge to the special venire.²⁹

It is no ground for challenge to the array that the jury panels for two distinct courts are drawn at the same time,³⁰ nor that the term

jurors in the separate trial of one jointly indicted with defendant is no ground for challenge to the array on the ground that they are disqualified as a whole. The proper procedure is to determine the qualification of each individual juror upon his voir dire examination. *Whitehead v. State*, 97 Miss. 537, 52 So. 259.

[b] *Service on Another Jury That Tried Defendant.*—That jurors had all served upon another jury which found against defendant on a similar state of facts, is a challenge to the poll and not to the array. *Baker v. Harris*, 60 N. C. 271.

[c] *Mere pecuniary interest as taxpayers in the fine*, which if defendant be found guilty, might be imposed is not ground for challenge to the array, though it applies to each and every juror. *State v. Lynn*, 3 Penne. (Del.) 316, 51 Atl. 878.

[d] *That all of the jurors are disqualified to act and that hence no legal jury can be in attendance*, is no ground for challenge to the array, even under the rule that there must be at least one member of the regular panel present to enable the court to organize a jury by means of summoning bystanders. *Whitehead v. State*, 97 Miss. 537, 52 So. 259.

24. *State v. Cartright*, 20 W. Va. 32.

[a] *Even though there was no statutory method provided for drawing juries*, since the constitution guarantees the right of trial by jury, and that means a jury as it existed at common law, any unfairness in selecting the jury panel could be met by a challenge to the array. *State ex rel. Murphy v. Superior Court*, 82 Wash. 284, 144 Pac. 32.

25. Ga. Pen. Code, §998.

26. Mont. Rev. Code, §6740.

[a] *The Ohio statute*, Gen. Code,

§1436, providing for a challenge to the array when the jury "was not selected, drawn, or summoned, or when the officer who executed the venire did not proceed as prescribed by law," probably applies to criminal as well as civil suits. *McHugh v. State*, 42 Ohio St. 154.

27. Ariz.—Pen. Code, §1017. Cal. Pen. Code, §1059. Idaho.—Rev. Code, §7819. Mont.—Rev. Code, §9247. Nev. Rev. Laws §7133. N. Y.—Code Crim. Proc., §362. N. D.—Rev. Code, §9955. Okla.—Rev. Laws, §5842. S. D.—Code Crim. Proc., §321. Utah.—Comp. Laws, §§3140, 4820.

[a] *By these statutes there are only two grounds*. There must be either "a material departure from the forms prescribed in respect to the drawing and return," or "an intentional omission of the sheriff to summon one or more of the jurors drawn." Further, as to "material departure" from the statutory forms, see *infra*, VII, E, 3, b, (VIII) to (XI); and further as to "intentional omission" of sheriff to summon jurors, see *infra*, VII, E, 3, b, (XI), (D).

28. N. Y.—*People v. Jackson*, 111 N. Y. 362, 19 N. E. 54. Okla.—*Remer v. State*, 3 Okla. Crim. 706, 109 Pac. 247. Utah.—*State v. Bates*, 25 Utah 1, 69 Pac. 70.

29. *State v. Owen*, 61 N. C. 425. See also *Barnes v. State*, 60 Miss. 355.

30. *Crane v. Dygert*, 4 Wend. (N. Y.) 675.

[a] *The fact that the grand and petit jury were drawn at the same time*, the names being placed alternately on the respective lists as drawn, is not ground for challenge to the array, nor for motion to quash the petit jury. *Dotson v. State*, 62 Ala. 141, 34 Am. Rep. 2.

of service for which jurors were drawn has expired.³¹ If the jury was drawn under the law in force at that time, a change in the law subsequent to the drawing,³² or to the offense on trial,³³ does not afford ground for challenge to the array. But the drawing of the jury under a non-existing law is ground for challenge.³⁴

(II.) **Previous Knowledge of or Remarks to Jury.**—It is no ground for challenge to the panel that the jurors have heard the case discussed on preliminary motions,³⁵ or that statements have been made in their presence by persons on trial for a like offense, about matters involved in the case about to be tried.³⁶ Nor are unauthorized remarks by the judge to the jurors on their assembling at the beginning of the term,³⁷ or improper remarks made by him in open court immediately before trial,³⁸ nor are such remarks by the prosecuting attorney.³⁹ So far as such matters are believed to have influenced the jurors, the question must be raised on challenge to the poll.⁴⁰ Prejudicial newspaper articles, printed during the impaneling of the jury, are no ground for the challenge.⁴¹

31. *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691.

[a] **Reason for Rule.**—The purpose of the challenge to the panel is to protect the defendant against any improper selection of jurors and it is not to protect the jurors from too long attendance upon the court. Hence it is a mere irregularity, for which the challenge will not lie that the jurors regularly drawn, summoned and returned were from a panel which had "expired by limitation" upon the listing of a new panel. *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513.

32. *Ray v. Lake Superior, T. & T. Ry. Co.*, 99 Wis. 617, 75 N. W. 420.

33. *Hawes v. State*, 88 Ala. 37, 7 So. 302, jury summoned and drawn under statute passed after commission of offense.

34. See *State v. Shupe*, 86 N. J. L. 410, 92 Atl. 53; *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284.

35. *State v. Arnold*, 12 Iowa 479, investigation as to prisoner's sanity. *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461 (on application for continuance); *State v. Wisdom*, 84 Mo. 177, on motion for change of venue.

36. *Gordon v. State*, 7 Ga. App. 691, 67 S. E. 893, party stated he had bought liquor of defendant who was charged with selling liquor illegally.

37. *Butler v. State*, 102 Miss. 575, 59 So. 845, the court made a speech on "generalization" about the enforce-

ment of law but his remarks were not directed at the case at bar.

Invasion of the province of the jury by such remarks, see 13 STANDARD PROC. 948, et seq.

38. *Thompson v. State*, 109 Ga. 272, 34 S. E. 579.

39. *Thompson v. State*, 109 Ga. 272, 34 S. E. 579.

[a] **Prejudicial Remarks in Presence of Whole Panel Before Trial.**—The prosecuting attorney made prejudicial statements regarding the case on the day before the trial, in explaining the case upon defendant's application for a postponement. This was in open court and the general panel was present. The supreme court assuming prejudicial remarks so made would be ground for the challenge held, the particular statement was not shown to have been prejudicial. *State v. Shupe*, 86 N. J. L. 410, 92 Atl. 53.

40. *Thompson v. State*, 109 Ga. 272, 34 S. E. 579; *Harrell v. State*, 11 Ga. App. 407, 75 S. E. 507; *Gordon v. State*, 7 Ga. App. 691, 67 S. E. 893; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461.

41. *State v. Crane*, 202 Mo. 54, 100 S. W. 422 (holding that the mere publication of prejudicial articles is not sufficient though it might be a basis for further examination of the jurors already impaneled to see whether they had read the articles and had become biased thereby); *State v. Hottman*, 196 Mo. 110, 94 S. W. 237, is explained as not requiring the court to re-examine on its own motion.

(III.) **Disqualification or Misconduct of Part of Jurors as Affecting Others.** That some of the jurors have been excused as being disqualified because of bias or otherwise, does not subject the remainder of the panel to a challenge to the array.⁴² But it has been held that the fact that a party is himself a member of the regular panel may be ground for challenge to the array, on the theory that the whole panel may be affected thereby,⁴³ and that it is proper to discharge all the panel where some were guilty of misconduct.⁴⁴

(IV.) **Excusing Some Jurors as Affecting Entire Panel.**—Where the court improperly strikes the names of jurors off the list, the proper practice is to challenge the array,⁴⁵ but generally the mere fact that some of the jurors were excused is not ground for the challenge.⁴⁶

42. *Gordon v. Kansas City So. Ry. Co.*, 222 Mo. 516, 121 S. W. 80. See *State v. Hopkins*, 16 S. C. 153, and *supra*, VII, E, 3, b, (I).

[a] **That jurors have expressed an opinion which disqualifies them and for which they are properly excused by the court after acceptance does not so disqualify the other jurors because they have associated with them, that they also should be excused.** *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500. See also *Taylor v. State*, 11 Lea (Tenn.) 708.

[b] **Juror Excused Because of Relationship.**—Where juror has been excused because of possible prejudice growing out of relationship to defendant, the other jurors should not be discharged merely because of their association with the excused juror. *Boyd v. State*, 14 Lea (Tenn.) 161.

[c] **Service on Jury Within Prescribed Time.**—Assuming that service of part of the jurymen at a previous term was ground of individual challenge, it would not affect those on the panel who did not so serve and so is not ground for challenge to the array. *Conkey v. Northern Bank*, 6 Wis. 447.

43. *Weaver v. Rudasill*, 172 Mo. App. 33, 154 S. W. 444.

44. *Griffie v. State*, 1 Lea (Tenn.) 41.

45. *Cochran v. State*, 113 Ga. 736, 39 S. E. 337; *Cunneen v. State*, 96 Ga. 406, 23 S. E. 412.

[a] **Reason for Rule.**—The statute provides a regular method and to permit the judge to depart therefrom by discharging some and substituting others, makes him responsible for the personnel of the jury which would be not only exceedingly embarrassing, but

a dangerous practice. *Cunneen v. State*, 96 Ga. 406, 23 S. E. 412.

[b] **Where the trial judge has exceeded his discretionary power in excusing the entire regular panel arbitrarily, and for no sufficient reason, challenge to the array lies.** *Deiter v. State*, 12 Ohio Cir. Ct. (N. S.) 97.

46. *Ala.*—*Lewis v. State*, 10 Ala. App. 31, 64 So. 537; *Parker v. State*, 7 Ala. App. 9, 60 So. 995. **N. Y.**—*People v. Schmidt*, 168 N. Y. 568, 61 N. E. 907. **Tex.**—*Oliver v. State*, 70 Tex. Crim. 240, 159 S. W. 235. See also *Ward v. State*, 70 Tex. Crim. 393, 159 S. W. 272.

[a] **Where Court Excuses All Jurors.**—Having a right to excuse individual jurors, the court may excuse all, and his so doing is not ground for challenge to the array of a new panel called to take their place. *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54.

[b] **That the court retained part of the regular panel and combined with it talesmen summoned on special venire, is no ground for challenge to the panel.** *State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377.

[c] **Though not done according to the code provisions, excusing jurors could not prejudice defendant. It is purely speculative whether the excused jurors would have rendered a different verdict.** *People v. Schmidt*, 168 N. Y. 568, 61 N. E. 907.

[d] **Fraud or Prejudicial Error Must Appear.**—It is no ground for quashing the venire that the trial judge had on his own motion quashed a previous venire, there being no showing of fraud or prejudicial injury to accused in respect to the jurors selected to try the

(V.) **Partiality or Misconduct of Officers Selecting or Summoning.**⁴⁷ The common law required that everyone who took part in the selection of jurors should stand indifferent as between the parties.⁴⁸ Hence challenge to the array was allowed on account of the partiality or default of the sheriff or other general officer of the court, in selecting and summoning the jurors.⁴⁹ The common-law rules have not been changed by statutes which have merely substituted some other method of selection,⁵⁰ and the general rule is that in so far as the officers charged with selecting or summoning have any direct interest in the litigation,⁵¹ or their relationship to parties in interest is such as to

case. *State v. Kellogg*, 104 La. 580, 29 So. 283.

[e] **Under the statute requiring material departure from forms presented by law**, one cannot by challenge to the panel, question the action of the judge in excusing jurors and calling a special venire, because he thinks there are not enough jurors in attendance. *State v. Switzer*, 38 Nev. 108, 145 Pac. 925.

[f] **Excuse Before Term.**—That the court excused members of the panel by order made before the term and entered on the first day of the term, is not ground for challenge to the panel, being neither a material departure from the forms prescribed by law for drawing nor an omission of the summoning officer to summon. *State v. Bates*, 25 Utah 1, 69 Pac. 70.

47. **Motion to disqualify sheriff and substitute some other officer to summon jury**, see *supra*, IV, B, 4, b, (III).

48. See *supra*, III, B, 1, d.

49. **Ind.**—*Block v. State*, 100 Ind. 357. **Minn.**—*Riley v. Chicago, M. & St. P. R. Co.*, 67 Minn. 165, 69 N. W. 718. **Mo.**—*State v. Powers*, 136 Mo. 194, 37 S. W. 936. **N. Y.**—*People v. McKay*, 18 Johns. 212. **N. C.**—*Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; *State v. Murph*, 60 N. C. 129. **Ore.**—*State v. Savage*, 36 Ore. 199, 60 Pac. 610. **Va.**—*Patrick v. Com.*, 115 Va. 933, 78 S. E. 628. **W. Va.** *State v. Cartright*, 20 W. Va. 32. **Wis.** *Conkey v. Northern Bank*, 6 Wis. 447; *State v. Cameron*, 2 Pin. 490, 2 Chand. 172. **Can.**—*Brown v. Maltby*, 20 N. Bruns. 92.

[a] "As the entire office of summoning the panel of jurors was at common law committed to the sheriff or other summoning officer, a right of challenge to the array on the ground of partiality or other disqualification of the officer was of the greatest import-

ance to litigants." *State v. Ju Nun*, 53 Ore. 1, 97 Pac. 96, 98 Pac. 513.

[b] **Common Law Rules Exemplified.** At common law if the sheriff returned a juror at one party's nomination, or knew he was prejudiced against one party it was called "unindifferency" on the sheriff's part. If he failed to summon a knight in a case in which the law required a knight to be one of the jury, it was a default on the part of the sheriff. If he or his bailiff or under officer returned persons not within the franchise, it was misconduct in the sheriff. And all these were grounds for challenging the whole array. If a bailiff returned some jurors at the nomination of a party it was ground for challenge to the array, provided the bailiff returned the whole array, but not if the array was made by divers bailiffs. But if all the jurors were of affinity to a party it was only ground for challenge to the polls. For a more extended discussion of the reasons for these distinctions, see *Com. v. Walsh*, 124 Mass. 32.

50. *State v. McQuaige*, 5 S. C. 429. See also *supra*, III, B, 1, d.

[a] **Applied to Board of Jury Commissioners.**—Challenge to the array would lie for any action of the board of jury commissioners where it would lie at common law to the action of the sheriff or his subordinate officers in selecting or summoning a jury. *People v. Harding*, 53 Mich. 48, 18 N. W. 555.

51. **Conn.**—*Quinebaug Bank v. Tarbox*, 20 Conn. 510. **Mich.**—*People v. Harding*, 53 Mich. 48, 18 N. W. 555. **N. C.**—See *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547. **Ore.**—*State v. Savage*, 36 Ore. 199, 60 Pac. 610, 61 Pac. 1128. **Va.**—*Patrick v. Com.*, 115 Va. 933, 78 S. E. 628.

[a] **Summoning Officer Under Di-**

make them incompetent to act,⁵² or are guilty of partiality or misconduct in selecting the jurors,⁵³ the challenge will lie. It has been held, however, that the mere fact that one interested in the case is one of the officers whose duty it is to make up the list of jurors, is no ground to quash the array.⁵⁴ Nor is it ground for the challenge

rect Control of Complainant.—That the jury was summoned by an officer connected with the police department and under the direct control of complainant who was chief of police, seems to be considered good ground of challenge. *People v. Wilber*, 61 Hun 620, 15 N. Y. Supp. 435, 39 N. Y. St. 743.

[b] Sheriff Who Is Prosecutor. *State v. Powers*, 136 Mo. 194, 37 S. W. 936.

[c] Sheriff Who Is Party Plaintiff. *Jones v. Woodwarth*, 24 S. D. 583, 124 N. W. 844.

[d] Sheriff's Interest As Taxpayer. The sheriff being a taxpayer was interested in the outcome of the suit, and therefore in a sense a party to it. This is good ground for challenge to the array. *Peck v. Essex*, 21 N. J. L. 656, reversing 20 N. J. L. 457.

[e] Where prosecuting attorney draws the jury. *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628.

52. *State v. McQuaige*, 5 S. C. 429.

[a] A sheriff who is a brother of a party to the action cannot return a jury, it being cause for challenge to the array. *Munshower v. Patton*, 10 Serg. & R. (Pa.) 334, 13 Am. Dec. 678.

[b] Sheriff Whose Deputy Was Defendant.—That talesmen were returned by sheriff in case in which his deputy was defendant is good ground for challenge. *Walker v. Green*, 3 Me. 215.

[c] Commissioner Related to Deceased.—That the commissioner who drew the jury was a blood relation of the deceased, is ground for challenge to the array. *State v. McQuaige*, 5 S. C. 429.

[d] That the sheriff was the son of the prosecuting attorney would not of itself be sufficient ground to challenge the array. *State v. Cameron*, 2 Pin. (Wis.) 490, 2 Chand. 172.

[e] That a brother of the sheriff instituted the prosecution is no ground to challenge the array thus summoned. *Brown v. State*, 14 Ga. App. 21, 80 S. E. 26; *Kelly v. State*, 14 Ga. App. 20, 80 S. E. 24.

53. *Conn.—Quinebank Bank v. Tar-*

State, 40 Fla. 191, 23 So. 851. *Mass. Com. v. Walsh*, 124 Mass. 32. *Mo. box*, 20 Conn. 510. *Fla.—Green v. Jones v. Springfield Traction Co.*, 137 Mo. App. 408, 118 S. W. 675; *State v. Degonia*, 69 Mo. 485. *N. Y.—Gardner v. Turner*, 9 Johns. 260; *Miles v. Pulver*, 3 Denio 84. *N. C.—Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547; *State v. Murph*, 60 N. C. 129. *Okla.—Harjo v. United States*, 1 Okla. Crim. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013.

[a] Corruption or bad faith on the part of the commissioners in the drawing and selection of the jury would always be ground for sustaining a challenge to the array. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

[b] Extreme partisanship of the jury commissioners would more properly be raised by motion to quash the array than by motion for change of venue. It was claimed that the difficulty which resulted in the murder of which defendant was charged, grew out of a political campaign and that the commissioners selected jurors prejudiced against defendant on political grounds. *State v. Pruett*, 49 La. Ann. 283, 21 So. 842.

[c] That juror was member of county court which selected the regular panel from which the jury was drawn can only be presented by challenge to the array. *Boteler v. Roy*, 40 Mo. App. 234.

[d] Partial Struck Jury Selected but Sheriff Not Intentionally Unfair. If the sheriff selects a partial or unfair list for a struck jury it is the duty of the court to set it aside on motion in the nature of challenge to the array, or to quash the panel, although there is no showing that he was intentionally unfair. *Riley v. Chicago, M. & St. P. R. Co.*, 67 Minn. 165, 69 N. W. 718.

54. *Clark v. Com.*, 123 Pa. 555, 16 Atl. 795, officer who made information.

[a] Sheriff Who Assisted Was Owner of Property Stolen.—It is no cause for challenge to the array that the sher-

that the clerk who issued the order to summon the jury is a party to the suit.⁵⁵ Also, a mere error or omission not arising out of any improper motive is not ground for the challenge;⁵⁶ neither is a mere irregularity without any purpose on the part of the officers to neglect or refuse to comply with the statute.⁵⁷ So even where the officer charged with the selection has a direct interest, it has been held that some partiality in the selection must appear;⁵⁸ though, on the other hand, some courts say that it is sufficient if the opportunity for fraud, bad faith or corruption is present,⁵⁹ and that it is not necessary to show any misconduct if, in fact, the officer is disqualified to act by reason of his interest or relationship.⁶⁰

iff who assisted in summoning the original venire was one of the owners of the slave alleged to have been stolen and that he assisted in drawing the jury. *Prince v. State*, 3 Stew. & P. (Ala.) 253.

[b] **Change of Venue May Be Remedy.**—Where plaintiff was one of the judges whose duty it was to select jurors in co-operation with the commissioners, defendants who thought themselves in danger from a jury drawn from such list should have applied for a change of venue. *Wallace v. Jameson*, 179 Pa. 98, 36 Atl. 142.

55. *Hart v. Tallmadge*, 2 Day (Conn.) 381, 2 Am. Dec. 105.

56. *Johnson v. State*, 59 N. J. L. 271, 35 Atl. 787, where, assuming that the omission of colored persons was ground for challenge to the array, it must be shown that the sheriff designedly omitted them and in some manner different from the way in which white persons not called to serve were omitted.

[a] **Where the clerk made an error in making up the tickets but there was no showing that his action was intentional or done from any improper motive, the array will not be quashed.** *Green v. State*, 40 Fla. 191, 23 So. 851.

[b] **Failure to summon juror resulting from mistake on part of sheriff and no fraud or collusion appearing is not ground for challenge to the array.** *State v. Dozier*, 33 La. Ann. 1362.

[c] **Design, Collusion or Prejudice Must Be Alleged.**—Where one jurymen was dead, another exempt, and another not summoned, there being no allegation of any design or collusion for the purpose of affecting the trial, nor any prejudice to the parties, the challenge was not allowed. *Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255.

[d] "If any jurors on a panel are

prejudiced, this matter cannot be inquired into on a challenge to the panel unless there was unfairness or prejudice in the selection or summoning of said jurors." *Wadsworth v. State*, 9 Okla. Crim. 84, 130 Pac. 808.

57. *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 199, 8 Pac. 146, *distinguishing State v. Jenkins*, 32 Kan. 477, 4 Pac. 809, where essential provisions of the statute were disregarded.

58. *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604.

[a] **Commissioner Had Case To Be Tried.**—Though the proper course for a commissioner, who has a cause pending, to be tried before a jury drawn from the names selected by the board of county commissioners, is to take no part in the selection of the names and to have that fact appear upon the commissioner's record, it is not ground for quashing the panel that the commissioner did act in the absence of some showing that there was an attempt at partiality in the selection. *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 604.

59. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293, need not be proved as to commissioners. See also *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547, where the challenge was sustained, though there was no finding of fraud on the part of the sheriff, but the opportunity for fraud was present.

[a] **Where the prosecuting attorney selected the names of the jurors the motion to quash should have been granted though there was no evidence of unfairness on his part nor improper motive, nor any showing that the jury was unfair or prejudiced against defendant.** *State v. Austin*, 183 Mo. 478, 82 S. W. 5.

60. *State v. McQuaige*, 5 S. C. 429.

The statutes in some jurisdictions have specifically abrogated the common-law right to challenge the array because of the officer's interest or relationship,⁶¹ or provide that it is a ground for challenge to a panel, formed from persons not drawn as jurors, that the officer summoning the jury would be disqualified to act as a juror, because of his bias.⁶² The latter statute has been held to be the only ground for challenge to a special venire.⁶³ Under it the test is would the officer summoning be qualified to sit as a juror.⁶⁴ Thus if he be a party to the cause he is clearly disqualified,⁶⁵ but prejudice is not shown merely because he has faithfully performed his duty in apprehending accused.⁶⁶

Under some statutes it must appear that the officer summoning jurors not regularly drawn has acted corruptly, or wilfully summoned jurors known to him to be prejudiced or biased for or against a party,⁶⁷ and the challenge is not allowed except for the grounds stated in the statute.⁶⁸ These statutes do not forbid questioning

[a] **No Improper Motive Need Appear.**—It is not necessary to show an improper motive nor that the sheriff actually used his power improperly. If he was a party he was disqualified to act in his official capacity, either on the drawing or summoning. *Jones v. Woodwarth*, 24 S. D. 583, 124 N. W. 844.

61. *How. St. (Mich.)*, §§12930, 12931; *N. Y. Code Civ. Proc.*, §§1177, 1178, 1179.

62. *Cal.*—*Pen. Code*, §1064. *Idaho.* *Pen. Code*, §7824. *Nev.*—*Rev. Laws*, §7138. *N. D.*—*Rev. Code*, §9961. *Okla. Rev. Laws*, §5848. *S. D.*—*Code Crim. Proc.*, §327.

[a] **The statute is based on the theory that the same circumstances which would bias a juror would tend to cause the officer to exercise his power unimpartially.** *State v. Jordan*, 19 *Idaho* 192, 112 *Pac.* 1049.

[b] **Question to test impartiality held proper**, see *People v. Ryan*, 108 *Cal.* 581, 41 *Pac.* 451.

63. *People v. Oliveria*, 127 *Cal.* 376, 59 *Pac.* 772; *People v. Durrant*, 116 *Cal.* 179, 48 *Pac.* 75; *People v. Wallace*, 101 *Cal.* 281, 35 *Pac.* 862; *People v. Vincent*, 95 *Cal.* 425, 30 *Pac.* 581; *People v. Darr*, 61 *Cal.* 554; *People v. Welch*, 49 *Cal.* 174.

[a] **Only Way Is by Challenge to Venire.**—If a special venire be summoned by a biased, prejudiced and incompetent person the only way to raise the question is by challenge to the special venire. *Saunders v. State*, 4

Okla. Crim. 264, 111 *Pac.* 965, *Ann. Cas.* 1912B, 766.

64. *State v. Kent*, 4 *N. D.* 577, 62 *N. W.* 631, 27 *L. R. A.* 686.

[a] **An elisor having been appointed to summon talesmen to complete the jury, the venire is subject to a challenge to the panel if the elisor be shown to be so biased that he could not himself have served as a talesman.** *People v. Teshara*, 134 *Cal.* 542, 66 *Pac.* 798; *People v. Fellows*, 122 *Cal.* 233, 54 *Pac.* 830.

[b] **Lies for Either Actual or Implied Bias.**—"The statute is so plain that no room is left for interpretation." If the officer would not himself be qualified as a juror because of actual or implied bias, as defined by the statute, he is also disqualified to summon the jury in whole or in part, and challenge to the panel should be allowed. *Koontz v. State*, 10 *Okla. Crim.* 553, 139 *Pac.* 842, *Ann. Cas.* 1916A, 689.

65. *Whipple v. Preece*, 24 *Utah* 364, 67 *Pac.* 1072.

66. *State v. Hayes*, 23 *S. D.* 596, 122 *N. W.* 652.

67. *Vernon Sayles' Civ. St. (Tex.)*, art. 5188; *Tex. Code Crim. Proc.*, arts. 660, 696.

68. *Arnold v. State*, 38 *Tex. Crim.* 1, 40 *S. W.* 734; *Galveston, H. & S. A. R. Co. v. Jessee*, 2 *Wills. Civ. Cas.*, §403; *Galveston, H. & S. A. R. Co. v. Perry*, 38 *Tex. Civ. App.* 81, 85 *S. W.* 62.

[a] **Where no such ground is alleged**

the power of the court to order a special venire to be substituted for the regular panel,⁶⁹ but the mere ordering of the sheriff to summon jurors is not of itself ground for quashing the venire.⁷⁰

(VI.) **Summoning Officer's Opinion.**—The mere opinion of the summoning officer as to the guilt or innocence of defendant is no ground to quash the array where there is no showing that he attempted to influence or prejudice the jurors he summoned,⁷¹ but under the statute he may be incompetent as having an opinion which would disqualify him to act as a juror,⁷² the distinction being drawn as between an opinion of guilt and an opinion as to an undisputed fact.⁷³

the motion to quash the panel is properly overruled. *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

[b] **Only one or both of these causes** can be urged to support a challenge to the array. *Hayward Lumb. Co. v. Cox* (Tex. Civ. App.), 104 S. W. 403, following *Roundtree v. Gilroy*, 57 Tex. 176.

[c] **Criminal Cases to Contrary Criticised.**—"There is really only one ground for challenge and that is the corruption of the officer summoning the jury and we believe that . . . no other cause of challenge to the array exists. The Court of Criminal Appeals has held differently in the cases of *White v. State*, 45 Tex. Cr. R., 597 [78 S. W. 1066], and *Hurt v. State*, 51 Tex. Cr. R., 338 [101 S. W. 806], under arts. 661, 696, Code Cr. Proc. [1895], which are similar in their provisions to those provided for in civil cases. We feel constrained, however, to follow the plain language of the statute, and the construction placed on such statute by the supreme court." *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 Tex. Civ. App. 351, 116 S. W. 365, following *Roundtree v. Gilroy*, 57 Tex. 176.

[d] **The fact that defendant was charged with shooting the sheriff and he would necessarily be an important witness for the state, does not furnish any reason for sustaining a challenge to the array, there being nothing to show that he did anything to influence the jurymen nor in fact did anything at all about their summoning except that his deputies made the service.** *Forrester v. State*, 73 Tex. Crim. 61, 163 S. W. 87.

[e] **Jurors Members of Society To Enforce Law.**—It is not ground for challenge to the array that the jurors were members of a society to enforce the law and were all "local option-

ists," though the prosecution was for violating the local option law. There was no evidence of corrupt practice by the officer summoning, and the jurors who had voted the local option ticket testified there was no agreement of theirs or the society regarding jury service. *Deadweyler v. State*, 57 Tex. Crim. 63, 121 S. W. 863.

69. *Texas, etc. R. Co. v. Pullen*, 33 Tex. Civ. App. 143, 75 S. W. 1084.

70. *Sanchez v. State*, 39 Tex. Crim. 389, 46 S. W. 249.

71. *Kan.—State v. Tawney*, 83 Kan. 603, 112 Pac. 161. *Ore.—State v. Savage*, 36 Ore. 199, 60 Pac. 610, 61 Pac. 1128. *S. D.—State v. Hayes*, 23 S. D. 596, 122 N. W. 652.

[a] **Expression of Opinion Not Coupled With Any Wrongful Act.** The fact that the sheriff who had summoned the jurors had expressed an opinion as to the guilt of the prisoner is not sufficient ground to challenge the array of jurors, unless he has done some act or omitted some duty by reason of which a juror called is disqualified. *People v. Ferris*, 1 Abb. Pr. N. S. (N. Y.) 193.

72. *People v. Coyodo*, 40 Cal. 586.

See preceding section.

[a] **Question Held Proper.**—On challenge to the panel for the bias of the officer it is proper to ask the officer: "If you were impaneled and sworn as a juror to try this cause, could you, and would you, give the defendant a fair and impartial trial?" It is not necessary as a foundation for that question to show that the officer had formed an opinion testified to by him, upon public rumor or newspaper reports. *People v. Ryan*, 108 Cal. 581, 41 Pac. 451.

73. *People v. Ryan*, 108 Cal. 581, 41 Pac. 451, opinion that defendant killed deceased not disqualifying where sher-

(VII.) **Summoning Officer Witness.**—That the summoning officer was liable to be called as a witness, is not, of itself, ground for challenge to the array.⁷⁴ But under the statute it may be a ground where he would be disqualified from becoming a juror.⁷⁵

(VIII.) **Formal Defects and Substantial Departure From Statutes.**—The general rule is that a challenge to the array does not lie for a mere formal or technical defect,⁷⁶ nor for a mere mistake,⁷⁷ nor for failure to follow directory provisions of the statute, not resulting in prejudice to the challenging party.⁷⁸ The challenge does lie for violation of those provisions of the statutes which are mandatory,⁷⁹ and where

iff had no opinion as to defendant's defense of justification.

See *infra*, VII, F.

74. *People v. Slater*, 119 Cal. 620, 51 Pac. 957; *Sullivan v. State*, 75 Wis. 650, 44 N. W. 647.

[a] The mere fact that the sheriff's name was on the indictment as a witness for the state did not as a matter of law disqualify him to act, nor was he disqualified for implied bias. At most the question to be decided was his actual bias. *State v. Hayes*, 23 S. D. 596, 122 N. W. 652.

[b] **Though Sheriff Was Witness at Preliminary Hearing.**—*People v. Slater*, 119 Cal. 620, 51 Pac. 957.

[c] Where there was no showing made of hostility, bias or prejudice, and the officer was not the prosecutor but stood indifferent, the mere circumstance that he was liable to be called as a witness, and had knowledge of facts against the defendant does not render him so incompetent that a special venire summoned by him should be discharged on motion. *Sullivan v. State*, 75 Wis. 650, 44 N. W. 647.

75. *State v. Jordan*, 19 Idaho 192, 112 Pac. 1049.

[a] **Is Ground Where Name Indorsed on Indictment.**—*Koontz v. State*, 10 Okla. Crim. 553, 139 Pac. 842, Ann. Cas. 1916A, 689.

76. *Fla.*—*Green v. State*, 40 Fla. 191, 23 So. 851. *Ill.*—*Barr v. People*, 103 Ill. 110. *Kan.*—*State v. Bohan*, 19 Kan. 28. *La.*—*State v. Campbell*, 134 La. 828, 64 So. 765; *State v. Watkins*, 106 La. 380, 30 So. 10. *Md.*—*Friend v. Hamill*, 34 Md. 298. *Mo.*—*State v. May*, 172 Mo. 630, 72 S. W. 918; *State v. Melton*, 130 Mo. App. 262, 109 S. W. 638; *State v. Stuckey*, 98 Mo. App. 664. *N. J.*—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30. *Ohio.*—*Forsythe v. State*, 6 Ohio 19. *Pa.*—*Com. v. Nye*, |

240 Pa. 359, 87 Atl. 585; *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. 521, 30 Atl. 274. *Tex.*—*Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428; *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591. *Wyo.*—*Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596; *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

77. *Fla.*—*Green v. State*, 40 Fla. 191, 23 So. 851. *Kan.*—*Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 199, 8 Pac. 146. *Md.*—*Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

78. *Ill.*—*People v. Peterson*, 153 Ill. App. 480; *Oakwood Stock Farm Co. v. Rahn*, 106 Ill. App. 269. *Kan.*—*State v. Yordi*, 30 Kan. 221, 2 Pac. 161. *La.*—*State v. Sheppard*, 115 La. 942, 40 So. 363. *Mo.*—*State v. Riddle*, 179 Mo. 287, 78 S. W. 606; *State v. Albright*, 144 Mo. 638, 46 S. W. 620. *N. J.*—*Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30. *Va.*—*Wash v. Com.*, 16 Gratt. (57 Va.) 530. *W. Va.*—*State v. Medley*, 66 W. Va. 216, 66 S. E. 358.

[a] **Rule in Texas as to Civil Juries.** Provisions as to summoning and formation of civil juries are merely directory and a substantial compliance is all that is required. *Galveston, H. & S. A. R. Co. v. Jessee*, 2 Wills. Civ. Cas., §403.

79. *Md.*—*Green v. State*, 59 Md. 123, 43 Am. Rep. 542. *Neb.*—*Clark v. Saline*, 9 Neb. 516, 4 N. W. 246. *N. J.*—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449. *Ohio.*—*Forsythe v. State*, 6 Ohio 19.

[a] **Rule Not Affected by Statute Forbidding Setting Aside Verdict for Irregularity.**—Gen. St., §664, providing that "no verdict shall be set aside on account of any irregularity in summoning the jury," applies only in cases where no challenge or exception to the array was made. Where mandatory

there has been a substantial departure from the statutory method provided for the purpose of securing impartial jurors, there must be a reversal though no actual prejudice be shown, if the objection was properly made.⁸⁰ By statute in many states the challenge to the panel lies for a material departure from the forms prescribed by law in respect to the drawing and return of the jury.⁸¹ Under these statutes the challenge does not lie where there has been a "substantial compliance" with the statutory regulations.⁸² So mere irregularities and slight deviations from the statute are not ground for the challenge where no prejudice results.⁸³ The statutory rule in some states also calls for a "substantial irregularity" in selecting, summoning or drawing the panel as ground for the challenge.⁸⁴ An additional

provisions of the statute are disobeyed, and the matter is properly brought to the court's attention, reversal will follow a wrong ruling thereon. *State v. McGee*, 80 Conn. 614, 69 Atl. 1059.

80. *Lincoln v. Stowell*, 73 Ill. 246; *Cincinnati, N. O. & T. P. R. Co. v. Strunk's Admx.*, 167 Ky. 340, 180 S. W. 528.

[a] **Rule Applied Where Statute Practically Nullified.**—In *Healey v. People*, 177 Ill. 306, 52 N. E. 426, after an exhaustive review of the cases the court concludes that where the statute merely directs certain acts or procedure in order to accomplish the result, a trivial or slight departure which does not appear to have prejudiced defendant will not be ground for reversal. But in the case at bar every requirement of the statute was omitted and the jurors selected in a manner which it was the very purpose of the statute to supersede. This was a violation of both the letter and spirit of the statute and to hold it not ground for reversal would be to nullify the statute."

[b] **Disregard of Provisions as to Professional Jurymen.**—*Louisville & N. R. Co. v. Messer*, 165 Ky. 506, 176 S. W. 1200; *Louisville & N. R. Co. v. Owens*, 164 Ky. 557, 175 S. W. 1039; *Louisville & N. R. Co. v. King*, 161 Ky. 324, 170 S. W. 938.

81. *Ariz.*—Pen. Code, §1017. *Cal.* Pen. Code, §1059. See *People v. Rodley*, 131 Cal. 240, 63 Pac. 351; *People v. Davis*, 73 Cal. 313, 15 Pac. 8; *People v. Shem Ah Fook*, 64 Cal. 380, 1 Pac. 347; *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691. *Idaho.*—Rev. Codes, §7819. *Ia.*—Code, §3679; *Bu-ford & Co. v. McGetchie*, 60 Iowa 298,

14 N. W. 790. *Minn.*—Rev. Laws, 1905, §5383; *State v. Quirk*, 101 Minn. 334, 112 N. W. 409. *Mont.*—Rev. Code, §9247. *Nev.*—Rev. Laws, §7133. *N. Y.* Code Crim. Proc., §362. *N. D.*—Rev. Code, §9955. *Ckla.*—Rev. Laws, §5842. *S. D.*—Code Crim. Proc., §321. *Utah.* Comp. Laws, §§3140, 4820. *Wash.* Rem. & Bal. Code, §2140.

[a] A strict conformity to the statutory method of selecting, drawing, and returning jurors cannot be too strongly recommended. A departure therefrom such as may deprive a defendant of an opportunity to secure a competent and impartial jury is ground for a challenge to the panel. *People v. Davis*, 73 Cal. 355, 15 Pac. 8.

82. *Ariz.*—*Tally v. State*, 159 Pac. 59. *Mont.*—*State v. Groom*, 49 Mont. 354, 141 Pac. 858; *State v. District Court*, 34 Mont. 107, 85 Pac. 870; *State v. Landry*, 29 Mont. 218, 74 Pac. 418; *State v. McHatton*, 10 Mont. 370, 25 Pac. 1046. *Okla.*—*Wadsworth v. State*, 9 Okla. Crim. 84, 130 Pac. 808; *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314.

83. *State v. Groom*, 49 Mont. 354, 141 Pac. 858; *State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *State v. Landry*, 29 Mont. 218, 74 Pac. 418; *State v. White*, 40 Utah 342, 121 Pac. 579.

[a] **Must Be Manifest Prejudice.** *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932. See also *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

[b] **Must Be Reasonable Apprehension of Injury.**—*State v. Rholeder*, 82 Wash. 618, 144 Pac. 914.

84. *Kirby's Dig.* (Ark.), §2355; *Ky.* Code Crim. Proc., §199. See *Mills' (Colo.) Ann. St.* (1912), §4254.

provision of some statutes is that the departure shall be to the prejudice of the defendant,⁸⁵ or that it shall appear the complaining party was injured by the irregularity.⁸⁶ Under such statutes there must be not only an irregularity or departure, but the injury therefrom must affirmatively appear.⁸⁷ By still other statutes there must have been some fraud practiced,⁸⁸ or some great wrong committed that would work irreparable injury.⁸⁹ Under these statutes actual disobedience of the law may not be ground for the challenge,⁹⁰ or, at least, the disobedience must have been so flagrant as to amount to a fraud in law,⁹¹ and it must appear not only that there was an opportunity to commit a fraud, but that a fraud was actually committed.⁹² The statutes sometimes provide that an irregularity in making lists, drawing or summoning must be intentional or prejudicial or a new panel will not be ordered.⁹³ Under such a statute an officer acting under an unauthorized order acts intentionally and challenge will lie.⁹⁴

It is difficult to lay down any general rule as to what is, and what is not, a sufficient compliance with the statutory requirements,⁹⁵ but the true rule has been said to be that violation of those provisions

85. N. Y. Code Crim. Proc., §362; 1898, §15. Miss.—Code, 1906, §2716.

86. Rev. Laws, §5842.

[a] **Statutory Rule in South Dakota.** Laws, 1913, ch. 280, §1, providing that exceptions to challenges cannot be taken unless defendant's rights are prejudiced by the court's ruling, is the same in effect as that of the New York code which reads, material departure to the prejudice of defendant. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

87. **Haw.**—Rev. Laws, §1795. **Me.** Rev. St., ch. 84, §103. **S. C.**—Civ. Code, §2947. **Va.**—Code, 1904, §§3156, 4018. **Wis.**—St., 1915, §2881.

88. **Haw.**—*Matsumura v. County of Hawaii*, 19 Hawaii 496. **Me.**—*State v. Neagle*, 65 Me. 468; *Wallace v. Columbia*, 48 Me. 436. **Okl.**—*Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937.

[a] **Does Not Lie Where Provision Deputed From Was for Juror's Benefit.** Failure of order for special jury to provide for interval required by statute between date when to be drawn and when to attend is not ground for challenge to the panel, since the requirement is for the benefit of the persons drawn, and omission to observe it could not prejudice defendant. *People v. Damron*, 212 N. Y. 256, 106 N. E. 67, affirming 160 App. Div. 424, 145 N. Y. Supp. 239.

89. **Ala.**—*Richardson v. State*, 191 Ala. 21, 68 So. 57; *Huguley v. State* (Ala. App.), 72 So. 764. **La.**—Act 135,

1898, §15. Miss.—Code, 1906, §2716.

89. *State v. Saintes*, 46 La. Ann. 547, 15 So. 160; *State v. Simmons*, 43 La. Ann. 991, 10 So. 382.

90. *Richardson v. State*, 191 Ala. 21, 68 So. 57, no ground for challenge that names were not drawn according to law, nor by officers authorized to draw.

91. *Cook v. State*, 90 Miss. 137, 43 So. 618.

[a] **Must Be Fraudulent Misconduct or Manifest Error.**—*Durrah v. State*, 44 Miss. 789.

92. *Cook v. State*, 90 Miss. 137, 43 So. 618.

93. Va. Code, 1904, §4018.

94. *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628.

[a] **Clerk Acting Under Unauthorized Order of Court.**—Where no more than the statutory number of names can be placed upon the venire facias, except by order of the court, the order must not be a mere general order made upon the court's own motion and not entered in the particular case. It follows that the clerk in acting under such an unauthorized order acts "intentionally" and hence his is not an irregularity, error or failure which comes within the curative provisions of §4018. *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628.

95. *People v. Davis*, 73 Cal. 355, 15 Pac. 8.

which are designed to secure impartial jurors is ground for the challenge, but violation of those designed merely to distribute jury duty fairly among the citizens is not.⁹⁶ The courts sometimes say that the provisions of the statutes as to the selection of jurors are mandatory and that challenge to the array will lie unless they are strictly followed,⁹⁷ but this rule goes no further than to presume prejudicial error when the statute is violated.⁹⁸ Other courts have stated in general terms that the statutory methods of drawing, summoning and impaneling are merely directory,⁹⁹ but this does not warrant the absolute disregard of essential provisions of the statutes,¹ even where the court says they are merely directory.² So the rule has been stated

96. *Friery v. People*, 54 Barb. (N. Y.) 319.

97. *Davis v. State*, 31 Neb. 247, 47 N. W. 854.

[a] "The fact that it may sometimes be inconvenient to the court or cause delay in the trial of a cause is no sufficient reason why the statutes should not be strictly and rigidly enforced." *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628.

[b] Even slight irregularities may be basis of the challenge if the departure be substantial. *Colson v. State*, 51 Fla. 19, 40 So. 183; *Ford v. State*, 44 Fla. 421, 33 So. 301; *Green v. State*, 40 Fla. 191, 23 So. 851.

98. *Haddix v. State*, 76 Neb. 369, 107 N. W. 781, if there is only an "extra official" act committed, whether it will be fatal or not depends upon whether the party was injured.

[a] **Bad Faith, Corruption or Other Cause Should Appear.**—Though the regulations of the statute should be strictly observed the panel will not be invalidated by failure to follow the directions of the statute, "in the absence of bad faith or corruption, or other adequate cause for setting it aside." *State v. Parker*, 132 N. C. 1014, 43 S. E. 830.

[b] **Prejudice Must Affirmatively Appear.**—*Colson v. State*, 51 Fla. 19, 40 So. 183; *Ford v. State*, 44 Fla. 421, 33 So. 301; *Green v. State*, 40 Fla. 191, 23 So. 851.

99. *State v. Jackson*, 167 Mo. 291, 66 S. W. 938; *State v. Gleason*, 88 Mo. 582; *State v. Matthews*, 88 Mo. 121; *State v. Ward*, 74 Mo. 253; *State v. Pitts*, 58 Mo. 556; *State v. Holme*, 54 Mo. 153; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125; *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30.

[a] **Statutory Rule in Mississippi.**

Code, 1906, §2718: "All the provisions of law in relation to the **listing, drawing, summoning and impaneling juries** are directory merely." *Gavigan v. State*, 55 Miss. 533; *Head v. State*, 44 Miss. 731. See also *Bushanan v. State*, 54 Miss. 332, 36 So. 388.

1. *State v. Austin*, 183 Mo. 478, 82 S. W. 5.

[a] **Distinction Between Irregularity and Unauthorized Act.**—So far as the action of the commissioners pertains to the time and place, the statute is considered directory, and provided they are properly done at another time and place they will be treated as irregularities. But where the commissioners assume to do things that they have no right or authority to do, whether at the time appointed by law or at any other time, such acts are not a mere irregularity but are officious unauthorized acts on their parts which will vitiate the panel if properly objected to. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293, reviewing many North Carolina cases and showing that the expression "the statute is only directory" so far as it seems to go beyond this rule, is dictum.

2. *Zininam v. State*, 186 Ala. 9, 65 So. 56.

[a] **Even Where Statute Says Its Provisions Are Directory.**—Though the Jury Act specifically states the intention to make the provisions thereof in relation to selecting, drawing, summoning and impaneling jurors, "directory merely and not mandatory," some of the provisions thereof are clearly mandatory. If they are not they are "insensible and of no effect." *Zininam v. State*, 186 Ala. 9, 65 So. 56. See also *Odom v. State*, 1 Ala. App. 68, 55 So. 546.

that irregularities are to be deemed immaterial unless it appears probable that the objecting party may have been prejudiced thereby.³ On the other hand, an intentional disregard of the provisions of the statute, cannot be deemed a substantial compliance therewith.⁴

(IX.) **Acts Not Performed at Statutory Time.**—The time fixed for the appointment of jury commissioners is directory, and failure to so appoint at that time is not ground for challenge to the panel.⁵ Provisions as to the time for drawing the jurors are usually directory only, and so not ground for challenge.⁶ But where the defendant is entitled to be present, a drawing previous to the time set is ground for the challenge.⁷ Failure to prepare the lists on the date required

[b] **Irregularity and Unfairness Distinguished.**—Under the statute mere irregularity must be distinguished from invasions of those provisions which are intended to prevent unfairness of selection. The former are not ground for quashing—the latter are. *Cook v. State*, 90 Miss. 137, 43 So. 618; *Posey v. State*, 86 Miss. 141, 38 So. 324.

3. *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[a] **They must plainly operate to the prejudice of the challenging party.** *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30.

[b] **Substantial Injustice Must Appear.**—Objections to the manner of return of the jury, or to the officer who returned even if unknown at the time of trial, will not be considered on review, unless substantial injustice is shown to have been done. *Boteler v. Roy*, 40 Mo. App. 234.

[c] **Another Statement of Rule.** Such a departure "as may deprive a defendant of an opportunity to secure a competent and impartial jury" is ground for the challenge. *People v. Davis*, 73 Cal. 355, 15 Pac. 8.

4. *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1, though departure resulted from an erroneous interpretation.

[a] **The rule as to disregarding technical errors does not apply** where the officer summoning the jury was guilty of gross misconduct prejudicial to defendant's right to have a trial by an impartial jury. *Harjo v. United States*, 1 Okla. Crim. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013.

5. *Kennedy v. Oregon Short Line R. Co.*, 18 Utah 325, 54 Pac. 988; *Nelson v. Southern Pac. Co.*, 18 Utah 244, 55 Pac. 364; *Williams v. Oregon Short Line R. Co.*, 18 Utah 210, 54 Pac. 991.

6. *Cal.*—*People v. Rodriguez*, 10 Cal. 50. *Utah.*—*Kennedy v. Oregon Short Line R. Co.*, 18 Utah 325, 54 Pac. 988; *Nelson v. Southern Pac. Co.*, 18 Utah 244, 55 Pac. 364; *Williams v. Oregon Short Line R. Co.*, 18 Utah 210, 54 Pac. 991, 72 Am. St. Rep. 777. *W. Va.* *State v. Medley*, 66 W. Va. 216, 66 S. E. 358. *Wyo.*—*State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

[a] **Failure To Give Notice to Officers To Attend Drawing.**—The prescribed three days' notice to the sheriff and justices of the peace is merely directory and for their benefit. If in fact they attend, though on shorter notice, the purpose of the statute is fulfilled in that the disinterested persons are present as witnesses to guard against the county clerk's favoring anyone as juror. So it is no ground for challenge that the shorter notice was given. *State v. Yordi*, 30 Kan. 221, 2 Pac. 161.

[b] **Drawing for Other Than Ensuing Month.**—*State v. Leroy*, 61 Wash. 405, 112 Pac. 635.

[c] **That summons to the commissioners was not issued at the time prescribed by law is a mere irregularity for which the venire will not be quashed.** "Time is not of the essence" of the statute. *State v. Clark*, 51 W. Va. 457, 41 S. E. 204.

7. *People v. Damron*, 212 N. Y. 256, 106 N. E. 67, affirming 160 App. Div. 424, 145 N. Y. Supp. 239, deprives him of a substantial right. To same effect is *People v. Burgess*, 153 N. Y. 561, 47 N. E. 889, where it seems drawing on an unauthorized day would be good ground for challenge, but the court held the drawing was on an authorized day.

by statute is not ground for challenge to the array,⁸ nor is failure to file the list by the clerk within the time prescribed.⁹ Provisions as to issuing the venire a specified time before trial are not ground for quashing unless the party was prejudiced thereby,¹⁰ nor is it where the copy was not served "forthwith" as the statute required.¹¹ The provision as to the time when a special venire must be returned is merely directory, and so no ground for challenge.¹²

(X.) **Irregularities in Drawing or Selecting the Veniremen.**—(A.) **WRIT OR ORDER FOR DRAWING.**—Errors in the order for drawing of the jurors which are merely clerical or non-prejudicial do not furnish grounds for challenge to the array.¹³

(B.) **BOARD OR COURT IRREGULARLY CONSTITUTED.**¹⁴—That the court before whom the general panel was drawn was not legally constituted is ground for challenge to the array,¹⁵ as it is that the judge who

8. *State v. Lee*, 35 S. C. 192, 14 S. E. 395, mere irregularity.

[a] **List Prepared Before Date Fixed by Statute.**—*Cook v. State*, 90 Miss. 137, 43 So. 618.

9. *State v. Gut*, 13 Minn. 341, not material.

10. *Wash v. Com.*, 16 Gratt. (57 Va.) 530.

[a] **No Prejudice Where No Delay and Defendant Had Copy on Time.** *Wash v. Com.*, 16 Gratt. (57 Va.) 530.

11. *Savage v. State*, 174 Ala. 94, 57 So. 469, the court was divided as to whether the service was mandatory, but the judges holding that it was, agreed that since the list was served two days before the trial defendant was not prejudiced.

[a] **May Be Ground To Postpone Trial.**—Failure to serve the venire on the defendant at the proper time is not good reason for quashing the suit. It would have been cause to postpone the trial until the defendant had the time allowed by law to examine and purge the panel. *Durrah v. State*, 44 Miss. 789.

12. *State v. Gut*, 13 Minn. 341; *State v. Payne*, 6 Wash. 563, 34 Pac. 137.

13. See cases following.

[a] **Omission of Township.**—Where the order for drawing the jurors is legal the challenge will not lie merely because the township from which jurors are to be drawn are not designated. *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72, *distinguishing* *People v. Hall*, 48 Mich. 482, 12 N. W. 665, 42 Am. Rep. 477, where the jury was neither a jury of the vicinage, nor of the

county at large, nor one desired by the judge himself for the purposes of the term, and hence it was not sanctioned by law.

[b] **Wrong Term.**—A mere clerical mispision by which the jurors are ordered for the wrong term, if in fact they appear at the right time, is not ground for challenge. *Peters v. State*, 100 Ala. 10, 14 So. 896.

[c] **Special Venire.**—The mere fact that jurors were on a special venire ordered to be summoned for the term instead of for the particular case is no ground for the challenge where the statute permitted them to be retained for the term. *Barr v. People*, 103 Ill. 110.

[d] **Mere clerical errors or omissions in the descriptive parts of the order.** *Perry v. State*, 177 Ala. 1, 59 So. 150, failure to recite that regular jurors were "drawn" as well as summoned.

[e] **Failure of the clerk to enter the order for a special venire on his minutes** is no ground for quashing the venire regularly issued, and served by virtue of the order. *Hawes v. State*, 88 Ala. 37, 7 So. 302.

[f] **Failure to serve the writ calling upon the commissioners to select jurors** is a mere irregularity, and no ground for challenge where the commissioners performed their duty. *State v. Derrick*, 44 S. C. 344, 22 S. E. 337; *State v. McGraw*, 35 S. C. 283, 14 S. E. 630.

14. **Partiality or interest of various officers who are members of court or board**, see *supra*, VII, E, 3, b, (V).

15. *Gardner v. State*, 55 N. J. L. 17,

ordered and superintended the drawing was disqualified to act,¹⁶ but the mere absence of some of the commissioners is no ground for the challenge when all had been properly notified to attend.¹⁷ Strictly, selection by an unauthorized person is ground for challenge to the array,¹⁸ but a deputy officer may act as one of the selecting officials in the absence of his principal,¹⁹ and the mere presence of persons who take no part is no ground for the challenge.²⁰ Where a jury commissioner is such de facto but not de jure the challenge will not lie if he has properly performed the duties of his office,²¹ but the contrary has been held.²²

(C.) **IRREGULARITIES AS TO LISTS AND JURY BOX.**—Failure to draw the jurors from a list or class designated by the statute is ground for challenge to the array,²³ but where there has been a substantial com-

26 Atl. 30, following *Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449.

16. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. See generally the title "Judicial Officers."

17. *State v. Thomas*, 50 La. Ann. 148, 23 So. 250.

[a] **Failure to notify a jury commissioner** of the drawing of the panel because of his absence from the parish is not sufficient cause to justify setting aside the venire. *State v. Bouvy*, 124 La. 1054, 50 So. 849.

18. *Dunn v. United States* (C. C. A.), 238 Fed. 508; *State v. Gay*, 25 La. Ann. 472.

[a] **Objection to officer who selected struck jury** is properly raised by challenge to the array. *Hulse v. State*, 35 Ohio St. 421.

[b] **Under a statute making fraud a necessary ingredient** of the right to challenge, the fact that names were drawn by unauthorized officers is no ground for challenge. *Richardson v. State*, 191 Ala. 21, 68 So. 57.

Unauthorized person drawing names from box, see *infra*, VII, E, 3, b, (X), (D).

19. *King v. Kahele*, 7 Hawaii 388.

[a] **Deputy Sheriff.**—Absence of sheriff when names are drawn is not ground for quashing venire as his presence is merely to perform a ministerial duty and he may be represented by a deputy. *State v. Aspara*, 113 La. 940, 37 So. 883. See also *State v. Bohan*, 19 Kan. 28.

[b] **Deputy Clerk.**—*State v. Gay*, 25 La. Ann. 472.

20. *State v. Aspara*, 113 La. 940, 37 So. 883.

[a] **Clerk of Auditor Furnished**

Names From Auditor's Books.—That the clerk of the auditor was present when jury commissioners made up list and furnished names of persons liable to jury duty from the auditor's books is no ground for challenge to array where he did not in any manner participate in the selection of names. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619.

21. *State v. Lee*, 35 S. C. 192, 14 S. E. 395.

[a] **Failure to take his oath** is not ground for quashing the venire, since the commissioner by virtue of his appointment is a de facto officer and his act is the performance of a public duty and so valid so far as litigants are concerned. *State v. Medley*, 66 W. Va. 216, 66 S. E. 358.

[b] **Bond Not Properly Approved.** It not being claimed that the commissioners had not given a sufficient bond but only that the clerk had not properly manifested his approval thereof, the commissioners were qualified and the panel will not be quashed. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

[c] **That a jury commissioner was not a freeholder**, assuming that he should be one, is but an irregularity for which the refusal to sustain a challenge to the array would be non-prejudicial. *Ickes v. State*, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442, judgment affirmed, 63 Ohio St. 549, 59 N. E. 233.

22. *State v. Vance*, 31 La. Ann. 398, clerk not having taken oath as commissioner he was not qualified to act and the venire should have been quashed as drawn without any warrant of law.

23. *State v. Skinner*, 34 Kan. 256,

pliance with the statute a mere non-prejudicial irregularity will not support a challenge,²⁴ and the same is true where the irregularity affects only the individual juror.²⁵ Mere failure to revise the list from which the statute directs names to be drawn is not ground for challenge unless prejudice results,²⁶ nor are irregularities in marking, locking, or custody of the wheel or box unless the same has been tampered with.²⁷

Irregularity as to List Drawn.—Mere technical defects in the form of the jury list is not ground for challenge.²⁸ That names were copied

8 Pac. 420; *State v. Jenkins*, 32 Kan. 477, 4 Pac. 809; *Brown v. Maltby*, 20 N. Bruns. (Can.) 92.

24. *State v. Rhoderer*, 82 Wash. 618, 144 Pac. 914, obtaining names from other sources than tax rolls and poll books.

[a] **Names Not All on Assessment Roll.**—A substantial compliance with the statute requiring the jurors to be selected from the assessment roll is necessary, but this does not mean that every name on the roll which might be put on the list, must be there, nor that the mere presence on the list of a name not on the roll would vitiate the list. *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1. See also *People v. Searcey*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

[b] **That names were drawn from the wrong assessment roll** is not ground for challenge where a majority were names of persons admittedly eligible. *Niles v. Circuit Judge*, 102 Mich. 328, 60 N. W. 771.

25. *State v. Merriman*, 34 S. C. 16, 12 S. E. 619, where the summoning of additional jurors from the tales box was unauthorized there is no ground for challenge to the array, but the challenge should be to such individual jurors as are drawn from the tales box.

26. *State v. Smarr*, 121 N. C. 669, 23 S. E. 549; *State v. Hensley*, 94 N. C. 1021. See also *State v. Johnson*, 116 La. 856, 41 So. 117 (as to method adopted for striking names off of the list); *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536.

[a] **That the list has not been revised each year** as the statute directs is not good ground for challenge to the array where there were several hundred names still on the list, and the only effect of the revision would have been to increase that number. *Wood v. McAlpine*, 55 Kan. 657, 118 Pac.

1060, *distinguishing State v. Jenkins*, 32 Kan. 477, 4 Pac. 809, where the list itself was other than required by statute.

[b] **Failure To Supplement List.** *Venire* will not be quashed "because the jury commissioners did not repair to the clerk's office and there supplement the jury list and draw the jurors as required by law." It was not shown that this failure resulted in the selection of any incompetent juror. *State v. Bradley*, 120 La. 248, 45 So. 120.

27. *Klemmer v. Mount Penn Gravity R. Co.*, 163 Pa. 521, 30 Atl. 274, custody of wheel. See also *Rolland v. Com.*, 82 Pa. 306, 22 Am. Rep. 758.

[a] **Box Not Marked Nor Proper Keys Thereto.**—Mere fact that the box was not marked strictly according to the statute, and that there was but one key to the two compartments therein, is an immaterial matter where there was no showing of tampering with the box, and the special venire was drawn from the proper compartment. *State v. Potts*, 100 N. C. 457, 6 S. E. 657.

[b] **Box Not Locked Nor Kept in Safe Place.**—Culpable negligence on the part of the commissioners in not keeping the jury boxes properly locked, and in a safe place, is no ground for challenge to the array where there is no suggestion that the boxes were in fact tampered with. *State v. Hensley*, 94 N. C. 1021.

[c] **That the box itself was not in all respects like that required by statute** is immaterial and not ground for quashing where it substantially fulfills the requirements as to secrecy and measures for keeping it from being tampered with. *Cook v. State*, 90 Miss. 137, 43 So. 618. See also *Campbell v. State* (Miss.), 17 So. 441.

28. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591.

[a] **Wrong Term Stated in Heading.**

on the list by some one not authorized is no ground for the challenge.²⁹ Failure of clerk to certify the list is a mere irregularity and not ground of challenge,³⁰ and the same is true as to the mere failure to record the list.³¹ If there be a substantial compliance with the statutory requirement as to certification, the challenge will not lie.³² The mere failure to relist the names returned to the wheel, is not ground for challenge,³³ nor is failure of the summoning officer to keep a required list of jurors in his office,³⁴ nor of the county commissioners to enter the list in their minutes where it was properly certified and delivered to the clerk.³⁵

(D.) **IRREGULARITY IN DRAWING BY LOT.**—It is ground for the challenge that the officers, in drawing, have not taken names as drawn by lot, as the statute requires,³⁶ but the mere drawing in blocks of

By inadvertence the list of jurors was headed "April Term," instead of "May Term." There was no term in April. The statute does not require headings on the list and the error is at most a mere irregularity, and hence motion to quash venire was properly overruled. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591.

[b] **That the commissioners each made a list proposing names, which several partial lists were then approved and in that form handed to the clerk, instead of being all transferred to one list, is not a material departure from the statutory method.** *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

29. *State v. Lee*, 35 S. C. 192, 14 S. E. 395, commissioners not being interfered with, it is a mere irregularity.

[a] **Names Written Under Supervision of Proper Person.**—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

30. *Cal.*—*People v. Young*, 108 Cal. 8, 41 Pac. 281, there was no doubt as to identity of the list. *N. Y.*—*Friery v. People*, 2 Abb. Dec. 215, *affirming* 54 Barb. 319. *Tex.*—*Coker v. State*, 7 Tex. App. 83.

31. *Friery v. People*, 2 Abb. Dec. (N. Y.) 215 (*affirming* 54 Barb. 319); *Coker v. State*, 7 Tex. App. 83.

32. *Friend v. Hamill*, 34 Md. 298; *State v. Bokien*, 14 Wash. 403, 14 Pac. 889.

[a] **Formal Defects Overlooked.** *State v. Bokien*, 14 Wash. 403, 14 Pac. 889.

[b] **Failure To State Date of Order.** *People v. Iams*, 57 Cal. 115.

[c] **Failure To State Lists Separately.**—Assuming that the statute directs the keeping of separate lists of the

jurors from the respective townships, the jurors having been properly selected a failure to so list them in the certification of the county clerk is not a material departure from the statute warranting a challenge to the panel. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717.

33. *State v. Aspara*, 113 La. 940, 37 So. 883, it will be presumed the commissioners kept a correct record and no fraud appears.

34. *Gardner v. State*, 55 N. J. L. 17, 26 Atl. 30.

35. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717.

36. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293, commissioners, though with no corrupt motive, rejected names drawn and selected others.

[a] **Though Statute Says Statute Is Directory.**—*Cook v. State*, 90 Miss. 137, 43 So. 618.

[b] **Officious Intermeddling by Sheriff.**—A challenge to the array is properly sustained where the sheriff, who was a party to a proceeding to test his title to office and which was to be heard at the ensuing term, officiously intermeddled with the drawing of the names out of the box, by taking the scrolls from the hand of the boy who drew them, and reading off the names, without giving any other person a chance to see them. And the mere fact that the court was unable to find that there had been any actual fraud on the sheriff's part is not controlling. It is sufficient that there may have been fraud. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547.

several instead of one by one is not ground for the challenge,³⁷ nor is a mere technical error in preparing the ballots, box, or wheel used in choosing names.³⁸ But if the ballots, or box, are so manipulated as to interfere with the choice by chance, it is ground for the challenge.³⁹ According to the weight of authority challenge will not lie for mere failure of the designated officer to personally⁴⁰ draw the names

37. Freeman v. McElroy (Tex. Civ. App.), 149 S. W. 428, names were not selected and they were listed in order as taken out.

38. Atchison, T. & S. F. R. Co. v. Davis, 34 Kan. 199, 8 Pac. 146. See also *State v. White*, 40 Utah 342, 121 Pac. 579.

[a] **Name in Box on Two Slips.** Where by some clerical error the same name was put in the box on two slips, and both were drawn out, this is no ground for challenge to the array. *Green v. State*, 40 Fla. 191, 23 So. 851.

[b] **Box Contained Less Than Statutory Number.**—The fact that by inadvertence the box from which the jury list was drawn contained only 148 instead of 150 names is not ground to challenge the array. *State v. Merri-man*, 34 S. C. 16, 12 S. E. 619.

[c] **That some names were improperly picked out of the box** is no ground for quashing, on the theory that those jurors thereupon became disqualified and there was not left in the box the names of jurors whom defendant was entitled to have serve. This the court says is "good metaphysics but too refined to be applied to the practical administration of law." *Cook v. State*, 90 Miss. 137, 43 So. 618.

[d] **Failure To Return Names to Box.**—Mere failure to return to the box before drawing a special venire, the names of jurors on a venire which had been quashed is no ground for quashing the venire. *Perry v. State*, 177 Ala. 1, 59 So. 150.

[e] **That two names were left in the box** evidently by mistake. *Atchison, T. & S. F. R. Co. v. Davis*, 34 Kan. 199, 8 Pac. 146, *distinguishing State v. Jenkins*, 32 Kan. 477, 4 Pac. 809, where the essential provisions of the statute were palpably disregarded.

[f] **Box Refilled.**—That commissioners opened box, emptied it, and put in names of new jurors to full number required by law, constitutes no fraud or injury. Former commissioners had failed to properly revise the list. *State*

v. Riley, 41 La. Ann. 693, 6 So. 730; *State v. Nockum*, 41 La. Ann. 689, 6 So. 729.

[g] **Jury box refilled without a formal order of the court** so to do, is not ground for challenge. *West v. State*, 118 Ala. 100, 24 So. 48.

[h] **Names Drawn from Box Rather Than Envelope.**—Statutory requirement that names of the grand jury be drawn from the envelope does not apply to the petit jury. Where the custom has been to place all slips in the box so as to enable them to be well shaken, there is no possible prejudice which can result to defendant. *State v. Montgomery*, 121 La. 1005, 46 So. 997, *following State v. Mitchell*, 119 La. 374, 44 So. 132.

39. McGann v. Hamilton, 58 Conn. 69, 19 Atl. 376, good ground for challenge to array if slips are not folded.

[a] **Where the clerk improperly withholds names from the box.** *Mel-drum v. State*, 23 Wyo. 12, 146 Pac. 596.

[b] **If names are removed from the box** as part of a design to compel the drawing of certain names which had been selected purposely to comprise the jury, this is ground for quashing. *Cook v. State*, 90 Miss. 137, 43 So. 618.

Right of court to purge lists or panel, see *supra*, VII, E, 3, a, (IV).

[c] **Refilling Before Exhaustion.** Under a statute requiring that the names in the jury box be exhausted before it is refilled, it is ground for quashal of the venire to refill it before exhaustion, especially so where the requirements of the statute are mandatory. *Steele v. State*, 111 Ala. 32, 20 So. 648.

40. State v. McGee, 80 Conn. 614, 69 Atl. 1059.

[a] **May Be by Another Under Direct Supervision.**—Though the statute is mandatory that the jurors shall be drawn "by the presiding judge," this does not mean that he must himself perform the manual act of drawing the names out of the box. He may direct another to do so in his presence. *Scott*

from the box, but this rule does not permit the delegation of the authority.⁴¹

(E.) DISCRETION AS TO SELECTING OR REJECTING NAMES. — At common law jurymen are named by the discretion of some person, and are not taken by some mode of chance or hazard.⁴² So an officer who is summoning talesmen, necessarily exercises some choice and the challenge will not lie merely because he has not taken them in order as he chanced upon them,⁴³ and he has a wide discretion in the matter of choosing only those whom he honestly believes are competent, according to some authorities,⁴⁴ but other authorities declare it to be misconduct for which the challenge will lie when the officer summons on the strength of his investigation.⁴⁵ The court may in ordering a special venire determine in advance that certain persons are not

v. State, 141 Ala. 39, 37 So. 366. See also *Pratt v. Grappe*, 12 La. 451.

[b] **May Be by One Not a Regularly Constituted Deputy.**—*State v. Melton*, 130 Mo. App. 262, 109 S. W. 858.

Selection of names by unauthorized persons generally, see *supra*, VII, E, 3, b, (X), (B).

41. *State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *State v. Payne*, 6 Wash. 563, 34 Pac. 317.

[a] **Distinction Between Deputizing and Delegating.**—A reversal was had where an assistant clerk, deputy sheriff and a judge of the common pleas met, and, at the suggestion of the assistant clerk, the deputy sheriff drew the names out of the boxes. The statute provided that the clerk should draw the names in the presence of the other two. This statutory duty he could not delegate. In his absence the assistant clerk might have drawn. But the deputy sheriff's duties were different. *State v. McGee*, 80 Conn. 614, 69 Atl. 1059. See also *People v. Labadie*, 66 Mich. 702, 33 N. W. 806, following *Gott v. Brigham*, 45 Mich. 424, 8 N. W. 41, sheriff cannot draw for clerk.

42. *The King v. Edmonds*, 4 B. & Ad. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009, "jurymen have always been named by the discretion of some person; of the sheriff, the coroners, or elizors."

43. *King v. Macfarlane*, 7 Hawaii 352.

44. *People v. Hampton*, 4 Utah 258, 9 Pac. 508.

[a] **Exclusion of Members of Particular Church.**—Though the officer summoning a special venire must not exclude persons merely because they are

of the same religious faith as defendant, it is no ground to quash the panel merely because no persons of that faith have been summoned. The officer has a wide discretion and in the exercise thereof may exclude members of a particular church whom he believes will not be impartial. *People v. Hampton*, 4 Utah 258, 9 Pac. 508.

[b] **The fact that the sheriff made inquiries as to the bias or prejudice of special veniremen** does not alone constitute ground for challenge. *State v. McCarty*, 17 Minn. 76.

[c] **Where sheriff was clearly actuated by no bad motive in picking out names for a special venire**, his only principle of selection being to avoid calling persons disqualified under the statute the accused was in no way prejudiced. *West v. State*, 80 Miss. 710, 32 So. 298.

[d] **Sheriff Notified Persons To Attend Prior to Order.**—The mere fact that the sheriff prior to an order of court, notified certain persons to attend court and then upon the court's ordering additional talesmen to be summoned, the sheriff summoned the men previously notified, does not constitute ground for challenge unless it appears that the sheriff acted from improper motives as partiality, or personal interest in the prosecution. *Haddix v. State*, 76 Neb. 369, 107 N. W. 781.

45. *Com. v. Nye*, 240 Pa. 359, 87 Atl. 585. Compare *Com. v. Cleary*, 148 Pa. 26, 23 Atl. 1110, where the court would have granted a new trial for such conduct but no prejudice had resulted to defendant.

[a] **Inquiry as to attitude on cap-**

qualified and omit them without laying the venire open to motion to quash,⁴⁶ but a venire is properly quashed which contains an illegal restriction as to the persons to be summoned.⁴⁷

It is not ground for the challenge that the selecting officers have chosen as jurors persons who did not have the required qualifications,⁴⁸ and their omission to exclude persons known to be entitled to exemption is but a technical irregularity for which the challenge will not lie,⁴⁹ nor can the challenge be based on a mere difference of opinion as to the qualification of the parties selected,⁵⁰ but the wilful omission of persons known by them to be competent and qualified is ground for the challenge,⁵¹ though the exclusion of certain classes of citizens, from motives of public policy, is no ground for the challenge if a sufficient number of unexceptional jurors is present.⁵² But the wilful and discriminatory exclusion of colored men from a panel drawn to try one of that race is ground for challenge to the array,⁵³

ital punishment and as to their opinions formed or expressed is ground for discharging the entire panel and not merely individual jurors. *Com. v. Nye*, 240 Pa. 359, 87 Atl. 585.

[b] **Inquiries as to acquaintance with the attorney** for the accused and rejection on that ground, amounts to contempt as well as ground for challenge. *Harjo v. United States*, 1 Okla. Crim. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013.

46. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

[a] **Determination Based on Unsworn Statements.**—Nor is it reversible error that he made his determination upon the unsworn statements of officers and others, though it would have been better practice to have examined them on oath, in the absence of any objection to that mode of proceeding. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

[b] **The court may purge the jury box of fraudulent names and thereafter order the venire drawn therefrom.** *Smith v. State*, 61 Miss. 754.

47. *Wash v. Com.*, 16 Gratt. (57 Va.) 530.

48. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75, to consider statute mandatory in this respect would throw an unreasonable burden on the judges.

49. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3, holding that anything to the contrary in *State v. Bowser*, 21 Mont. 133, 53 Pac. 179, is obiter.

50. *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596.

51. *State v. Tighe*, 27 Mont. 327, 71

Pac. 3, this is not a "substantial compliance" because the list would not be proper and so litigants would be deprived of their right to have a proper list in the box.

52. *Rawlins v. Georgia*, 201 U. S. 638, 26 Sup. Ct. 560, 50 L. ed. 899.

[a] **Not Error To Exclude Those Who would Be Excused by Court.**—It is no ground for challenge to the array that the jury commissioners have excluded certain classes of citizens, as doctors, lawyers, firemen, etc.; such exclusion not being the result of any class or race prejudice but because of their occupations they either were entitled to exemption or would have been excused by the court. *Rawlins v. Georgia*, 201 U. S. 638, 26 Sup. Ct. 560, 50 L. ed. 899.

53. **U. S.**—*Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667. **Ala.**—*Ragland v. State*, 187 Ala. 5, 65 So. 776; *Green v. State*, 73 Ala. 26. **Fla.**—*Montgomery v. State*, 53 Fla. 115, 42 So. 894. **La.** *State v. West*, 116 La. 626, 40 So. 626; *State v. Casey*, 44 La. Ann. 969, 11 So. 583. **Miss.**—*Farrow v. State*, 91 Miss. 509, 45 So. 619. **Mo.**—*State v. Thomas*, 250 Mo. 189, 157 S. W. 330; *State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200. **N. J.**—*Johnson v. State*, 59 N. J. L. 271, 35 Atl. 787. **Okla.**—*McIntosh v. State*, 8 Okla. Crim. 469, 128 Pac. 735, following *Smith v. State*, 4 Okla. Crim. 328, 111 Pac. 960.

[a] **Sufficient ground to quash a special venire** that colored men were discriminated against. *Pollard v. State*,

but their mere absence from the list is not ground for the challenge.⁵⁴ Similarly it is no ground for challenge that a venire composed entirely of colored persons has been summoned where there is no showing of inclusion or exclusion of any person because of his color.⁵⁵

(F.) REPLACING SAME PERSONS ON PANEL AFTER QUASHING. — After quashing a venire because of disqualification of the judge who selected the veniremen the same persons may be selected on the new list,⁵⁶ nor will the challenge lie merely because the same persons have been again summoned after their discharge for the disqualification of the summoning officer.⁵⁷ The mere fact that the sheriff summons some of the same persons who were on a venire which has been discharged is not ground for the challenge,⁵⁸ even where the discharge was for the bias of the summoning officer,⁵⁹ though the contrary has been held where the second officer acted under direction of the first.⁶⁰

58 Tex. Crim. 299, 125 S. W. 390; Cavitt v. State, 15 Tex. App. 190.

[b] **Habeas Corpus Is Not the Proper Remedy.**—Under the statute it is not a matter of *right* for any man to serve on the jury, but is a *duty* imposed upon him. All that can be required is that the law does not discriminate. The proper way to raise the question, if there has been any discrimination by the jury commissioners, is by challenging the panel, not by habeas corpus on the theory that the conviction is illegal. Haggard v. Com., 79 Ky. 366, 2 Ky. L. Rep. 356.

As to right to insist upon trial by mixed jury or by jury composed entirely of men of same color, race or nationality as prisoner, see *supra*, II, B, 1.

Evidence of discrimination, see *infra*, VII, E, 3, f.

54. Ala.—Ragland v. State, 187 Ala. 5, 65 So. 776. La.—State v. West, 116 La. 623, 40 So. 920; State v. Baptiste, 105 La. 661, 30 So. 147; State v. Casey, 44 La. Ann. 969, 11 So. 583. N. C. State v. Sloan, 97 N. C. 499, 2 S. E. 666. Tenn.—Ransom v. State, 116 Tenn. 355, 96 S. W. 953. Tex.—Hemphill v. State, 75 Tex. Crim. 63, 170 S. W. 154; Hubbard v. State, 43 Tex. Crim. 564, 67 S. W. 413; Carter v. State, 39 Tex. Crim. 345, 46 S. W. 236, 48 S. W. 508; Cavitt v. State, 15 Tex. App. 190. Va.—Lawrence v. Com., 81 Va. 484, following Mitchell v. Com., 33 Gratt. (74 Va.) 845.

55. Coleman v. Com., 84 Va. 1, 3 S. E. 878.

[a] Practice of Ordering Colored Men To Be Summoned Condemned.

While refusing to reverse because the judge had ordered colored men to be summoned on a special venire, since the party complaining had not exhausted his peremptories and so was not injured, the court severely criticises the practice as contrary to the spirit of the constitutional amendments intended to abolish race distinctions. Capehart v. Stewart, 80 N. C. 101.

56. Waller v. Com., 84 Va. 492, 5 S. E. 364. See also Mitchell v. Com., 33 Gratt. (74 Va.) 845.

57. State v. Weeden, 133 Mo. 7, 34 S. W. 473; State v. Degonia, 69 Mo. 485.

[a] **Recalling Same Jurors and Resummoning Distinguished.**—After the court has ordered jurors summoned by an elisor because of the disqualification of the sheriff it is error to call into the box the jurors summoned by the sheriff, but it would not bar the elisor from summoning the same jurors. State v. Weeden, 133 Mo. 7, 34 S. W. 473.

[b] **Venire having been quashed for failure to properly summon**, there is no error in directing sheriff to summon anew veniremen who were on the former venire and who were not otherwise disqualified. Caperton v. Nickel, 4 W. Va. 173.

58. Arnold v. State, 38 Tex. Crim. 1, 40 S. W. 734, it is not a ground stated in the statute.

59. People v. Vincent, 95 Cal. 425, 30 Pac. 581, so far as it is an objection it lies to and must be taken against the jurors as individuals.

60. Shuford v. State, 4 Okla. Crim. 513, 113 Pac. 211.

(G.) **NOMINATION OR SUGGESTING OF NAMES BY UNAUTHORIZED PERSONS.** The challenge lies where jurors were put on the panel at their own request and not chosen by any authority whatever,⁶¹ as it does where names are suggested to commissioners by one who has no authority so to do,⁶² or where the public prosecutor unlawfully nominates some of the jurors.⁶³ But a party may, in good faith, notify the selecting officer of facts affecting the eligibility of various persons.⁶⁴

(H.) **IRREGULARITY IN APPORTIONMENT.** — Improper apportionment among the precincts or districts of the county is ground for challenge to the array.⁶⁵ Failure of a township to return a proper list is not ground for the challenge,⁶⁶ but arbitrarily leaving out townships is.⁶⁷ That the officer drawing a special venire did so from only part of the towns, cities and villages, is not ground for the challenge if done in good faith,⁶⁸ but it is ground for the challenge that the sheriff violated his instructions and only drew jurors from a single locality.⁶⁹

(I.) **IRREGULARITY AS TO NUMBER OF JURORS.** — Some courts hold that the failure to provide the full panel of jurors required by law is good ground for challenge to the array,⁷⁰ and that any error which has the effect of denying one the number of jurors allowed by the court's order is ground for quashing the venire.⁷¹ But on the other hand it has been held that the mere failure to select the full number designated by the court is no ground for challenge if no improper motive, or prejudice to the party, appears,⁷² and that the statutory pro-

61. *McCloskey v. People*, 5 Park. Crim. (N. Y.) 308.

62. *State v. Sheppard*, 115 La. 942, 40 So. 363, but where the suggested names are not taken, there is no prejudice.

63. *Peak v. State*, 50 N. J. L. 179, 12 Atl. 701.

[a] Mere fact that judge inquires of the prosecuting attorney concerning the qualifications of a juror whose name is on the list and about whose qualifications he may be in doubt is not a selecting of the names by the prosecuting attorney. *State v. Melton*, 130 Mo. App. 262, 109 S. W. 858, distinguishing *State v. Austin*, 183 Mo. 478, 82 S. W. 5, where prosecutor nominated.

64. *Quinebaug Bank v. Tarbox*, 20 Conn. 510.

65. *Davis v. State*, 31 Neb. 247, 47 N. W. 854; *Clark v. Saline*, 9 Neb. 516, 4 N. W. 246, provision of statute is mandatory.

[a] **Omission Through Ignorance or Obstinacy.** — Where the board of supervisors, through ignorance or obstinacy, disregarded the provisions of the statute apportioning the jurors to the supervisors' districts according to the

number of electors in each, it is proper to quash the venire. *Purvis v. State*, 71 Miss. 706, 14 So. 268.

66. *People v. MacGregor*, 178 Mich. 436, 144 N. W. 869; *Wise v. Otter Creek Lumber Co.*, 86 Mich. 40, 48 N. W. 695; *People v. Coffman*, 59 Mich. 1, 26 N. W. 207. See also *Eberts v. Mount Clements Sugar Co.*, 182 Mich. 449, 148 N. W. 810.

67. *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72.

68. *State v. Lundgren*, 124 Minn. 162, 144 N. W. 752, Ann. Cas. 1915B, 377.

69. *Houghton Common Council v. Huron Copper Min. Co.*, 57 Mich. 547, 24 N. W. 820, drawing was from single village and there was reason to believe some jurors biased.

70. **D. C.** — *United States v. McBride*, 7 Mackey 371. **Ga.** — *Ivey v. State*, 4 Ga. App. 828, 62 S. E. 565; *Moon v. State*, 68 Ga. 687; *Thomas v. State*, 27 Ga. 287. **Mont.** — *Du Pont v. McAdow*, 6 Mont. 226, 9 Pac. 925.

71. *Odom v. State*, 1 Ala. App. 68, 55 So. 546.

72. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717, error through clerical mistake no ground.

visions as to the number to be selected is a mere economic provision in the interest of the public which does not concern defendant.⁷³ Where the statute prescribes a certain number of qualified jurors are to be on the panel before peremptories are required the proper practice is to move to quash an incomplete panel.⁷⁴ That an excess in number has been selected is no ground for the challenge,⁷⁵ though it has been held to the contrary.⁷⁶

(XI.) **Irregularities in Venire or Summons and Service Thereof.**—(A.) **DEFECTS IN THE VENIRE OR SUMMONS.**—The challenge will lie when there is no legal venire issued as the law requires,⁷⁷ but will not lie merely because there was no formal summons if, in fact, the jurors do attend.⁷⁸ Mere errors in the wording of the venire which do not alter its legal effect, are no ground for the challenge,⁷⁹ nor does the failure

[a] **No Prejudice Where Juror Was Excused.**—*Melton v. State*, 71 Tex. Crim. 130, 158 S. W. 550. But see *Thomas v. State*, 63 Tex. Crim. 98, 138 S. W. 1018, and *Kellum v. State*, 33 Tex. Crim. 82, 24 S. W. 897, holding it ground for quashing the venire facias when the names of six or seven jurors are omitted.

73. *State v. Croney*, 31 Wash. 122, 71 Pac. 783. See also *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

[a] **Commissioners Need Not Certify Reasons.**—That the commissioners have not certified to the superior court their reason for not having selected the full number of jurors is a mere irregularity of procedure and is not ground for challenging the panel. *State v. Straub*, 16 Wash. 111, 47 Pac. 227.

74. *State v. May*, 168 Mo. 122, 67 S. W. 566.

75. *Smith v. State*, 1 Ala. App. 140, 55 So. 449 (it cannot be prejudiced); *State v. Medley*, 66 W. Va. 216, 66 S. E. 358.

[a] **That the court ordered more men drawn than the statute specified is not ground for challenge, especially where the number drawn proved not sufficient for the exigencies of the term and talesmen had to be summoned to complete the panel in the case at bar.** *People v. Coughlin*, 67 Mich. 466, 35 N. W. 72.

[b] **At most it can only be ground for challenge to the individual jurors in excess of the required number.** *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

76. *Colson v. State*, 51 Fla. 19, 40 So. 183; *Gladden v. State*, 13 Fla. 623

(wherein list contained 302 names instead of 300); *Patrick v. Com.*, 115 Va. 933, 78 S. E. 682; *Jones v. Com.*, 100 Va. 842, 41 S. E. 951.

77. *Jackson v. State*, 171 Ala. 38, 55 So. 118.

[a] **But in Alabama under the present statute (Acts 1909, ch. 29, p. 312) requiring some fraud to be practiced, the challenge will not lie though there was no order made to summon the jurors.** *Richardson v. State*, 191 Ala. 21, 68 So. 57.

[b] **Special Venire Ordered on Improper Application.**—That the special venire has not been ordered on the application of the district attorney or of the defendant is ground for quashing the writ. *Gavigan v. State*, 55 Miss. 533.

78. *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778; *State v. McGraw*, 35 S. C. 283, 14 S. E. 630.

79. *State v. Nerbovig*, 33 Minn. 480, 24 N. W. 321.

[a] **That the venire misdescribed the case as a civil instead of a criminal case, is a mere formal defect where the jurors all appeared pursuant to it.** *State v. Nerbovig*, 33 Minn. 480, 24 N. W. 321.

[b] **Mere use of word "felony" instead of the word "offense" in that part of the venire facias which requires jurors to "reside remote from the place where the offense is charged to have been committed" is an immaterial error for which the venire will not be quashed.** *Poindexter v. Com.*, 33 Gratt. (74 Va.) 766.

[c] **Failure To State Jurors' Occupations.**—*Childress v. State*, 122 Ala. 21, 26 So. 162; *Thompson v. State*, 122

of the clerk to sign the venire make it void, and so quashable.⁸⁰ That a juror's name appeared twice on the venire is not ground for quashing the writ;⁸¹ neither are mere mistakes in names on the venire.⁸²

(B.) **IRREGULARITY IN SERVICE.**—Challenge will not lie though the service was not made in a strictly legal manner.⁸³ So summoning by mail has been upheld where the jurors generally obeyed the summons,⁸⁴ and mere irregularities on the part of the summoning officers are not ground for quashing the venire.⁸⁵ That individual talesmen have not been properly summoned should be met by challenge to the poll directed against the particular juror.⁸⁶

(C.) **SERVICE BY UNAUTHORIZED PERSON.**—That the person who served the venire was not an officer authorized so to do is ground to quash the venire or challenge the array, according to some authorities,⁸⁷

Ala. 12, 26 So. 141; *Baker v. State*, 122 Ala. 1, 26 So. 194.

[d] **Directing venire to constable instead of to sheriff** is not ground for the challenge. *Jackson v. State*, 30 Tex. App. 664, 18 S. W. 643; *Suit v. State*, 30 Tex. App. 319, 17 S. W. 458.

80. *Hale v. State*, 72 Miss. 140, 16 So. 387.

[a] **Being amendable** it is of no importance that it was not actually amended on the motion to quash; the jurymen having attended, the writ has served its purpose. *Hale v. State*, 72 Miss. 140, 16 So. 387.

81. *McKee v. State*, 82 Ala. 32, 2 So. 451.

[a] **No Collusion or Improper Design Appearing.**—*McCarty v. State*, 26 Miss. 299.

82. *Ziniam v. State*, 186 Ala. 9, 65 So. 56; *Savage v. State*, 174 Ala. 94, 57 So. 469; *Smith v. State*, 165 Ala. 50, 51 So. 610; *Phillips v. State*, 162 Ala. 14, 50 So. 194; *Vincenzo v. State*, 1 Ala. App. 62, 55 So. 451; *Com. v. Cressinger*, 193 Pa. 326, 44 Atl. 433. See also *Perry v. State*, 177 Ala. 1, 59 So. 150; *Gibbs v. State*, 7 Ala. App. 20, 60 So. 999.

[a] **Wrong Middle Initial, No Collusion or Fraud Appearing.**—*Mann v. Farlee*, 44 Vt. 672.

[b] **Statutory Rule in Ohio.**—Gen. Code, §11,436. A challenge to the array should not be sustained for a mere technical misnomer in that a venire contained the name "John F. Hetzler," and the sheriff served on "John C. Hetzler," who appeared but was excused upon his statement that his name was not "John F. Hetzler." *McHugh v. State*, 42 Ohio St. 154.

[c] **Rule Under Statutes Requiring Fraud To Be Shown.**—*Morris v. State*, 193 Ala. 1, 68 So. 1003. See also *Boles v. State*, 24 Miss. 445.

83. *Cal.*—*People v. McKay*, 122 Cal. 628, 55 Pac. 594. *S. C.*—*State v. Tidwell*, 100 S. C. 248, 84 S. E. 778; *State v. McGraw*, 35 S. C. 283, 14 S. E. 630. *Tex.*—*Miller v. Burgess* (Tex. Civ. App.), 154 S. W. 591; *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

[a] **The method by which the sheriff summoned jurors on special venire** is not material. *West v. State*, 80 Miss. 710, 32 So. 298.

84. *N. Y.*—*People v. Burgess*, 153 N. Y. 561, 47 N. E. 889, where all the jurors qualified to sit actually appeared, there was no prejudice. *Pa. Com. v. Nye*, 240 Pa. 359, 87 Atl. 585, all but six of a panel of sixty-one responded to the notices. *Tex.*—*Miller v. Burgess* (Tex. Civ. App.), 154 S. W. 591; *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

85. *People v. McKay*, 122 Cal. 628, 55 Pac. 594 (no intentional omission appearing); *State v. Riddle*, 179 Mo. 287, 78 S. W. 606.

[a] **Mere summoning of juror by incorrect middle initial** is not ground for challenge. *State v. Mills*, 91 N. C. 581.

[b] **That the venire is not in the hands of the deputies who assisted the sheriff in summoning the jury**, is not ground for challenge to the array. *State v. Albright*, 144 Mo. 638, 46 S. W. 620.

86. *Clears v. Stanley*, 34 Ill. App. 338.

87. *State v. Douglass*, 63 N. C. 500.

[a] **Service by constable instead of**

but if he was at least a de facto officer, and the jurors attended there is no ground to quash the panel,⁸⁸ and if the objection be only to particular jurors it can only be raised by challenge to the poll.⁸⁹ The mere fact that an elisor has been appointed without sufficient cause is no ground for challenge to the panel,⁹⁰ nor is it ground for quashing a special venire that the court directed the sheriff to have it served by certain deputies selected for their fairness.⁹¹ Other authorities hold that the obtaining of an impartial jury is not affected at all by the question of who performed the ministerial duty of summoning so long as there was no bad faith or partiality.⁹²

(D.) JURORS NOT ALL SUMMONED.—That some jurors have not been summoned is no ground for challenge to the array, the sheriff having acted in good faith,⁹³ but it is ground for quashing the panel that the summoning officer failed to summon jurors named in the venire because he deemed them exempt, or unfit, for jury service.⁹⁴ By statute

elisor or coroner as provided by law in case of sheriff's disqualification. *Burnside v. People*, 39 Colo. 485, 90 Pac. 97.

[b] Where the sheriff summoned jurors after the court had ordered the coroner to do so, it was ground for challenge to the array. *Boykin v. People*, 22 Colo. 496, 45 Pac. 419.

[c] Where Coroner Attempts To Delegate His Power.—*People v. Enwright*, 134 Cal. 527, 66 Pac. 726.

88. *State v. McGraw*, 35 S. C. 283, 14 S. E. 630.

[a] Deputy Sheriff Appointed and Sworn But Commission Not Recorded. *Smith v. People*, 39 Colo. 202, 88 Pac. 1072.

89. *Thurman v. Com.*, 154 Ky. 555, 157 S. W. 919.

90. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Young*, 108 Cal. 8, 41 Pac. 281.

[a] Appointment of Elisor Without Cause.—Where no showing is made that the elisor is biased or prejudiced no challenge to the panel lies for his mere appointment without cause. That can be brought up on exception as an error of law occurring at the trial. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830. See also *People v. Welch*, 49 Cal. 174.

As to when elisors should be appointed, see *supra*, IV, B, 4, b.

91. *Lipscomb v. State*, 76 Miss. 223, 25 So. 158.

92. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

93. *Ala.*—*Webb v. State*, 100 Ala. 47, 14 So. 865 (the sheriff had not been

able to find them after diligent search); *Coates v. State*, 1 Ala. App. 35, 56 So. 6. See also *Davis v. State*, 126 Ala. 44, 28 So. 617; *Jackson v. State*, 76 Ala. 26. S. C.—*State v. Derrick*, 44 S. C. 344, 22 N. E. 337, juror absent from county. Tex.—*Ward v. State*, 70 Tex. Crim. 393, 159 S. W. 272, several jurors absent from county. See *Haywood v. State*, 61 Tex. Crim. 92, 134 S. W. 218.

[a] Under Statute.—*Ware v. State*, 12 Ala. App. 101, 67 So. 763.

[b] Proper Practice Is To Amend Return and Issue Attachments.—*Herrera v. State* (Tex. Crim.), 180 S. W. 1097.

[c] Sheriff Must Have Acted Corruptly or Unfairly.—In the absence of any allegation that the sheriff acted corruptly or with partiality in summoning the venire, a challenge to the array does not lie for failure to summon several drawn on the special venire. *State v. Stanton*, 118 N. C. 1182, 24 S. E. 536.

[d] Neglect of an inferior officer to summon a venireman in the manner required by law, is not ground to challenge the array, particularly where the venireman was in ill-health and doubtless would have been excused had he been regularly summoned. *The King v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

94. *Parker v. State*, 102 Ala. 128, 15 So. 819; *Ezell v. State*, 102 Ala. 101, 15 So. 810.

How far summoning officer may exercise his discretion in selecting jurors

in many states, an intentional omission of the summoning officer to summon one or more of the jurors drawn is ground for challenge to the panel.⁹⁵ Under these statutes the wilful omission of but one juror is clearly ground for the challenge,⁹⁶ but merely discarding names of persons who cannot be served, is no ground.⁹⁷

(E.) FAILURE TO OBEY SUMMONS. — That the whole panel summoned do not appear is not ground to quash the venire.⁹⁸

(F.) IRREGULARITIES IN SERVICE OF LIST ON DEFENDANT. — The service of a wrong list is no ground for quashing the venire where the correct list was subsequently and in due time served.⁹⁹ Imperfections in the list are not ground for quashing¹ unless the defendant was misled there-

when serving a special venire, see *supra*, VII, E, 3, b, (X), (E).

95. *Ariz.*—Pen. Code, §1017. *Cal.* Pen. Code, §1059. *Idaho.*—Rev. Codes, §7819. *Mont.*—Rev. Code, §9247. *N. D.* Rev. Code, §9955. *Nev.*—Rev. Laws, §7133. *N. Y.*—Code Crim. Proc., §326. *Okla.*—Rev. Laws, §5842. *S. D.*—Code Crim. Proc., §321. *Utah.*—Comp. Laws, §§3140, 4820.

[a] The intentional omission is clearly ground for the challenge when properly raised. *Garcia v. State* (*Ariz.*), 162 Pac. 605.

[b] Reason for Statute.—“If the sheriff may be permitted to summon only such veniremen as suits his whim or caprice, he can pick the jury in any given case as effectively as though the selection of the entire jury were left exclusively to him . . . A panel from which he had omitted to serve one or more of the jurors drawn should be discharged.” *State v. Groom*, 49 Mont. 354, 141 Pac. 858.

96. *People v. Armstrong*, 2 Idaho 298, 13 Pac. 342. See also *State v. Groom*, 49 Mont. 354, 141 Pac. 858.

97. *State v. Morse*, 35 S. D. 18, 150 N. W. 293, as where names of deceased persons are disregarded.

98. *Ala.*—*Ware v. State*, 12 Ala. App. 101, 67 So. 763; *Lewis v. State*, 10 Ala. App. 31, 64 So. 537. See also *Parker v. State*, 7 Ala. App. 9, 60 So. 925. *N. J.*—*Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255. *Ohio.*—*Warden v. State*, 24 Ohio St. 143. *Pa.*—*Com. v. Nye*, 240 Pa. 359, 87 Atl. 585. *Tex.* *Haywood v. State*, 61 Tex. Crim. 92, 134 S. W. 218.

[a] Under Texas Statutes.—*Galveston, H. & S. A. R. Co. v. Perry*, 38 Tex. Civ. App. 81, 85 S. W. 62.

[b] Court May go on Without Waiting for Absentees.—*Johns v. State*, 55 Md. 350.

[c] No Error Where no Attachment Asked for.—Where a number did not answer the call but it appeared that some were properly excused or were out of the state or had died, and that no attempt had been made by attachment or other writ to bring in any absent veniremen there is no error in refusing to quash the special venire. *Oliver v. State*, 70 Tex. Crim. 140, 159 S. W. 235.

99. *Coates v. State*, 1 Ala. App. 35, 56 So. 6.

Failure to serve in time, see *supra* VII, E, 3, b, (IX).

Irregularities in list from which jurors drawn, see *supra*, VII, E, 3, b, (X), (C).

1. *Jones v. State*, 104 Ala. 30, 16 So. 135, use of arbitrary sign to denote number of precinct where juror resided.

[a] Use of “Ditto Marks” Not Misleading.—The list served on defendant should be a neat, legible copy without erasures, the use of “ditto marks,” etc. But it is no ground for quashing the venire unless the list is so imperfect that defendant and his counsel are misled thereby. *Cole v. State*, 105 Ala. 76, 16 So. 762.

[b] Juror’s name twice on copy is not ground for quashing the venire. *McKee v. State*, 82 Ala. 32, 2 So. 451.

[c] That the list served on defendant recited his name incorrectly in the caption is no ground for quashing. It is technically no part of the list, could not have misled defendant or his counsel and should have been objected to, if at all, at the time of service. *Henderson v. State*, 98 Ala. 35, 13 So. 146.

[d] Jurors on list by wrong name is not ground for quashing. *Browning v. State*, 33 Miss. 47; *Bowen v. State*, 3 Tex. App. 617; *Swofford v. State*, 3 Tex. App. 76, 88.

by, and a juror on the list by a wrong name may be stricken off on objection made.²

(G.) **IRREGULARITIES IN RETURN OF SERVICE.**—Informalities in the return of service are immaterial where the service was made and the jurors appeared.³ That the sheriff's return does not show service of a copy of the venire upon the defendant, is not ground for quashing the venire if the service was in fact made.⁴

c. **Time To Challenge.**—(I.) **In General.**—The common-law rule was that challenge to the array could not be made until the full jury was present,⁵ and it has been held that the making of the challenge is premature where the case has not been called for trial.⁶

[e] **Initials Correct on List and Incorrect on Original.**—*State v. Campbell*, 134 La. 828, 64 So. 765.

[f] **Description by Initial Where Original Gives Full Name.**—*Cato v. State*, 72 Ga. 747.

[g] **Name on original omitted from list served on defendant.** *Gibbs v. State*, 7 Ala. App. 30, 60 So. 999.

[h] **Alabama Statutory Rules.**—Under Alabama statute (Acts, 1909, §25) making fraud sole ground for the challenge it is no ground that there are discrepancies between original venire and copy served on defendant. *Autrey v. State*, 190 Ala. 10, 67 So. 237; *Morris v. State*, 193 Ala. 1, 68 So. 1003.

[i] Under the former statute (1) it was no ground for quashing the venire that the list served on defendant did not designate which jurors were on the regular list, and which had been drawn on special venire (*Cawley v. State*, 133 Ala. 128, 32 So. 227), (2) or that it was not signed or certified (*Phillips v. State*, 162 Ala. 14, 50 So. 194), (3) or that residences of jurors were not stated (*White v. State*, 136 Ala. 58, 34 So. 177), (4) or their occupations (*McClellan v. State*, 140 Ala. 99, 37 So. 239); (5) or that jurors were named by initials of their Christian names (*Hall v. State*, 130 Ala. 45, 30 So. 422; *Cole v. State*, 105 Ala. 76, 16 So. 762; *Aikin v. State*, 35 Ala. 399), (6) or were on list by wrong names (*Smith v. State*, 145 Ala. 17, 40 So. 957; *Coleman v. State*, 145 Ala. 13, 40 So. 977; *Stewart v. State*, 137 Ala. 33, 34 So. 418; *Longmire v. State*, 130 Ala. 66, 30 So. 413; *Kimbrell v. State*, 130 Ala. 40, 30 So. 454; *Bell v. State*, 115 Ala. 25, 12 So. 526). (7) But the challenge would lie where persons not properly summoned were put on the list. *Car-*

wile v. State, 148 Ala. 576, 39 So. 220; *Walker v. State*, 146 Ala. 45, 41 So. 878; *Porter v. State*, 146 Ala. 36, 41 So. 421; *Harris v. State*, 144 Ala. 61, 40 So. 571; *Collins v. State*, 137 Ala. 50, 34 So. 403. Compare, however, *Stockdale v. State*, 165 Ala. 12, 51 So. 563; *Parsons v. State*, 81 Ala. 577, 2 So. 854, 60 Am. Rep. 193, where a different rule was laid down under statutes requiring the list of jurors "so drawn" to be served on defendant.

2. *Martin v. State*, 144 Ala. 8, 40 So. 275; *Swofford v. State*, 3 Tex. App. 76, proper practice is to move to strike off his name or challenge him individually when called.

3. *State v. Gut*, 13 Minn. 341; *State v. Toland*, 36 S. C. 515, 15 S. E. 599.

[a] **Sheriff Failed To Sign Return.** Correction made *nunc pro tunc*. *Com. v. Chauncey*, 2 Ashm. (Pa.) 90; *Com. v. Green*, 1 Ashm. (Pa.) 289.

[b] **Mistake in Name.**—A mistake in writing "General" instead of "Gemnel" in return of jurors summoned, is not ground for successful challenge when the panel and the notice served on the juror contain the name Gemmel. *Com. v. Valsalka*, 181 Pa. 17, 33, 37 Atl. 405.

4. *Gray v. State*, 55 Ala. 86, the court may permit the return to be amended so that it will speak the truth.

5. **Ind.**—*McDonald v. State*, 172 Ind. 293, 88 N. E. 673, 139 Am. St. Rep. 383. **Wis.**—*Lamb v. State*, 36 Wis. 424. **Eng.**—*The King v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

6. *Tarrance v. State*, 43 Fla. 446, 30 So. 685.

[a] Compare *Heitman v. Morgan*, 10 Idaho 562, 79 Pac. 225, which holds

(II.) **As Soon as Facts Known.**—Generally the motion or challenge should be made as soon as the facts which warrant it are known, or it will be deemed to have been waived,⁷ and so far as the matters are of public record,⁸ or of a nature discoverable by the use of due diligence, the challenge is waived by not being made at the time the facts should have been discovered.⁹ This is undoubtedly the true rule

that litigants have every opportunity to test the fairness and legality of the jury when case is called for trial. The court has no jurisdiction to consider an *ex parte* motion made before any case was on trial, or called or set for trial.

7. **Fla.**—*McNish v. State*, 47 Fla. 69, 36 So. 176. **Ga.**—*Pressley v. State*, 19 Ga. 192, juror on list by wrong name. **Mass.**—*Fowler v. County Comrs.*, 6 Allen 92; *Tripp v. Bristol County Comrs.*, 2 Allen 556 (party knew that officer was interested); *Fitchburg R. Co. v. Boston & M. R.*, 3 Cush. 58; *Orrok v. Commonwealth Ins. Co.*, 21 Pick 456, 32 Am. Dec. 271. **N. J.**—*Smith v. Smith*, 52 N. J. L. 207, 19 Atl. 255. **N. Y.**—*New York v. Mason*, 4 E. D. Smith 142, 1 Abb. Pr. 344. **N. C.** *State v. Parker*, 132 N. C. 1014, 43 S. E. 830. **Pa.**—*Wallace v. Jameson*, 179 Pa. 98, 36 Atl. 142; *Klemmer v. Mt. Penn Gravity R. Co.*, 163 Pa. 521, 30 Atl. 274. **Tenn.**—*Hannum v. State*, 90 Tenn. 647, 18 S. W. 269, special panel ordered when defendant not present.

[a] **Reason for Rule.**—After waiving right of challenge and taking a chance of acquittal he cannot "take a double chance by impeaching the jury upon whom he has placed himself for a safe deliverance." *State v. Douglass*, 63 N. C. 500.

[b] **Where Objection Purposely Withheld.**—*People v. McArron*, 121 Mich. 1, 79 N. W. 944.

[c] **Objection to authority of person who summoned the jury is waived** where known at time of trial but not raised until after verdict. *Kennedy v. Com.*, 14 Bush (Ky.) 340.

[d] **Plaintiff Member of Panel.** Objection after verdict is too late. *Weaver v. Rudasill*, 172 Mo. App. 33, 151 S. W. 444.

[e] **Objection at Time of Return.** (1) A challenge is in time when made before challenge to the polls and before the sheriff's return of the venire, upon its being stated in open court that the sheriff, who was an interested

party, had served the venire personally. *State v. Powers*, 136 Mo. 194, 37 S. W. 936. (2) But failure to object at that time waives the right. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[f] **Sheriff's Misconduct Discovered During Trial.**—Defendant's counsel may move to withdraw the case from the jury and to discharge said jury as soon as he learns of misconduct on the part of the officer summoning them which amounts to prejudice. *Harjo v. United States*, 1 Okla. Crim. 590, 98 Pac. 1021, 20 L. R. A. (N. S.) 1013.

[g] **Jury Composed of Professional Jurors.**—*Hart v. State*, 67 Tex. Crim. 497, 150 S. W. 188.

[h] **Name of Juror Misspelled.**—Objection should have been made when the list was furnished to the defendant. *Tipton v. State*, 74 Tex. Crim. 225, 168 S. W. 97.

[i] **Juror Named by Wrong Initial.** Objection that name of juror drawn on special venire was incorrectly initialed should have been made before the name was put in the box. *State v. Mills*, 91 N. C. 581.

[j] **Names Drawn From Box Instead of Envelope.**—*State v. Montgomery*, 121 La. 1005, 46 So. 997.

8. *Haight v. Omaha & C. B. St. Ry. Co.*, 99 Neb. 56, 154 N. W. 836.

[a] **That jury commissioners were not duly qualified to act must be raised** before plea, trial and verdict. It is a matter of public record, readily ascertainable. *State v. Tisdale*, 41 La. Ann. 338, 6 So. 579.

9. *State v. Jones* (S. C.), 75 S. E. 449.

[a] **Failure to discover that the jury commissioners did not select the names jointly, ought, by the exercise of due diligence on defendant's part, to have been discovered before trial.** Inquiry should have been made of those who participated in the proceedings prescribed by the statute. *State v. Jones* (S. C.), 75 S. E. 449.

[b] **By statute on first day of term, unless the facts could not, by due dili-**

as to most grounds for quashing,¹⁰ but it is clear that for some grounds the court may quash whenever the matter is brought to its attention,¹¹ and one does not waive an irregularity by failing to object thereto at the time it was committed, if that was not at a time when he should have been in court.¹²

If grounds for quashing the panel appear upon the voir dire examination, the motion should be made at once.¹³

(III.) **Before Trial.**—Ordinarily a challenge to the array must be made before trial,¹⁴ and the right to challenge is waived by proceeding with the trial,¹⁵ though the motion to quash has been held to be in

gence, have then been known to defendant. *State v. Curtis*, 44 La. Ann. 320, 10 So. 784; *State v. Simmons*, 43 La. Ann. 991, 10 So. 382; *State v. Ashworth*, 41 La. Ann. 683, 6 So. 556; *State v. Coudier*, 36 La. Ann. 291; *State v. Vance*, 31 La. Ann. 398.

10. *Wallace v. Jameson*, 179 Pa. 98, 36 Atl. 142; *Klemmer v. Mt. Penn Gravit R. Co.*, 163 Pa. 521, 30 Atl. 274.

11. *New York v. Mason*, 4 E. D. Smith (N. Y.) 142, 1 Abb. Pr. 344 (discretionary with court to prevent injustice); *State v. Douglass*, 63 N. C. 500.

[a] **Illegality and Irregularity Distinguished.**—A distinction was made between preparing a list in an illegal manner, by making selections from personal or political motives, for which the court would quash at any time, and mere irregularities as filing commissioner's oaths, which the parties might waive. *Klemmer v. Mount Penn Gravit R. Co.*, 163 Pa. 521, 30 Atl. 274.

[b] **Allowed After Jury Sworn.** It was a proper exercise of the court's discretion to discharge the entire panel upon its being brought to its attention that the officer who summoned the jury was prejudiced, although the jury had been sworn, recess taken, and the court having reconvened, was about to take testimony when the motion to quash was made. *Jones v. Springfield Traction Co.*, 137 Mo. App. 408, 118 S. W. 675.

12. *Cincinnati, N. O. & T. P. Ry. Co. v. Strunk's Admr.*, 167 Ky. 340, 180 S. W. 528.

[a] **Notice of Irregularity Not Presumed.**—Where the panel was filled from persons called to serve at a criminal trial held just before the case at bar, instead of from the regular list, the parties cannot be presumed to have had any notice of the irregularity, and a new trial was ordered although there

had been no challenge to the array. *Haight v. Omaha & C. B. St. Ry. Co.*, 99 Neb. 56, 154 N. W. 836.

[b] **Where the error consists in discharging the entire panel prematurely**, an objection to the new panel is not waived, because no objection was made at the time the former panel was discharged. *Cincinnati, N. O. & T. P. Ry. Co. v. Strunk's Admr.*, 167 Ky. 340, 180 S. W. 528.

13. *Sylvester v. State*, 46 Fla. 166, 35 So. 142; *Kelly v. Chicago, R. I. & P. Ry. Co.*, 175 Ill. App. 196.

14. **U. S.**—*Turner v. United States*, 66 Fed. 280, 13 C. C. A. 436. **Ky.** *Continental Coal Corp. v. Cole's Admr.*, 155 Ky. 139, 159 S. W. 668. **Neb.** *Haight v. Omaha & C. B. St. Ry. Co.*, 99 Neb. 56, 154 N. W. 836; *Davis v. State*, 31 Neb. 247, 47 N. W. 854.

[a] **By appearing in justice's court**, answering and taking part in the proceedings, irregularities in the drawing of the jury are waived. *Hallett v. Boyer*, 114 N. Y. Supp. 559.

[b] **By Appearing and Moving for Continuance.**—A venire which was irregular because issued before the return day in the justice's court, cannot be quashed, where defendant appeared on the return day, and took a continuance. He should have objected to the venire at the time of his appearance. *Greer v. Wilson*, 38 W. Va. 100, 18 S. E. 380.

15. **Ala.**—*Ryan v. State*, 100 Ala. 105, 14 So. 766; *Thomas v. State*, 94 Ala. 74, 10 So. 432. **Conn.**—*State v. McGee*, 80 Conn. 614, 69 Atl. 1059. **N. C.** *State v. Parker*, 132 N. C. 1014, 43 S. E. 830.

[a] **Statutory Rule in Louisiana.** Under the statute it is sufficient if the motion to quash the venire be made before entering on the trial of the case. *State v. Bradley*, 120 La. 248, 45 So.

time when made after indictment read, plea made and prosecution announces ready for trial.¹⁰

(IV.) **Before Impanelling Begun.**—In some jurisdictions the challenge is in time if made as counsel are about to start selecting the jury,¹¹ and should be made when the jury is first called upon the panel,¹² and before the jury is impaneled.¹³

The general rule being that a challenge to the polls waives a challenge to the array,¹⁴ one who does not challenge the array before entering upon the business of drawing a jury, waives his right.¹⁵

120. See also *State v. Powers*, 136 La. 75, 66 So. 544.

[b] **Claim of Discrimination Waived.**—Any claim that defendant was discriminated against in that, being a colored man, no persons of his race were put on the jury list by the commissioners is waived by going to trial without challenging the panel. *Haggard v. Com.*, 79 Ky. 366, 2 Ky. L. Rep. 356.

[c] **Pleading and going to trial** (1) is waiver of defects which could otherwise be raised by motion to quash the array. *New York v. Mason*, 4 E. D. Smith (N. Y.) 142, 1 Abb. Pr. 344; *Keeler v. Delavan*, 4 Barb. (N. Y.) 317; *Com. v. Smith*, 2 Serg. & R. (Pa.) 300; *Legaux v. Wells*, 4 Yeates (Pa.) 43. (2) A plea of not guilty waives mere irregularities. *Com. v. Freeman*, 166 Pa. 332, 31 Atl. 115; *Com. v. Seybert*, 4 Pa. Co. Ct. 152. (3) Rule extends to one who "stands mute" and for which a plea of "not guilty" is then entered under the statute. *Dyott v. Com.*, 5 Whart. (Pa.) 67.

16. *Peters v. State*, 100 Ala. 10, 14 So. 896.

[a] **Though defendant's attention was called to an irregularity in the drawing**, at the time it occurred, the right of challenge at any time before trial actually commences, is not waived. *Davis v. State*, 168 Ala. 53, 52 So. 939.

17. *State v. District Court*, 34 Mont. 107, 85 Pac. 870.

18. *State v. Wright*, 45 Kan. 136, 25 Pac. 631; *Ullman v. State*, 124 Wis. 602, 103 N. W. 6, before impanelling commences.

19. **N. J.**—*O'Donnell v. Weiler*, 72 N. J. L. 142, 59 Atl. 1055. **Ohio.** *Ickes v. State*, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442, judgment affirmed, 63 Ohio St. 519, 59 N. E. 233. **Tex.** *International & G. N. R. Co. v. Woodward*, 26 Tex. Civ. App. 389, 63 S. W. 1051; *Ray v. State*, 4 Tex. App. 450.

20. **U. S.**—*United States v. Loughery*, 13 Blatchf. 267, 26 Fed. Cas. No. 15,631. **Ind.**—*Evansville & S. I. Tr. Co. v. Johnson* (Ind. App.), 97 N. E. 176. **Ia.**—*State v. Davis*, 41 Iowa 311. **Kan.**—*State v. Wright*, 45 Kan. 136, 25 Pac. 631; *State v. Eagle*, 45 Kan. 138, 25 Pac. 632. **Ky.**—*Eichman's Committee v. South Covington, etc. Ry. Co.*, 126 Ky. 519, 104 S. W. 316. **Mo.**—*State v. Powers*, 136 Mo. 194, 37 S. W. 936; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Weeden*, 133 Mo. 7, 34 S. W. 473; *State v. Clark*, 121 Mo. 500, 26 S. W. 562. **N. Y.**—*People v. McKay*, 18 Johns. 212. **N. C.**—*State v. Parker*, 132 N. C. 1014, 43 S. E. 830. **Tex.** *Cooley v. State*, 38 Tex. 636.

[a] **After challenges exhausted**, both peremptory and for cause, it is too late. *State v. Everson*, 63 Kan. 66, 64 Pac. 1034.

[b] **After Challenges Decided.** Challenge comes too late when made after challenges for cause have been interposed, decided and jurymen have taken their seats. *Forsythe v. State*, 6 Ohio 19.

[c] **Though a challenge be in form a challenge to the array**, if it is in fact a challenge to the polls, a subsequent challenge to the array cannot be made. *State v. Clark*, 121 Mo. 500, 26 S. W. 562.

21. **Cal.**—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. **Ga.**—*Inman v. State*, 72 Ga. 269; *Thomas v. State*, 27 Ga. 287. **Ill.**—*Mueller v. Rebhan*, 94 Ill. 142. **Ind.**—*Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246. **La.** *State v. Lindsey*, 14 La. Ann. 42. **Mich.** *People v. McArron*, 121 Mich. 1, 79 N. W. 944. **N. D.**—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003.

[a] **Failure To Put the Panel Upon the Prisoner With Due Formality.** *Vaughan v. State*, 88 Ga. 731, 16 S. E. 61; *Ivey v. State*, 4 Ga. App. 828, 62

(V.) **Before Jury Sworn.**—Under some statutes the challenge may be made at any time before the jury is impaneled and sworn,²² and the general rule is that it must be made before the jurors are accepted and sworn.²³

S. E. 565. But see *Cochran v. State*, 62 Ga. 731.

[b] **Improper discharge of jurors by the judge and the substitution of others is waived.** *Cochran v. State*, 113 Ga. 786, 39 S. E. 337.

[c] **That name of one juror has been incorrectly written on the list, so in effect, depriving him of a full panel, is waived.** *Moon v. State*, 68 Ga. 687.

[d] **That judge filled panel where a juror did not respond to his name and was not within reach of court's process, is waived.** *Clifton v. State*, 53 Ga. 241.

[e] **By joining in striking a jury one waives his right to object to the manner in which the list was selected.** *Ohio & M. Ry. Co. v. Stein*, 140 Ind. 61, 39 N. E. 246.

[f] **Statutory Rule in Texas.**—Code Crim. Proc., art. 659.

22. *Hulse v. State*, 35 Ohio St. 421.

23. **Ala.**—*Tennison v. State*, 188 Ala. 90, 66 So. 112; *Longmire v. State*, 130 Ala. 66, 30 So. 413; *Williams v. State*, 81 Ala. 1, 1 So. 179, 60 Am. Rep. 133. **Ark.**—*Brown v. State*, 12 Ark. 623. **D. C.**—*United States v. McBride*, 7 Mackey 371. **Ill.**—*People v. Duncan*, 261 Ill. 339, 103 N. E. 1043 (*following People v. Connors*, 246 Ill. 9, 92 N. E. 567); *St. Louis, etc. R. Co. v. Wheelis*, 72 Ill. 538; *Kelly v. Chicago, R. I. & P. Ry. Co.*, 175 Ill. App. 196; *DeKalb, etc. R. Co. v. Rowell*, 74 Ill. App. 191. **Ia.** *State v. Minor*, 106 Iowa 642, 77 N. W. 230; *Harriman v. State*, 2 G. Gr. 270. **Kan.**—*State v. Jenkins*, 32 Kan. 477, 4 Pac. 809. **La.**—*State v. Beasley*, 32 La. Ann. 1162; *State v. Courtney*, 28 La. Ann. 794. **Mass.**—*Com. v. Gee*, 6 Cush. 174. **Minn.**—*State v. Quirk*, 101 Minn. 334, 112 N. W. 409. **Miss.**—*Gavigan v. State*, 55 Miss. 533. **Nev.**—*State v. Switzer*, 38 Nev. 108, 145 Pac. 925. **N. J.**—*Smith v. Clayton*, 29 N. J. L. 357. **N. M.**—*Territory v. Abeita*, 1 N. M. 545. **N. Y.**—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *New York v. Mason*, 4 E. D. Smith 142, 1 Abb. Pr. 344; *People v. Mack*, 35 App. Div. 114, 54 N. Y. Supp. 698. **N. C.**—*State v. Parker*, 132 N. C. 1014, 43 S. E. 830. **Pa.**—*McDer-*

mott v. Hoffman, 70 Pa. 31. **S. C.** *State v. Williams*, 2 Hill 381.

[a] **Is Rule by Statute in Many States.**—**Ariz.**—Pen. Code, §1018. **Cal.** Pen. Code, §1060. **Idaho.**—Rev. Codes, §§7820, 7828. **Minn.**—Rev. Laws, 1905, §5383. **Mont.**—Rev. Code, §9248. **Nev.** Rev. Laws, §7134. **N. Y.**—Code Crim. Proc., §363. **N. D.**—Rev. Code, §9956. **Ohio.**—Gen. Code, §11436. **Okla.**—Rev. Laws, §5843. **S. D.**—Code Crim. Proc., §322. **Utah.**—Comp. Laws, §§3141, 4821. **Va.**—*Thompson v. Com.*, 8 Gratt. (49 Va.) 637.

[b] **"It is elementary that when a jury is sworn without objection the defendant in a criminal case waives all irregularities in the manner and method of selecting the panel known to him at the time."** *Delmont v. State*, 15 Wyo. 271, 86 Pac. 623, 1102.

[c] **Motion to quash the special venire comes too late when not presented to the court until after the jury has been selected, accepted, impaneled and sworn.** *Carter v. State*, 39 Tex. Crim. 345, 48 S. W. 508, 46 S. W. 236.

[d] **Assuming that the court exceeded his statutory powers in not giving the sheriff full power to select such deputies as he chose to serve a special venire, this would constitute but an irregularity in summoning, and not available, under the statute, after the jury was empaneled and sworn.** *Lipscomb v. State*, 76 Miss. 223, 25 So. 158.

[e] **Applies to Regular and Special Venire.**—Whether a challenge be to the regular panel or to the special venire called when the regular panel is exhausted, the challenge must be before the jury is sworn. *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772.

[f] **In Hawaii.**—Assuming that a law requiring a mixed jury to be drawn alternately from boxes containing Hawaiian and foreign names, is mandatory, the objection to failure so to do must be made before the jurors have been sworn on their voir dire and accepted. *Dowsett v. Maukeala*, 10 Hawaii 166.

[g] **In Kansas.**—In *State v. Jenkins*, 32 Kan. 477, 4 Pac. 809, it is said the challenge must be made before jury

(VI.) **Before Verdict.**—Challenge to the array must be made before verdict rendered,²⁴ and cannot be raised for the first time on motion for a new trial,²⁵ or in arrest of judgment.²⁶ After verdict it is too late to question the drawing though it has been decided in another case to have been improperly made.²⁷

(VII.) **Under Statutes Requiring Injury To Be Shown.**—Some statutes provide a verdict shall not be set aside unless injury be shown or the objection was taken before verdict,²⁸ and a similar provision in some states requires the objection to be taken before the swearing of the jury.²⁹ These statutes have not changed the former rule that the

sworn. But as explained in *State v. Wright*, 45 Kan. 136, 25 Pac. 631, this does not mean that it can be made at any time before jury sworn. It may be waived by not being made sooner.

24. Ark.—*Brown v. State*, 12 Ark. 623. Cal.—*People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933. Fla.—*Sylvester v. State*, 46 Fla. 166, 35 So. 142. Haw. Rev. Laws, §1795. Ill.—*People v. Duncan*, 261 Ill. 339, 103 N. E. 1043; *People v. Conners*, 246 Ill. 9, 92 N. E. 567. Ia.—*State v. Beeder*, 44 La. Ann. 1007, 11 So. 816; *Vidal v. Thompson*, 11 Mart. O. S. 23. Me.—Rev. St., ch. 84, §103; *Wallace v. Columbia*, 48 Me. 436; *Walker v. Green*, 3 Me. 215. Mo.—*State v. Collins*, 86 Mo. 245; *Boteler v. Roy*, 40 Mo. App. 234; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125. N. M. Territory v. Abeita, 1 N. M. 545. N. Y. *Bergman v. Wolff*, 11 N. Y. Supp. 591, 33 N. Y. St. 499. N. C.—*State v. Moore*, 120 N. C. 570, 26 S. E. 697.

[a] In the absence of fraud or collusion an objection to the array is too late after verdict. *Steele v. Malony*, 1 Minn. 347.

[b] In civil cases it is too late after verdict to object to the manner of drawing and summoning the jurors. *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83.

[c] Where the venires and the return showed the facts, it was too late, after verdict, to raise the objection that jurors were not properly drawn. *Pittsfield v. Barnstead*, 40 N. H. 477; *Bodge v. Foss*, 39 N. H. 406; *Wilcox v. School Dist. No. 1*, 26 N. H. 303.

[d] Jury Not Properly Selected. An objection that defendant was tried by a "picked-up jury" comes too late after verdict rendered. *Ellington v. State*, 63 Tex. Crim. 427, 140 S. W. 1101.

[e] **Names Improperly Drawn.** That the names were drawn out of the box by a boy over the age prescribed by statute is waived by failure to make the motion to quash before verdict. *State v. Parker*, 132 N. C. 1014, 43 S. E. 830.

[f] **Objection that traverse jury list was not properly certified is too late after verdict.** *Mikell v. State*, 62 Ga. 368.

[g] **Irregularities in Lists.**—*Gibbs v. State*, 7 Ala. App. 30, 60 So. 999.

[h] **Objections to officer who returned jury is too late after verdict.** *Boteler v. Roy*, 40 Mo. App. 234; *Vierling v. Stifel Brewing Co.*, 15 Mo. App. 125; *State v. Douglass*, 63 N. C. 500.

[i] **Partiality of Sheriff.**—*Daniel v. Frost*, 62 Ga. 697.

25. *People v. Coffman*, 24 Cal. 230.

26. Ala.—*Thomas v. State*, 94 Ala. 74, 10 So. 432. Neb.—*Davis v. State*, 31 Neb. 247, 47 N. W. 854. Eng.—*Rex v. Sheppard*, 1 Leach C. C. 101.

27. *State v. Courtney*, 28 La. Ann. 794.

28. S. C. Civ. Code, §2947; *State v. Coleman*, 8 S. C. 237; *Okershauser v. State*, 136 Wis. 111, 116 N. W. 769; *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

29. *Barnes v. Com.*, 92 Va. 794, 23 S. E. 784; W. Va. Code, §4658.

[a] If the objection be not made until after verdict the defendant must show he was injured thereby. *Jones v. Com.*, 100 Va. 842, 41 S. E. 951. See also *Parsons v. Harper*, 16 Gratt. (57 Va.) 64.

[b] **That a Juror Who Served Was Not the One Described on the Venire Facias.**—*Short v. Com.*, 90 Va. 96, 17 S. E. 786.

[c] **That the Venire Facias Contained More Than the Statutory Num-**

objection must be raised prior to the time stated, as to irregularities which are not injurious to the party.³⁰

d. *Waiver of Right*.³¹—(I.) *In General*.—A challenge to the array may be waived;³² generally irregularities in selecting the jury,³³

ber of Names.—*Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

[d] **Formerly Applied to Civil Cases Only.**—Previously to the amendment of this statute making it applicable to both civil and criminal cases this provision did not apply to criminal cases. *Myers v. Com.*, 90 Va. 785, 20 S. E. 152; *Vawter v. Com.*, 87 Va. 245, 12 S. E. 339; *Jones v. Com.*, 87 Va. 63, 12 S. E. 226; *Spurgeon v. Com.*, 86 Va. 652, 10 S. E. 979.

[e] **Formerly Distinguished Between Irregularities and Absence of Venire.**—Before the addition of the paragraph making the absence of a venire facias no ground for reversal unless made ground of exception before the jury is sworn, the section applied only to irregularities. If there was no venire facias in a felony case the judgment was reversed. *Myers v. Com.*, 90 Va. 785, 20 S. E. 152, construing amendment to §3156, as not being retroactive. See also *Vawter v. Com.*, 87 Va. 245, 12 S. E. 339; *Lewis v. Com.* (Va.), 12 S. E. 1050; *Jones v. Com.*, 87 Va. 63, 12 S. E. 226; *Hall v. Com.*, 60 Va. 555.

30. *Patrick v. Com.*, 115 Va. 933, 78 S. E. 628; *Charlottesville v. Failes*, 103 Va. 53, 48 S. E. 511; *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

[a] **Failure of the jury commissioners to jointly make up the list** is a mere irregularity for which objection must be raised before trial. *State v. Jones* (S. C.), 75 S. E. 449.

[b] **Does Not Excuse Want of Knowledge of Matter of Public Record.** That neither the officers nor counsel of defendant corporation know of an error in the listing of jurors until after verdict, does not excuse their not raising the question sooner, as the matter was one of public record which by diligence they could have ascertained. *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401, 34 N. W. 243.

31. **Failure to reduce to writing as constituting waiver of oral challenge**, see *infra* VII, E, 3, e, (1).

Failure to raise objection to individual jurors who have not been properly

drawn or summoned as waiving the objection, see *supra*, III, B, 1, l; IV, B, 9.

32. *United States v. McBride*, 7 Mackey (D. C.) 371.

[a] **Waiver of Special Venire.**—Under the code, §7264, defendant may in writing waive a special venire. Having so done there is no error in declining to quash the venire. *Burton v. State*, 194 Ala. 2, 69 So. 913.

33. **La.**—*State v. Dorsey*, 138 La. 410, 70 So. 343, drawing by sheriff instead of by clerk. **Neb.**—*Van Etten v. Butt*, 32 Neb. 285, 49 N. W. 365; *Burrell v. State*, 25 Neb. 581, 41 N. W. 399; *Brown v. State*, 9 Neb. 157, 2 N. W. 378. **N. J.**—*Smith v. Clayton*, 29 N. J. L. 357. **N. D.**—*State v. Gordon*, 32 N. D. 31, 155 N. W. 59.

[a] **Objection to the manner of making the list of jurors by the sheriff** should have been made at the time, or is deemed waived. *State v. Nerbovig*, 33 Minn. 480, 24 N. W. 321.

[b] **Where counsel are present as each step is taken, and do not object at the time, they waive any irregularity in impaneling the jury.** *United States v. McBride*, 7 Mackey (D. C.) 371.

[c] **That the tales jurors were called one at a time by the sheriff from a list prepared by him, instead of the names being drawn in regular manner by chance from a box or wheel, cannot later be complained of where the party made no objection or challenge at the time.** *State v. Jones*, 52 La. Ann. 211, 26 So. 752.

[d] **Order Improperly Limiting Selection.**—Assuming that the court exceeded its powers in ordering the sheriff on a special venire to summon only freeholders, the prisoner by failing to object at the time the order was made and challenging the array upon the sheriff's return waives his right to object. *State v. Boon*, 80 N. C. 461.

[e] **That bailiff selected the men and the clerk then wrote their names down after they were seated in the jury box is a mere irregularity which is waived by failure to object at the time.** *People v. Johnson*, 104 Cal. 418, 38 Pac. 91.

or in summoning the jurors,³⁴ are waived by failing to make objection.

(II.) **Failure To Make Timely Objection.**—The failure to make a seasonable or timely objection or challenge to the panel or array is generally a waiver of the right thereafter to urge objections which might have been grounds of challenge.³⁵

(III.) **Consent to Irregularity.**—Right to quash the array is clearly waived where the court gives counsel an opportunity and they decline it,³⁶ or where consent is given to an irregularity before or at the time it is committed,³⁷ nor can the defendant object to action of

[f] That the jurors had been selected for a prior term is not ground for a reversal, in the absence of any challenge to the array or exception reserved as to any juror at the trial. *Kinch v. State*, 70 Tex. Crim. 419, 156 S. W. 649.

[g] **Bystander improperly returned** instead of transferring from the other jury or new venire issued for jurors wanted for term, is waived where not objected to at the trial. *Wallace v. Columbia*, 48 Me. 436.

[h] Where talesmen are resorted to in absence of regular jurors, the irregularity is waived if no objection was made and attachment asked for absent jurors. *Hughes v. State*, 50 Tex. Crim. 32, 95 S. W. 1034. See also *Crawford v. Creagh*, 1 Ala. 592.

[i] That sheriff was not indifferent as the case was against his deputy, is waived where jurors returned by him are permitted to serve without challenge. *Walker v. Green*, 3 Me. 215.

[j] **Failure To Object to Officer's Supposed Partiality.**—(1) *Perry v. State* (Tex. Crim.), 34 S. W. 618. See also *Leavitt v. Sizer*, 35 Neb. 80, 52 N. W. 832. (2) By consenting to the appointment of the sheriff by not objecting or excepting when he was ordered to summon a special venire, the defendant waives his right to raise the question that the sheriff was prejudiced. *State v. Hayes*, 23 S. D. 596, 122 N. W. 652.

[k] **Failure To Insist on Full Panel.** *Jordan v. State*, 22 Ga. 545.

[l] **Ordering of Special Venire.** *Bennett v. Tintie Iron Co.*, 9 Utah 291, 34 Pac. 61.

[m] **Calling Same Jurors After One Challenge Sustained.**—The objection that the sheriff in summoning a special venire after challenge to array sustained, called the same jurors, is waived where not raised in the trial

court. *Burrell v. State*, 25 Neb. 581, 41 N. W. 399. See also *Griffie v. State*, 1 Lea (Tenn.) 41. As to right to replace same jurors, see *supra*, VII, E, 3, b, (X), (F).

34. *State v. Jones*, 61 Mo. 232.

35. See *supra*, VII, E, 3, c.

36. Cal.—*People v. Oliveria*, 127 Cal. 376, 59 Pac. 772. Mich.—*People v. Craig*, 48 Mich. 502, 12 N. W. 675. Pa. Com. v. Nye, 240 Pa. 359, 87 Atl. 585.

[a] **Opportunity Given After Trial Begun.**—*Weil v. Kreutzer*, 134 Ky. 563, 121 S. W. 471, 24 L. R. A. (N. S.) 557.

[b] **No Waiver Where Counsel Expressly Refuse To Waive.**—Where no formal array was put upon prisoner as required by statute, the trial court said if no objection to the array was made, it would consider it waived. Counsel replied: "We waive nothing." The court responded: "Some things are considered waived by silence." No objection to the array was made, and trial proceeded. This was held not to amount to a waiver, and a new trial was ordered. *Cochran v. State*, 62 Ga. 731. Compare *Vaughan v. State*, 88 Ga. 731, 16 S. E. 64; *Schumpert v. State*, 9 Ga. App. 553, 71 S. E. 879.

37. Ga.—*Inman v. State*, 72 Ga. 269 (counsel consent to irregular panel); *Sarah v. State*, 28 Ga. 576, consent to take from wrong list. La.—*State v. Watkins*, 106 La. 380, 31 So. 10, consent to summon talesmen before regular list exhausted. Mich.—*People v. Wheeler*, 142 Mich. 212, 105 N. W. 607. N. Y.—*Watkins v. Weaver*, 10 Johns. 107, consent to summoning by incompetent officer.

[a] **Election Between Struck Jury and Continuance.**—A party having, after disagreement of the jury, consented to a struck jury instead of one from the regular panel, the alternative being that the case go over the term, cannot after verdict insist upon his right

the court rendered necessary or proper by his previous challenges or objections.³⁸

(IV.) **Going On With Trial After Objection.**—After his challenge is overruled and he has taken an exception, one does not lose his rights by going on and attempting to secure as fair a jury as he can by the use of his challenges to individual jurors.³⁹ But it has been held that by unqualifiedly accepting the jury after it has been selected and impaneled, a party waives a previous challenge.⁴⁰ And where additional peremptories have been allowed a party who has failed to use them upon the jurors from the objectionable venire, he cannot thereafter claim to be prejudiced by the previous overruling of his challenge.⁴¹ So also one waives his challenge by failing to produce his proof and going on with the drawing of the jury;⁴² and after challenge to the array has been sustained, one waives it by going on with the trial.⁴³

to a jury regularly drawn. *Bennett v. Syndicate Ins. Co.*, 43 Minn. 45, 44 N. W. 794.

[b] **Counsel Failed To Elect as Between Statutes.**—Where the judge offered to have the jury summoned either under an old statute or a new one, and counsel did not then make a choice, the defendant cannot afterward challenge the array on the ground that the court selected the wrong method. *Mahon v. State*, 127 Tenn. 535, 156 S. W. 458.

[c] **Calling of Special Jury Consented to.**—*Bank of British North America v. Ward*, 9 Brit. Col. (Can.) 49.

[d] **Where a jury trial was subsequently waived** and the cause was tried by the court by consent of parties, any error in forming the jury was waived. *Wykoff v. Loeber*, 5 Mont. 535, 6 Pac. 263.

38. *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665, 19 Am. St. Rep. 547, summoning jury from bystanders, made necessary by previous challenges to the panel.

[a] **Defendant who has had a special venire quashed** on the ground that the jury box from which it was drawn had not been legally prepared, cannot object to a special venire thereupon ordered by the court under the provisions of the statute regarding such order on its being found there is no legal box. *Russell v. State*, 53 Miss. 367.

39. *Clinton v. Englebrecht*, 13 Wall. (U. S.) 431, 20 L. ed. 659; *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[a] **Where defendant objected as**

soon as the jury was called, and again objected to the array after thirty men had qualified, his first objection was a challenge to the array and not to the polls, and hence is not waived. *State v. Weeden*, 133 Mo. 7, 34 S. W. 473.

[b] **Objection to Manner of Striking.**—Where the statute provided that if defendant failed to strike names off the list, the judge should appoint some disinterested person to do so and the judge proceeded to strike off the names himself to which defendant excepted, it was not necessary to make a further objection in the form of a formal challenge to the array. *Gallagher v. State*, 26 Wis. 423.

40. *Gay v. City of Eugene*, 53 Ore. 289, 100 Pac. 306; *Emery v. State*, 101 Wis. 627, 78 N. W. 145.

[a] **Having affirmatively answered that they were satisfied with the jury**, on query made by the court before swearing the jury, an objection that the jurors had not been properly summoned is waived. *Cornell v. State*, 104 Wis. 527, 80 N. W. 745.

[b] **An express waiver of all objections**, including peremptory challenges, is a waiver of the challenge to the array previously taken. *Weeping Water Electric L. Co. v. Haldeman*, 35 Neb. 139, 52 N. W. 892.

41. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 922.

42. *People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780. See *infra*, VII, E, 3, f, (I).

43. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524 (can be waived in

But where the challenge is to the panel, the fact that by the use of his peremptory challenges the challenger so purged the jury that it was constituted substantially as it should have been had the statute been followed, does not cure the error.⁴⁴

e. *Formal Requisite and Subsequent Pleadings.*—(I.) **Written or Oral Challenge.**—According to most authorities the common-law rule required a challenge to the array to be in writing,⁴⁵ and that is the rule in almost all states.⁴⁶ But in some jurisdictions the challenge may be oral,⁴⁷ or it may be made orally, and transcribed by the official reporter.⁴⁸ Where challenge should be in writing one waives his oral

criminal case), *distinguishing* *Cancemi v. People*, 18 N. Y. 128, where prisoner proceeded with a jury of less than twelve.

44. *Watha v. State*, 14 Ohio Cir. Ct. (N. S.) 145, motion for writ of error denied.

[a] **Too Many Bystanders Called.** Under the statute only three bystanders could be called. When the challenger exhausted his peremptories there remained but three bystanders. This did not cure the court's error in calling five bystanders. *Louisville & N. R. Co. v. King*, 161 Ky. 324, 170 S. W. 938.

45. **Mo.**—*State v. Church*, 199 Mo. 605, 98 S. W. 16; *State v. Brennan*, 164 Mo. 487, 65 S. W. 325. **Tenn.**—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458. **Wis.**—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[a] **Practice Doubted.**—The court doubts that the practice obtained at common law stating that Mr. Chitty cites no authority and that there are English cases holding *ore tenus* sufficient. *Peak v. State*, 50 N. J. L. 179, 12 Atl. 701.

[b] **Must Be in Such Form That it Can Be Put on the Record.**—*The King v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

46. **Ariz.**—Pen. Code, §1018 "must be in writing." But compare §1030, which seems to permit oral challenge entered in minutes. **Fla.**—*Montgomery v. State*, 53 Fla. 115, 42 So. 894; *Tarrance v. State*, 43 Fla. 446, 30 So. 685. **Ga.**—*Bryan v. State*, 124 Ga. 79, 52 S. E. 298. **Idaho.**—Rev. Codes, §7820. **Ill.**—*McDonald v. People*, 25 Ill. App. 350, practice sanctioned but no discussion as to necessity. **Ia.**—*State v. Davis*, 41 Iowa 311; *Suttle v. Batie*, 1 Iowa 141. **Mich.**—*People v. Tubbs*, 147 Mich. 1, 110 N. W. 132; *Ryder v.*

People, 38 Mich. 269; *People v. Doe*, 1 Mich. 451. **Minn.**—Rev. Laws, 1905, §5383. **Mo.**—*State v. Church*, 199 Mo. 605, 98 S. W. 16; *State v. Hottman*, 196 Mo. 110, 94 S. W. 237; *State v. Brennan*, 164 Mo. 487, 65 S. W. 325; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Clark*, 121 Mo. 500, 26 S. W. 562. **Neb.**—*Strong v. State*, 63 Neb. 440, 88 N. W. 772. **Nev.**—*State v. Raymond*, 11 Nev. 98. **N. J.**—See *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284, practice sanctioned but no discussion as to necessity. **N. Y.**—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Dameron*, 160 App. Div. 424, 145 N. Y. Supp. 239, affirmed in 212 N. Y. 256, 106 N. E. 67. **N. D.**—Rev. Code, §9956. **Okl.**—Rev. Laws, §5843. **S. D.**—Code Crim. Proc., §322. **Tenn.**—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458. **Tex.**—*Perry v. State* (Tex. Crim.), 34 S. W. 618; *Gulf, C. & S. F. Ry. Co. v. Gilvin* (Tex. Civ. App.), 55 S. W. 985; *Woodward v. State*, 9 Tex. App. 412. **Wash.**—Rem. & Bal. Code, §2140.

[a] **Reason for Rule.**—In *Mahon v. State*, 127 Tenn. 535, 156 S. W. 458, it is said that the reason of the rule is that the challenge is an informal pleading and that all pleadings must be in writing.

47. *Kirby's Dig.* (Ark.) §2369.

48. *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[a] **The presence of stenographic reporter makes the common law rule unnecessary and it is sufficient if the challenge be stated at the bar of the court and taken down by the reporter.** *Ullman v. State*, 124 Wis. 602, 103 N. W. 6. See also *Peak v. State*, 50 N. J. L. 179, 12 Atl. 701.

[b] **Statute so Provides.**—**Cal.**—Pen. Code, §1060. **Mont.**—Rev. Code, §9248.

challenge by not reducing it to writing on permission given so to do.⁴⁹

(II.) **Verification.**—In some states, the challenge, or motion, must be verified.⁵⁰

(III.) **Certainty of Allegations.**—The challenge should be certain and definite,⁵¹ and must be in such terms that the court can determine whether the facts, if true, are sufficient to support the challenge,⁵² and

Nev.—Rev. Laws, §7134. Utah.—Comp. Laws, §§314T, 4821.

49. *People v. Tubbs*, 147 Mich. 1, 110 N. W. 132.

50. Fla.—*Montgomery v. State*, 53 Fla. 115, 42 So. 894; *Tarrance v. State*, 43 Fla. 446, 30 So. 685. Neb.—*Weeping Water, etc. Co. v. Haldeman*, 35 Neb. 139, 52 N. W. 892. Tex.—*Vernons' Sayles' Civ. St.*, art. 5190; *Code Crim. Proc.*, art. 663. See *Perry v. State* (Tex. Crim.), 34 S. W. 618; *Woodard v. State*, 9 Tex. App. 412. Wash.—*Rem. & Bal. Code*, §2140.

[a] **Must Be Positive.**—The motion to quash the panel must be verified positively and not upon the mere belief of the attorney. *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139, 52 N. W. 892.

Affidavits as evidence, see *infra*, VII, E, 3, f, (II).

51. Cal.—See *People v. Collins*, 105 Cal. 504, 39 Pac. 16. Neb.—*Strong v. State*, 63 Neb. 440, 88 N. W. 772. N. J.—*O'Donnell v. Weiler*, 72 N. J. L. 142, 59 Atl. 1055. Tenn.—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458. Wis.—*Ullman v. State*, 128 Wis. 602, 103 N. W. 6; *Conkey v. Northern Bank*, 6 Wis. 447. Eng.—*The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

[a] **Allegations Must Be Definite.** The assertion that the jury drawers "drew from the jury box some names that were not included in the list summoned to appear as jurors" is indefinite as it does not clearly appear whether the intention is to aver that all of the names drawn were not placed upon the list given the sheriff or that there was an omission to summon certain jurors. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

[b] **Where challenge based on disqualification of summoning officer**, it "must be made in same form as if made to a juror." Cal.—*Pen. Code*, §1064. Nev.—*Rev. Laws*, §7138. N. D.—*Rev. Code*, §9961. S. D.—*Code Civ. Proc.* §327.

As to requisites of challenge to juror for cause, see *infra*, VII, E, 4, d.

[c] **Challenge Uncertain.**—Where a challenge is so worded that it cannot be told which of two panels is objected to the court is justified in disregarding it. *Garcia v. State* (Ariz.), 162 Pac. 605.

52. Neb.—*Strong v. State*, 63 Neb. 440, 88 N. W. 772. Nev.—See *State v. Raymond*, 11 Nev. 98. N. J.—*State v. Barker*, 68 N. J. L. 19, 52 Atl. 284; *Fowler v. State*, 58 N. J. L. 423, 34 Atl. 682. N. Y.—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Ebel*, 180 N. Y. 470, 73 N. E. 235. N. C.—See *State v. Walker*, 145 N. C. 567, 59 S. E. 878. S. D.—*State v. Morse*, 35 S. D. 18, 150 N. W. 293. Tenn.—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458. Tex.—*Perry v. State* (Tex. Crim.), 34 S. W. 618; *Woodard v. State*, 9 Tex. App. 412. Wis.—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6. Wyo.—*Gunnell v. State*, 21 Wyo. 125, 128 Pac. 512.

But see *Jones v. Com.*, 100 Va. 842, 41 S. E. 951.

[a] **The statutes frequently provide** that the challenge must plainly and distinctly "specify the facts" or "state the grounds" of challenge. See the statutes.

[b] **Mere statement by counsel that the accused demanded his legal rights**, and would not waive anything, except a copy of the indictment and a list of the witnesses, is not sufficient to constitute a challenge to the array. *Schumpert v. State*, 9 Ga. App. 553, 71 S. E. 879. Compare *Cochran v. State*, 62 Ga. 731.

[c] **Discrimination Against a Class.** (1) An allegation that the venire list does not contain the name of a single colored man, is not a substantive allegation that the jury commissioners discriminated against negroes in making up the list. *State v. Baptiste*, 105 La. 661, 30 So. 147. (2) But an allegation is sufficient which states that the sheriff "did fail and refuse to select

if it merely alleges conclusions of law demurrer thereto will be sustained.⁵³ The ground must be so stated that the opposite party can demur to its sufficiency in point of law,⁵⁴ or raise an issue with respect to the truth of the facts set forth.⁵⁵ The court has some discretion as to how specifically the grounds must be stated.⁵⁶

(IV.) **Amendment of Challenge.**—By statute amendment of the challenge on allowance of an exception thereto, is sometimes permitted,⁵⁷ and the amended challenge thereupon becomes a substitute for the original.⁵⁸

(V.) **Demurrer or Exception to Challenge.**—Where the facts are not questioned, but only their legal sufficiency as ground for the challenge, the adverse party demurs.⁵⁹ A demurrer to a challenge does not

any colored men of African descent to serve on the jury as aforesaid, thus discriminating against all colored men of African descent. . . . That it has been the custom for many years . . . for the sheriff to refuse to select any names of persons of the African race to serve on the jury in this honorable court. . . . That the discrimination and refusal of the sheriff to select any men of the African race to serve on the jury is on account of their race, color and previous condition of servitude." This sufficiently sets out that there was a discrimination by the sheriff. *Montgomery v. State*, 53 Fla. 115, 42 So. 894.

[d] **Must state unfair acts as well as interest of commissioner.** *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937.

[e] **The failure to summon certain jurors was intentional,** must be made to appear from the allegations of the challenge. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

[f] **Lack of diligence in summoning veniremen,** must be directly alleged. A mere allegation that the veniremen did not all appear is not sufficient. *Haywood v. State*, 61 Tex. Crim. 92, 134 S. W. 218.

[g] **Where the challenge is to the sheriff for favor** there should be a specific allegation of his partiality. *Brown v. Maltby*, 20 N. Bruns. (Cañ.) 92.

53. *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284.

[a] **The challenge must set forth facts showing material departure.** *Garcia v. State* (Ariz.), 162 Pac. 605; *Talley v. State* (Ariz.), 159 Pac. 59.

[b] **Conclusion.**—A statement "the said panel was illegally and improperly selected" amounts only to a state-

ment of a legal conclusion and not of facts showing a violation of statutes or constitution. *State v. Brennan*, 164 Mo. 487, 65 S. W. 325. See also *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

54. **N. J.**—*Fowler v. State*, 58 N. J. L. 423, 34 Atl. 682. **Wis.**—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6. **Eng.**—*The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

See *infra*, VII, E, 3, e, (V).

55. *Fowler v. State*, 58 N. J. L. 423, 34 Atl. 682; *The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009. See *infra*, VII, E, 3, e, (VI).

[a] **Must Be Traversable Allegations.**—To merely allege that the sheriff "has not chosen the panel indifferently and impartially" and that "the said panel is not an indifferent panel," is demurrable as nothing is stated which can be traversed. *Reg. v. Hughes*, 1 Car. & K. 235, 47 E. C. L. 235.

56. *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

57. **Ariz.**—Pen. Code, §1020. **Cal.** Pen. Code, §1062. **Idaho.**—Rev. Code, §7822. **Minn.**—Rev. Laws, 1905, §5384. **Mont.**—Rev. Code, §9250. **Nev.**—Rev. Laws, §7136. **N. Y.**—Code Crim. Proc., §365. **N. D.**—Rev. Code, §9958. **Okla.** Rev. Laws, §5845. **S. D.**—Code Crim. Proc., §324. **Utah.**—Comp. Laws, §4823.

58. *People v. Brown*, 48 Cal. 253.

59. **Ill.**—*Rockford Ins. Co. v. Nelson*, 75 Ill. 548; *Clears v. Stanley*, 34 Ill. App. 338. **Mich.**—*People v. Coughlin*, 67 Mich. 466, 35 N. W. 72. **N. J.** *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284. **Eng.**—*The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

admit the truth of the alleged cause for challenge, but only the truth of the facts stated in the challenge and on which the challenge is based,⁶⁰ and does not admit those facts unless they are sufficiently pleaded.⁶¹

The statutes sometimes provide for what is called an "exception" to the challenge where the sufficiency of the facts alleged as ground for challenge are denied.⁶² This is the equivalent of the common-law demurrer to the challenge,⁶³ and admits the truth of the facts alleged,⁶⁴ and the statutes usually so provide.⁶⁵ The exception need not be in writing but is entered on the minutes of the court or reporter.⁶⁶

(VI.) **Denial of Challenge.**—Where the opposite party disputes the facts alleged as ground of the challenge he should join issue thereon.⁶⁷ This pleading is usually termed a "denial."⁶⁸ It need not be in writing but is entered on the minutes of the court or reporter.⁶⁹

(VII.) **Counterplea.**—The practice of counterpleading by setting up some new matter consistent with the matter of challenge but which annuls it as a ground of challenge has been recognized.⁷⁰

(VIII.) **Permitting Joinder of Issue After Demurrer or Exception Overruled.**—It is proper practice to permit the joining of issue after demurrer has been overruled,⁷¹ at the same time permitting the chal-

See *supra*, VII, E, 3, e, (III).

60. *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284, it is like a demurrer to a pleading.

61. *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284.

62. See *People v. Damron*, 160 App. Div. 424, 145 N. Y. Supp. 239, *affirmed* in 212 N. Y. 256, 106 N. E. 67, and the statutes.

63. **Idaho.**—*People v. Armstrong*, 2 Idaho 298, 13 Pac. 342. **Mont.**—*State v. Groom*, 49 Mont. 354, 141 Pac. 858; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3. **N. Y.**—*People v. Wilber*, 61 Hun 620, 15 N. Y. Supp. 435, 39 N. Y. St. 743.

64. **Idaho.**—*People v. Armstrong*, 2 Idaho 298, 13 Pac. 342. **Minn.**—*Riley v. Chicago, M. & St. P. R. Co.*, 67 Minn. 165, 69 N. W. 718. **Mont.**—*State v. Groom*, 49 Mont. 354, 141 Pac. 858; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.

65. See the statutes.

66. **Ariz.**—Pen. Code, §1019. **Cal.** Pen. Code, §1061. **Mont.**—Rev. Code, §9249. **Nev.**—Rev. Laws, §7135. **N. Y.** Code Crim. Proc., §364. **N. D.**—Rev. Code, §9957. **Okla.**—Rev. Laws, §5844. **S. D.**—Code Crim. Proc., §323. **Utah.** Comp. Laws, §4822.

67. *Montgomery v. State*, 53 Fla. 115, 42 So. 894; *Gardner v. Turner*, 9 Johns. (N. Y.) 260. See *supra*, VII, E, 3, e, (III).

[a] **Triers Appointed Only After Denial.**—*The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

68. *Riley v. Chicago, M. & St. P. R. Co.*, 67 Minn. 165, 69 N. W. 718; *The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

So termed by statute in many states, see citations in next note.

69. **Ariz.**—Pen. Code, §1021. **Cal.** Pen. Code, §1063. **Idaho.**—Rev. Codes, §7823. **Mont.**—Rev. Code, §9251. **Nev.** Rev. Laws, §7137. **N. Y.**—Code Crim. Proc., §366. **N. D.**—Rev. Code, §9909. **Okla.**—Rev. Laws, §5846. **S. D.**—Code Crim. Proc., §325. **Utah.**—Comp. Laws, §4824.

70. *The King v. Edmonds*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

71. *Montgomery v. State*, 53 Fla. 115, 42 So. 894.

[a] **Permitted Nunc Pro Tunc After Peremptory Used.**—The court permitted counsel for the people to put in an answer and demurrer nunc pro tunc after the court had sustained an oral demurrer. Having at the same time offered to defendant the right to reply and to introduce evidence which was declined, there was no error, though defendant had meanwhile used one per-

lenger to reply,⁷² and the statutes permit the court to allow a denial after overruling an exception.⁷³

f. *Examination and Evidence.*⁷⁴ — (I.) **Burden of Proof and Presumptions.** — On challenge to the array the challenger must stand ready to prove his challenge by proof of the illegality,⁷⁵ and a challenge is properly overruled where no evidence is offered.⁷⁶ The burden of proving the facts alleged as ground of challenge is on the challenger,⁷⁷ and he must make it affirmatively appear that the grounds for challenge exist,⁷⁸ for in the absence of any showing to the contrary the presumption always is that the officials properly performed their duties.⁷⁹ But neglect or misconduct of the officer having been shown,

emptory challenge. *McDonald v. People*, 25 Ill. App. 350.

72. *McDonald v. People*, 25 Ill. App. 350.

73. See *People v. Damron*, 160 App. Div. 424, 145 N. Y. Supp. 239, *affirmed* in 212 N. Y. 256, 106 N. E. 67, and the statutes.

74. **Necessity that prisoner be present** at examination of jurors, see the title "Trial."

75. *Cal.*—*People v. Brown*, 48 Cal. 253. *Fla.*—*Montgomery v. State*, 53 Fla. 115, 42 So. 894; *Tarrance v. State*, 43 Fla. 446, 30 So. 685; *Savage v. State*, 18 Fla. 909. *Ill.*—*Borrelli v. People*, 164 Ill. 549, 45 N. E. 1024; *DeKalb, etc. R. Co. v. Rowell*, 74 Ill. App. 191. *La.*—*State v. Stewart*, 117 La. 476, 41 So. 798. *Mo.*—*State v. Craft*, 164 Mo. 631, 65 S. W. 280. *Mont.*—*State v. Jones*, 32 Mont. 442, 80 Pac. 1095. *N. Y.*—*People v. Borgstrom*, 178 N. Y. 254, 70 N. E. 780. *Eng.*—*Rex v. Savage*, 1 Moody C. C. 51.

[a] **There must be a formal offer to prove** by the testimony of a witness named, or by affidavits, and the witness must be present and called, or leave to call him asked. *State v. Bowser*, 21 Mont. 133, 53 Pac. 179.

76. *Ia.*—*State v. Linde*, 54 Iowa 139, 6 N. W. 168. *Mont.*—*State v. Bowser*, 21 Mont. 133, 53 Pac. 179. *S. C.*—*State v. Brownfield*, 60 S. C. 509, 39 S. E. 2. *Tex.*—*Forrester v. State*, 73 Tex. Crim. 61, 163 S. W. 87.

[a] **It is the court's duty to overrule** the challenge when no offer is made to prove the cause alleged. *State v. Cameron*, 2 Pin. (Wis.) 490, 2 Chand. 172.

[b] **Challenger Estopped by Silence.** Where one of the grounds of challenge was that the notice of draw-

ing had not been published, it having been stated in open court that the notice had been published, the challenger is estopped from raising the question that it was not proved by his silence. *Garcia v. State* (Ariz.), 162 Pac. 605.

77. *State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *Maddox v. State* (Okla. Crim.), 158 Pac. 883.

78. *Ala.*—*Ragland v. State*, 187 Ala. 5, 65 So. 776. *Kan.*—*State v. Whisner*, 35 Kan. 271, 10 Pac. 852. *La.*—*State v. Green*, 49 La. Ann. 60, 21 So. 124. *Mich.*—*People v. Coughlin*, 67 Mich. 466, 35 N. W. 72. *N. Y.*—*People v. Wilber*, 61 Hun 620, 15 N. Y. Supp. 435, 39 N. Y. St. 743.

79. *Cal.*—*People v. Sowell*, 145 Cal. 292, 78 Pac. 717. *Mich.*—*People v. Coughlin*, 67 Mich. 466, 35 N. W. 72. *Miss.*—*Cody v. State*, 3 How. 27. *Mont.*—*State v. Groom*, 49 Mont. 354, 141 Pac. 858; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179. *Neb.*—*Davis v. State*, 31 Neb. 247, 47 N. W. 854. *S. C.*—*State v. Weaver*, 58 S. C. 106, 36 S. E. 499; *State v. Toland*, 36 S. C. 515, 15 S. E. 599.

[a] **Presumed that the regular panel was exhausted** or engaged in other causes and so it was competent to summon bystanders. *State v. Jones*, 61 Mo. 232.

[b] **Presumed No Improper Selection.**—*Watha v. State*, 14 Ohio Cir. Ct. (N. S.) 145.

[c] **Presumed law was followed** as to time when jury list was made up. *Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965.

[d] **Presumed that officer was duly sworn** before he summoned jurors. *State v. Riddle*, 179 Mo. 287, 78 S. W. 606.

Presumptions in favor of court's rul-

the burden shifts to the other party to show facts which defeat the challenge.⁸⁰

(II.) **Motion and Affidavits as Proof.**—The averments of the motion or challenge are not themselves evidence of the truth of the facts alleged,⁸¹ and it has been held that the *ex parte* affidavit or verification in support of the motion or challenge, is not evidence.⁸² But the proof may be by affidavits or by oral evidence,⁸³ and it has been said that the better practice is to make the proof by affidavits,⁸⁴ and it is within the discretion of the trial court to order the proof to be made in that form.⁸⁵

(III.) **Admissibility of Evidence.**—Where the opposite party demurs the challenging party cannot introduce any evidence.⁸⁶ Otherwise, however, the challenger must be given an opportunity to prove the facts upon which his challenge is based,⁸⁷ except where no sufficient grounds are alleged.⁸⁸ So it is reversible error to refuse to receive evidence on the question of discrimination, when properly raised by

ings on the challenge, see *infra*, VII, E, 3, h, (I).

80. *State v. Groom*, 49 Mont. 354, 141 Pac. 858, assuming that the good faith of the sheriff is a defense to his neglect the challenger need not prove the negative.

81. *State v. Stewart*, 117 La. 476, 41 So. 798; *State v. Craft*, 164 Mo. 631, 65 S. W. 280; *State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

[a] **Where the motion is not properly verified** so that it may be used as an affidavit as well as a pleading, there is no evidence before the court on which it can set aside the panel. *Weeping Water Electric Light Co. v. Haldeman*, 35 Neb. 139, 52 N. W. 892.

82. *State v. Baptiste*, 105 La. 661, 30 So. 147; *Gunnell v. State*, 21 Wyo. 125, 128 Pac. 512. But see *Weeping Water Electric L. Co. v. Haldeman*, 35 Neb. 139, 52 N. W. 892.

[a] **Verification of motion by defendant** is not sufficient. *Rivers v. State*, 117 Tenn. 235, 96 S. W. 956.

[b] **Verification on Information and Belief.**—Challenge to array is not sustained by proof where there is nothing but defendant's verification and that is only on "information and belief." *Forrester v. State*, 73 Tex. Crim. 61, 163 S. W. 87.

[c] **Reason for Rule.**—The challenge is the pleading and its averments must be proved by evidence. So the defendant by merely incorporating his own affidavit into his statement of grounds of challenge cannot make it

evidence of the facts averred. *People v. Brown*, 48 Cal. 253.

Necessity of verifying challenge, see *supra*, VII, E, 3, e, (ii).

83. *Borrelli v. People*, 164 Ill. 549, 45 N. E. 1024; *State v. Bowser*, 21 Mont. 133, 53 Pac. 179.

[a] **Unsworn telephone message to court from juror's office**, that juror had left the state, is mere hearsay and could furnish no legal basis for finding to that effect. *Ware v. State*, 12 Ala. App. 101, 67 So. 763.

See *infra*, VII, E, 3, f, (III).

84. *Borrelli v. People*, 164 Ill. 549, 45 N. E. 1024.

85. *State v. Linde*, 54 Iowa 139, 6 N. W. 168, statute does not prescribe method.

[a] **Reducing Oral Testimony to Affidavit.**—The challenge having been allowed on the sheriff's oral testimony showing his bias, the defendant is in no manner injured by the filing of an affidavit by the sheriff, acting under the court's order, recording his testimony, even if it be conceded that such filing was an irregularity. *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

86. *Montgomery v. State*, 53 Fla. 115, 42 So. 894.

87. *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969.

[a] **Error Harmless Where Subsequent Opportunity Declined.**—*People v. Lee*, 1 Cal. App. 169, 81 Pac. 969.

88. *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937.

challenge to the panel.⁸⁹ The evidence offered is not admissible unless it applies specifically to the selection of the panel which is sought to be quashed,⁹⁰ and is germane to the irregularity complained of.⁹¹ By statute in some states the officers whose irregularity is complained of may be examined,⁹² though their evidence be contradictory of the certificate.⁹³ Under these statutes the judge who ordered the drawing of the jury may be called as a witness when the regularity of the drawing is questioned,⁹⁴ and the clerk or other officers present at the drawing may be examined.⁹⁵ And where the challenge is based on the statute making the officer incompetent when he could not act as a juror, he may be examined as to his competency.⁹⁶ In some jurisdictions, however, the jury commissioners cannot be heard to testify in contradiction of their official return,⁹⁷ but the oral evidence of the clerk as to just what occurred may be received.⁹⁸

(IV.) **Sufficiency of Evidence.**—The challenge must be proved to the satisfaction of the court.⁹⁹

89. *Smith v. State*, 4 Okla. Crim. 328, 111 Pac. 960.

90. *State v. Thomas*, 250 Mo. 189, 157 S. W. 330.

[a] Where discrimination against negroes was claimed, it was proper to refuse to receive the testimony of nine hundred negroes that they were in all respects qualified for jury service but had never been drawn. While that tended to prove discrimination in the past it did not tend to prove discrimination in the particular panel. *State v. Thomas*, 250 Mo. 189, 157 S. W. 330.

91. *Haywood v. State*, 61 Tex. Crim. 92, 134 S. W. 218.

92. See *State v. Linde*, 54 Iowa 139, 6 N. W. 168, and the statutes.

93. *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *State v. Gut*, 13 Minn. 341.

94. *State v. District Court*, 34 Mont. 107, 85 Pac. 870.

[a] **Minutes of Secretary Are Not Conclusive.**—The minutes of the secretary of the judges being admittedly incomplete the court not only has inherent power to correct them, but the minutes are not conclusive on the challenge to the panel and the court trying the challenge may examine the presiding judge who was himself an actor in the facts being tried. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

95. *State v. Brecht*, 41 Minn. 50, 42 N. W. 602; *State v. Gut*, 13 Minn. 341.

96. *Koontz v. State*, 10 Okla. Crim. 553, 139 Pac. 842.

[a] **Should Not Be Confined to General Questions.**—On the trial of the challenge to the panel based on the

bias of the elisor who summoned it, it is reversible error to confine the questions to such general inquiries as "Have you formed or expressed an opinion," or "Have you a bias," but counsel should have been permitted to ask relevant questions bringing out the facts just as in an examination of a prospective juror. It is the judgment of the court upon the facts—not the elisor's opinion that is in issue. *People v. Teshara*, 134 Cal. 542, 66 Pac. 798.

97. *State v. Johnson*, 116 La. 856, 41 So. 117; *State v. Revells*, 31 La. Ann. 387.

98. *State v. Nockum*, 41 La. Ann. 689, 6 So. 729; *State v. Riley*, 41 La. Ann. 693, 6 So. 730.

99. *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

[a] **Evidence Insufficient To Show Juror Not Summoned.**—*Stewart v. State*, 137 Ala. 33, 34 So. 818.

[b] **Improper Apportionment Among Precincts Not Shown.**—A list of votes cast in the several precincts is not enough without an allegation that those voting were all the persons therein competent to serve as jurors. *Clark v. Saline*, 9 Neb. 516, 4 N. W. 246.

[c] **That no jurors were selected from a certain township is not sufficiently shown by proof that the list does not contain names from a certain town which did not comprise the whole township.** *People v. Searcey*, 121 Cal. 1, 53 Pac. 359, 41 L. R. A. 157.

[d] **Must Show Presence of Qualified Jurors in Omitted District.**—Showing qualified voters is not alone suf-

(V.) **Re-examination.**—After overruling a challenge to one panel based on the officer's partiality, the court, having permitted a full examination, will not permit a re-examination as to a second special panel unless further proof as to the officer's prejudice is offered.¹

g. **Trial and Determination.**—(I.) **By What Tribunal.**—At common law the challenge to the array, so far as it involved only a question of law, was tried by the court,² but if an issue of fact was formed the trial was by triers.³ The modern practice is for the court to try both the issues of law and fact,⁴ and it is frequently so provided by

ficient. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717.

[e] **Evidence Conclusive That Commissioners Not Prejudiced.**—Proof that the jurors were selected before the murder of which defendant was accused was committed is conclusive evidence that the commissioners were not prejudiced against defendant in their selection. *Cavitt v. State*, 15 Tex. App. 190.

[f] **The mere fact that the list contains only names of white men is no evidence of discrimination on part of the jury commissioners.** *Ala.*—*Ragland v. State*, 187 Ala. 5, 65 So. 776. *La.* *State v. West*, 116 La. 626, 40 So. 920; *State v. Baptiste*, 105 La. 661, 30 So. 147; *State v. Casey*, 44 La. Ann. 969, 11 So. 583. *N. C.*—*State v. Sloan*, 97 N. C. 499, 2 S. E. 666. *Tex.*—*Hemp-hill v. State*, 75 Tex. Crim. 63, 170 S. W. 154; *Hubbard v. State*, 43 Tex. Crim. 564, 67 S. W. 413. *Va.*—*Lawrence v. Com.*, 81 Va. 484.

[g] **That negroes (1) were wilfully excluded is not sufficiently shown by the mere affidavit of defendant verifying his motion to quash.** *Rivers v. State*, 117 Tenn. 235, 96 S. W. 956. (2) While in a close case the evidence that no negro had been selected or impaneled on either a grand or petit jury might have weight on motion to quash the special venire for race discrimination, where it is shown by the direct testimony of the officers who made up the list that there was no discrimination, such evidence cannot be given weight. *Pollard v. State*, 58 Tex. Crim. 299, 125 S. W. 390. (3) Affidavits of colored citizens to the effect that they have never seen or heard of colored men being called on juries for a specified number of years is not sufficient to show such were not drawn. *Ransom v. State*, 116 Tenn. 355, 96 S. W. 953.

[h] **That the court selected colored men to the exclusion of white men, is not shown merely because on overruling the motion to quash the venire the court gave as one of his reasons the fact that both the prisoner and the prosecutrix were colored coupled with the additional reason that the venire was composed of intelligent colored men qualified to serve.** *Coleman v. Com.*, 84 Va. 1, 3 S. E. 878.

1. *State v. Hayes*, 23 S. D. 596, 122 N. W. 652.

2. *Ga.*—*Copenhagen v. State*, 14 Ga. 22. *Mass.*—*Com. v. Walsh*, 124 Mass. 32. *Wis.*—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

3. *Ga.*—*Copenhagen v. State*, 14 Ga. 22. *Mass.*—*Com. v. Walsh*, 124 Mass. 32. *Wis.*—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[a] **Common-Law Practice.**—(1) If the facts are denied two triers are appointed out of the panel or perhaps two persons named by the court. If triers pronounce the causes of challenge unfounded, the trial proceeds. If the facts are admitted, but are deemed insufficient, the court adjudgeth and either quashes the array or overrules the challenge. *Gardner v. Turner*, 9 Johns. (N. Y.) 260, citing *Coke Litt.* 158. (2) *Ullman v. State*, 124 Wis. 602, 103 N. W. 6, it is said the triers were appointed by the court. But compare *Lee v. Evalul*, 1 N. J. L. 283, where it is said the triers must come from the panel unless there are special objections when the court may appoint other persons.

4. *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127; *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937.

[a] **All issues, whether of law or fact, on an objection to the entire panel are now triable summarily by the court, whether the challenge is regulated by statute or is a mere matter**

statute.⁵ The judge is not disqualified to try the motion to quash merely because he was the one who selected the panel.⁶

(II.) **Procedure at Trial.**—The challenge to the array was tried publicly, at common law.⁷ The court should hear the matter on its merits,⁸ and it seems that counsel should ordinarily be permitted to argue.⁹ The issues should be tried summarily.¹⁰ Where the challenge is based on the officer's not having the qualifications of a juror the statutes frequently provide that the challenge shall be determined in the same manner as if made to a juror.¹¹

(III.) **Decision and Procedure Thereupon.**—Where there is a demurrer or exception the court should either overrule or sustain it.¹² The proper practice where there is a denial is for the court to hear testimony and try the question of fact presented,¹³ and the statute frequently so provides;¹⁴ but the mere fact that a denial is filed does not compel the court to try the question of fact where an exception would lie.¹⁵ If the evidence fails to show the existence of the facts on which the challenge is based, it is properly overruled.¹⁶ If the

of practice regulated by the court. *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[b] That is the custom in this state and in New England. No exception lies because triers were not appointed for the purpose. *Com. v. Walsh*, 124 Mass. 32.

5. **U. S.**—Rev. St., §819. **Ariz.**—Pen. Code, §1021. **Ark.**—Kirby's Dig., §§2369, 4534. **Cal.**—Pen. Code, §1063. **Ga.**—Pen. Code, §998. **Ky.**—Code Crim. Proc., §212. **Minn.**—Rev. Laws, 1905, §§5384, 5385. **Mont.**—Rev. Code, §6742. **N. Y.**—Code Civ. Proc., §1180. **N. D.**—Rev. Code, §9977. **Okla.**—Rev. Laws, §5863. **S. D.**—Code Crim. Proc., §343. **Tex.**—Vernon Sayles' Civ. St., art. 5191; Code Crim. Proc., art. 664. **Utah.**—Comp. Law, §4824. **Wash.**—Rem. & Bal. Code, §2140.

In Colorado is by court or by triers appointed by court, see *Mills St.*, §4259.

6. *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

7. *Epps v. State*, 19 Ga. 102.

8. *Riley v. Chicago, M. & St. P. Ry. Co.*, 67 Minn. 165, 69 N. W. 718.

9. See *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

10. *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

11. See the statutes.

Determination of challenges to individual jurors, see *infra*, VII, E, 4, k.

12. **Cal.**—*People v. Enwright*, 134 Cal. 527, 66 Pac. 726, action by court held to amount to a ruling. **Fla.**

Montgomery v. State, 53 Fla. 115, 42 So. 894. **Mont.**—*State v. Groom*, 49 Mont. 354, 141 Pac. 858.

[a] **Sustaining Demurrer Disallows the Challenge.**—The action of the court in sustaining or allowing a demurrer or exception and impaneling the jury amounts to a disallowance of the challenge. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.

13. *State v. District Court*, 34 Mont. 107, 85 Pac. 870; *State v. Jones*, 32 Mont. 442, 80 Pac. 1095; *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937.

[a] **The regular practice is for the counsel for state, on defendant's challenge being made to the panel, to either except to it, or deny it; or having first excepted, and that having been disallowed, to deny the facts alleged in the challenge; and the court should then proceed to try the question of fact.** *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

14. See the statutes.

15. *People v. Wallace*, 101 Cal. 281, 25 Pac. 862, court may simply overrule the challenge.

[a] **Where Challenge Would Not Lie if Facts Established.**—There is no error in summarily overruling the challenge where even if the facts alleged were established the challenge could not be sustained. *Wood v. State*, 3 Okla. Crim. 553, 107 Pac. 937.

16. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

venire is found bad, the persons comprising it are no longer jurymen and should be discharged from further attendance,¹⁷ and notwithstanding an individual juror may have been examined and found qualified he should be discharged,¹⁸ and the proper practice is to set aside the whole panel and not merely the individuals to the improper summoning of whom the challenge was directed.¹⁹

By statute, in many states, on allowance of the challenge the jury is discharged as to that case while on disallowance the jury is impaneled,²⁰ but in other states if the irregularity was in selecting or summoning, the standing jurors are excluded and new jurors summoned, while if it is in the drawing, the names are replaced and redrawn.²¹ After the venire has once been quashed, it cannot be held good in another case.²²

The proper practice on quashing the venire is to continue the session for the transaction of such business as may not require a jury.²³

h. *Review of Ruling on Challenge.*²⁴ — (I.) **Right to and Extent of Review.** — It has been held that where the trial has been by the court, there can be no review of his finding of fact that the ground for challenge did not exist,²⁵ at least where the evidence is conflicting,²⁶ but

Burden of proof and presumptions, see *supra*, VII, E, 3, f, (I).

Sufficiency of evidence, see *supra*, VII, E, 3, f, (IV).

17. La.—*State v. Revells*, 31 La. Ann. 387. Mich.—*Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505. N. C. *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

[a] Where challenge to regular panel has been confessed by the state, the effect is to discharge the entire panel, and it is then proper to resort to a special venire previously ordered the same as if the regular panel had all been excused on individual challenge. *State v. Owen*, 61 N. C. 425.

18. *Muscoe v. Com.*, 87 Va. 460, 12 S. E. 790.

19. *Epes' Case*, 5 Gratt. (46 Va.) 676. See *Vernon Sayles' Civ. St. (Tex.)*, art. 5192; *Code Crim. Proc.*, art. 665.

20. *Ariz.*—*Pen. Code*, §1022. *Cal. Pen. Code*, §1065. *Idaho.*—*Rev. Code*, §7825. *Ia.*—*Code*, §3682. *Mont.*—*Rev. Code*, §9252. *Neu.*—*Rev. Laws*, §7139. *N. Y.*—*Code Crim. Proc.*, §368. *N. D.*—*Rev. Code*, §9962. *Okla.*—*Rev. Laws*, §5849. *S. D.*—*Code Crim. Proc.*, §328. *Utah.*—*Comp. Laws*, §§3142, 4825.

21. *Kirby's Dig. (Ark.)*, §2356; *Code Crim. Proc. (Ky.)*, §200.

22. *State v. Smith*, 31 La. Ann. 406;

State v. Revells, 31 La. Ann. 387.

[a] Where the challenge was by the same party, defendant in another case, he is estopped to question the right of the judge to sustain the challenge and discharge the entire panel. *Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505.

23. *State v. Vance*, 31 La. Ann. 398, the term does not lapse.

24. Habeas corpus not a proper method of review, see *supra*, VII, E, 3, b, (X), (E), note 53 [b].

25. *Johnson v. State*, 59 N. J. L. 271, 35 Atl. 787, question of fact why no colored men were summoned.

[a] **In Absence of Abuse of Discretion.**—The question being as to the impartiality of the sheriff, for actual bias, the decision of the trial court overruling a challenge to the panel will not be disturbed in the absence of an abuse of discretion. *State v. Hayes*, 23 S. D. 596, 122 N. W. 652, followed in *State v. Walsh*, 25 S. D. 30, 125 N. W. 295.

26. *People v. Teshara*, 134 Cal. 542, 66 Pac. 798; *People v. Hartman*, 130 Cal. 487, 62 Pac. 823.

[a] **If affidavits are contradictory** the supreme court follows the custom of not interfering with rulings of the trial court made on affidavits pro and con. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

where the facts are undisputed the only question is one of law.²⁷ By statute the decision of the trial court has been made not subject to exception in some states.²⁸ On appeal the court will not consider objections which were not included in the challenge as made below,²⁹ but it may consider a challenge which was not in form sufficiently specific.³⁰ Where the parties have treated an exception as raising an issue of fact, the reviewing court will treat the matter as though issue had been joined by denial,³¹ and the fact that no exception was filed does not make it error for the court to pass upon the challenge as though it had been excepted to,³² nor is the summary overruling of a challenge which set forth no legal objection, prejudicial merely because no replication is filed.³³

The presumption is that the trial court had before it the proper evidence upon which it based its ruling on the challenge,³⁴ and that the circumstances warranted its ruling;³⁵ the party claiming error must make it appear from the record,³⁶ and unless it affirmatively ap-

27. *Louisville & N. R. Co. v. King*, 161 Ky. 324, 170 S. W. 938.

28. *Alderson v. Com.*, 25 Ky. L. Rep. 32, 74 S. W. 679.

[a] **Examples Under Statute.**—(1) Construing such a statute, the court in *Deaton v. Com.*, 157 Ky. 308, 163 S. W. 204, following *Daniel v. Com.*, 154 Ky. 601, 157 S. W. 1127, holds that while the action of the trial court in selecting jurymen himself instead of leaving it to the sheriff was not proper, it is not reviewable. See also *Hendrickson v. Com.*, 146 Ky. 742, 143 S. W. 433, where the error complained of was in not drawing the names from the wheel or drum. (2) In *Curtis v. Com.*, 110 Ky. 845, 62 S. W. 886, the rule was followed where the trial court clearly committed error in drawing the jury from a wrong list.

29. *Cal.*—*People v. Enwright*, 134 Cal. 527, 66 Pac. 726 (service by coroner instead of sheriff); *People v. Richards*, 1 Cal. App. 566, 82 Pac. 691. *Mich.*—*Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505. *Neb.*—*Davis v. State*, 31 Neb. 247, 47 N. W. 854, that there was no full panel not questioned by objection to inequality in apportionment of jurors to precincts.

30. *People v. Enwright*, 134 Cal. 527, 66 Pac. 726, challenge was not objected to and record showed what was complained of.

31. *State v. Groom*, 49 Mont. 354, 141 Pac. 858.

32. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

[a] **Action of trial court in overruling a challenge to the panel, insuffi-**

cient on its face is not necessarily vitiated by fact that record does not show any exception. *People v. Dameron*, 160 App. Div. 424, 145 N. Y. Supp. 239 (*construing Code Crim. Proc.*, §§361-368), *affirmed* in 212 N. Y. 256, 106 N. E. 67.

33. *Provident Inst. for Savings v. Burnham*, 128 Mass. 458.

34. **III.**—*People v. Board of Supervisors*, 23 Ill. App. 386. *Mo.*—*Flournoy v. Phoenix Brick & Const. Co.*, 159 Mo. App. 376, 140 S. W. 752. *Wash.* *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

[a] **Where no evidence in support of the challenge appears in the record, the ruling of the court overruling the challenge will not be reversed. If the denial was error, it must affirmatively appear in the record.** *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

Presumption that officers performed their duties, see *supra*, VII, E, 3, f, (1).

35. *State v. Gleason*, 88 Mo. 582, to uphold the overruling of the challenge, while it will be assumed that there was a regular panel which had not been discharged, it will not be assumed that the regular jurors were not all engaged in other cases.

[a] **Presumption That Jury Was Accepted.**—If no challenge in writing appears it is presumed the jury was accepted, in both civil and criminal cases. *Suttle v. Batie*, 1 Iowa 141.

36. *Haw.*—*Territory v. Johnson*, 16 Hawaii 743. *Neb.*—*Davis v. State*, 31 Neb. 247, 47 N. W. 854. *Pa.*—*Klem-*

pears otherwise, it will be presumed that the challenge was not made in time, where the court overruled it.³⁷

(II.) **Prerequisites to Review.**—Where the practice requires an exception to the court's rulings as a prerequisite to an appeal, the exception must be made to the ruling on the challenge,³⁸ and a bill of exceptions is also necessary in some states³⁹ where the challenge does not become a part of the record proper unless it is inserted in the bill of exceptions.⁴⁰ In others, a transcript of the record as to the proceedings on the selection of the jury, when properly certified, may be considered independently of any bill of exceptions.⁴¹

(III.) **Decision on Review.**—Though it has been held to be reversible error to overrule a proper challenge to the array,⁴² the more usual holding is that refusal to quash the panel is not ground for reversal in the absence of some positive injury sustained by the challenger,⁴³

mer v. Mount Penn Gravity R. Co., 163 Pa. 521, 30 Atl. 274.

See *infra*, VII, E, 3, h, (II).

[a] **Case Must Show Evidence or Offer To Introduce.**—To review the action of the trial court in overruling a challenge to the array the case must show that the challenger introduced evidence in support of his challenge or offered to introduce some which was refused. *State v. Brownfield*, 60 S. C. 509, 39 S. E. 2.

[b] **Failure To Show Who Selected Jurors.**—Where the bill of exceptions fails to show whether the jury was selected by jury commissioners or not, and in the absence of any such statement in the record, it will be presumed that the jury was organized according to law and drawn by the commissioners. *Ross v. State*, 56 Tex. Crim. 275, 118 S. W. 1034.

37. *Ryan v. State*, 100 Ala. 105, 14 So. 766; *Delmont v. State*, 15 Wyo. 271, 86 Pac. 623, 1102.

38. *Mo.*—*State v. Bell*, 166 Mo. 106, 65 S. W. 736. *Wash.*—*State v. Vance*, 29 Wash. 435, 70 Pac. 34. *Wyo.* *Haines v. Territory*, 3 Wyo. 167, 13 Pac. 8.

See the title "Objections and Exceptions."

39. *State v. Bell*, 166 Mo. 106, 65 S. W. 736; *Warden v. State*, 24 Ohio St. 143. See generally the title "Bills of Exceptions."

[a] **Nothing To Review Where No Bill or Other Showing.**—*Warden v. State*, 24 Ohio St. 143.

40. *State v. Brennan*, 164 Mo. 487, 65 S. W. 325; *Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[a] **Since the return of the venire** is no part of the "minutes of the court" it is not part of the judgment roll, and hence is not properly part of the record on appeal unless incorporated in the bill of exceptions. *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362.

41. *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

[a] **Journal Entry Sufficient.**—*State v. Vance*, 29 Wash. 435, 70 Pac. 34.

42. *State v. Groom*, 49 Mont. 354, 141 Pac. 858; *Moore v. Navassa Guano Co.*, 130 N. C. 229, 41 S. E. 293.

43. *Colo.*—*Boykin v. People*, 22 Colo. 496, 45 Pac. 419. *Ill.*—*Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *People v. Madison County*, 125 Ill. 334, 17 N. E. 802; *Torpedo Top Co. v. Royal Ins. Co.*, 162 Ill. App. 338 (*following Wilhelm v. People*, 72 Ill. 468); *Yunker v. Marshall*, 65 Ill. App. 667. *Utah.* *Whipple v. Preece*, 24 Utah 364, 67 Pac. 1072, sheriff who summoned jurors, a party to the action.

[a] **Statutory Rule.**—N. Y. Code Crim. Proc., §455; S. D. Laws, 1913, ch. 280, §1.

[b] **Error Harmless Where None of Panel Served.**—Though the court erroneously overruled a motion to quash the regular panel the error is harmless where the jury was selected from a special venire called at defendant's request under the statute, and, pursuant to the court's order, no one of those called on the regular panel was called on the special venire nor permitted to serve on the jury. *Cook v. State*, 90 Miss. 137, 43 So. 618.

[c] **Failure To Require Written**

and the court's discretion in granting the motion to quash should not be interfered with unless the record shows prejudice to the appellant.⁴⁴

4. Challenge to Individual for Cause.—a. *Nature and Right.*⁴⁵
(1.) *In General.*—The right to participate in the selection of a jury by interposing challenges for cause is an indispensable element of the right to trial by jury.⁴⁶ The right exists in condemnation proceedings,⁴⁷ and where a struck jury has been demanded.⁴⁸ It exists in misdemeanor as well as in capital cases,⁴⁹ and is allowed on the trial of preliminary as well as final issues.⁵⁰ The statutes specifically provide, in many states, that either party may challenge for cause,⁵¹ and the right clearly belongs to the commonwealth as well as to the accused,⁵²

Challenge Harmless.—*Ullman v. State*, 124 Wis. 602, 103 N. W. 6.

[d] **No Prejudice Where Jurors Fair and Impartial.**—The overruling of a motion to quash the venire is not reversible error when based on the impartiality of the officer who summoned the venire, and it does not appear that the jurors who were finally selected were not fair and impartial. *Gunnell v. State*, 21 Wyo. 125, 128 Pac. 512.

[e] **Error Harmless Where Verdict Directed.**—Error in method of calling the jury is harmless where the court directed a verdict. *State v. Trimbell*, 12 Wash. 440, 41 Pac. 183.

44. *Jones v. Springfield Traction Co.*, 137 Mo. App. 408, 118 S. W. 675.

[a] **Party Estopped To Deny Venire Irregular.**—A venire facias having been quashed as irregular, on motion of prisoner's counsel, he is estopped to set up that venire was not irregular. *Muscoe v. Com.*, 87 Va. 460, 12 S. E. 790.

[b] **Record Showing Two Lists.** The overruling of a challenge to the array based upon the claim that the jurors were drawn from an unauthorized list, will be upheld where it appears that two lists were made, and that at least one was authorized and the record does not show from which list the jurors were actually drawn. *People v. Hubert*, 251 Ill. 514, 96 N. E. 294.

45. See also *supra*, VII, E, 1, e.

46. *Wabash R. Co. v. Coon Run Drainage, etc. Dist.*, 194 Ill. 310, 62 N. E. 679.

[a] "The law guarantees . . . the right to challenge for cause." *Schufflin v. State*, 20 Ohio St. 233.

[b] **Common-Law Right.**—"The right of challenge comes from the common law with the trial by jury itself,

and has always been held essential to the fairness of trial by jury." *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. ed. 1011. See *Lamb v. State*, 36 Wis. 424.

47. *Wabash R. Co. v. Coon Run Drainage, etc. Dist.*, 194 Ill. 310, 62 N. E. 679; *Kundinger v. City of Saginaw*, 59 Mich. 355, 26 N. W. 634. *Compare In re Convers' Appeal*, 18 Mich. 459, where the right is conceded in condemnation cases, though the right to challenge peremptorily is denied therein.

Trial by jury in condemnation proceedings, see 8 STANDARD PROC. 317, et seq.

48. *Davis v. Hunter*, 7 Ala. 135.

As to special or struck jury, see *infra*, VII, G.

49. *State v. Fulton*, 66 N. C. 632.

50. *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

51. See generally the statutes, and *Ariz.*—Civ. Code, 1913, §3557. *Ark.*—Kirby's Dig., 1904, §2372. *Cal.*—Code Civ. Proc., §601. *Haw.*—Rev. Laws, §1789. *Mont.*—Rev. Code, 1907, §9259. *Nev.*—Rev. Laws, 1912, §5205. *N. D.*—Comp. Laws, 1913, §7615. *Ore.*—Lord's Laws, 1910, §125. *S. D.*—Code Civ. Proc., 1910, §251. *Utah.*—Comp. Laws, 1907, §3137. *Wash.*—Rem. & Bal. Code, 1910, §324.

52. *McFadden v. Com.*, 23 Pa. 12, 62 Am. Dec. 308; *Jewell v. Com.*, 22 Pa. 94; *State v. Stalmaker*, 2 Brev. (S. C.) 1; *State v. Barrontine*, 2 Nott & McC. (S. C.) 553.

[a] **The prisoner is entitled to aid of counsel in selecting the jury.** *State v. Cummings*, 5 La. Ann. 330. Right of argument on examination, see *infra*, VII, E, 4, k.

the statutes specifically so providing.⁵³ The right to challenge for cause never becomes exhausted in the same sense as the right to peremptory challenges.⁵⁴

(II.) **Repetition of Challenge.**—A juror cannot be challenged a second time for matter which might have been proved or given in evidence on the trial of the first challenge.⁵⁵ One who challenges to the array cannot afterwards challenge to the polls for what would have been a good challenge to the array;⁵⁶ nor can one upon his challenge for principal cause being overruled, assign the same facts on a challenge to the favor.⁵⁷ Under some statutes, however, the court may, in its discretion, permit a challenge to be renewed.⁵⁸

(III.) **Withdrawal of Challenge.**—It is proper to refuse to permit a challenge to be withdrawn;⁵⁹ and one cannot withdraw a challenge for cause after it has been found true;⁶⁰ nor can it be withdrawn as a matter of right after it has been admitted by the other side.⁶¹

(IV.) **Grounds.**—This subject is fully treated elsewhere in this title.⁶²

b. **Waiver of Right To Challenge.**⁶³—(I.) **Right May Be Waived.**⁶⁴ The right to challenge for cause is clearly one which may be waived in civil actions,⁶⁵ and by the weight of modern authority the right

53. See generally the statutes.

54. Ind.—*Alexander v. Dunn*, 5 Ind. 122. Ia.—*Suttle v. Batie*, 1 Iowa 141. Miss.—*Williams v. State*, 37 Miss. 407. Ohio.—*Hooker v. State*, 4 Ohio 348, "may be exercised indefinitely." R. I. *Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. Tex. See also *Cooley v. State*, 38 Tex. 636; *Loggins v. State*, 12 Tex. App. 65.

[a] **Statute so Provides.**—La.—Act 135, 1898, §14. Miss.—Code, 1906, §788. Vt.—Pub. St., §§1580, 2274, 2275.

Time to challenge, see *infra*, VII, E, 4, c.

Waiver of right, see *infra*, VII, E, 4, b.

As to peremptory challenges, see *infra*, VII, E, 5.

55. *Mann v. Glover*, 14 N. J. L. 195, but if challenge be for new matter it may be tried.

56. *Mann v. Glover*, 14 N. J. L. 195.

Right to challenge to polls after challenge to array, see *infra*, VII, E, 4, b, (II).

57. *Mann v. Glover*, 14 N. J. L. 195, that is he cannot gain any new right by merely changing the name of his challenge.

58. *State v. Dumphey*, 4 Minn. 438, challenge made and at once withdrawn may be permitted to be renewed before jury completed.

59. *State v. Allen*, 46 Conn. 531.

60. *State v. Allen*, 46 Conn. 531.

[a] **Rule Based Upon Two Reasons.** The court has no power to compel the juror to act. And the cause assigned having been the juror's expressed opinion, he would be likely to be controlled by his desire to vindicate himself. *State v. Allen*, 46 Conn. 531.

61. *State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Lautenschlager*, 22 Minn. 514.

[a] The court has discretion to refuse leave to withdraw, and that discretion cannot be reviewed. *Morrison v. Lovejoy*, 6 Minn. 183.

62. See *infra*, VII, F.

63. **Waiver by failure to challenge within the required time**, see *infra*, VII, E, 4, c.

Waiver of objections to form of challenge, see *infra*, VII, E, 4, d, (V).

Waiver of right to trial by triers by acquiescence in trial by court, see *infra*, VII, E, 4, g, (II).

That no objection can be made to the reception of the juror's unsworn answers unless objection thereto was made at the time, see *infra*, VII, E, 4, f.

64. **As to right to waive jury trial**, see generally 16 STANDARD PROC. 925, et seq.

65. Ala.—*Oliver v. Herron*, 106 Ala. 639, 17 So. 387. Conn.—*State v. Hoyt*,

may be waived in criminal cases,⁶⁶ though some courts have held that there cannot be a waiver of statutory qualifications in criminal cases.⁶⁷ It is proper to refuse to permit a challenge to be waived.⁶⁸

47 Conn. 518, 36 Am. Rep. 89. **Mass.** *Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Fox v. Hazelton*, 10 Pick. 275; *Com. v. Norfolk County*, 5 Mass. 435. **N. Y.**—*People v. Thayer*, 132 App. Div. 593, 116 N. Y. Supp. 821. **R. I.**—*Ryan v. Riverside, etc. Mills*, 15 R. I. 436, 8 Atl. 246.

[a] Generally as to the right to waive defects in the jury in civil actions, see *Merrill v. St. Louis*, 83 Mo. 244, 53 Am. Rep. 576, *affirming* 12 Mo. App. 466.

66. **Mo.**—*State v. Robertson*, 71 Mo. 446. **Neb.**—*Hickey v. State*, 12 Neb. 490, 11 N. W. 744, reviewing cases. **Nev.**—*State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33. **N. Y.**—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Thayer*, 132 App. Div. 593, 116 N. Y. Supp. 821, *affirming* 115 N. Y. Supp. 855. **N. D.**—*State v. Goetz*, 21 N. D. 569, 131 N. W. 514, not a constitutional right. **Okla.**—*Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324, *affirmed* in 190 U. S. 548, 23 Sup. Ct. 762, 47 L. ed. 1175, statutory right which may be waived. **Ore.**—*State v. McDonald*, 8 Ore. 113. **Tex.**—*McMahon v. State*, 17 Tex. App. 321; *Greer v. State*, 14 Tex. App. 179. **Wis.**—*Emery v. State*, 101 Wis. 627, 78 N. W. 145; *Flynn v. State*, 97 Wis. 44, 72 N. W. 373.

Compare Pierson v. People, 79 N. Y. 424, 35 Am. Rep. 524, where the same rule is held, but the waiver was of a challenge to the array.

[a] "No sufficient reason is given for the distinction that is made in some of the cases, between civil and criminal cases, and between capital and other criminal cases. . . . There is no reason why every party to an action, civil or criminal, should not be held to exercise the right given him to examine as to the qualifications of jurors called to act in his case, and, if he waives that right, to be concluded thereby, unless actual prejudice is otherwise shown." *State v. Pickett*, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302, *overruling State v. Groome*, 10 Iowa 308, and reviewing the decisions in many jurisdictions.

[b] **It Is Like the Right To Cross Examine a Witness.**—It does not belong to that class of rights which cannot be waived. *Com. v. Ware*, 137 Pa. 465, 20 Atl. 806.

[c] **Even in Capital Cases.**—The court carefully distinguishes between waivers of this sort, and waivers of duly constituted juries of twelve men *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Mack*, 35 App. Div. 114, 54 N. Y. Supp. 698, 13 N. Y. Crim. 401; *People v. Toledo*, 135 N. Y. Supp. 49; *State v. Goetz*, 21 N. D. 569, 131 N. W. 514.

[d] **Public Policy Only Limit as to Waiver.**—*Vaughn v. State*, 88 Ga. 731, 16 S. E. 64; *Sarah v. State*, 28 Ga. 576.

[e] **Rule Does Not Conflict With Rule Requiring Twelve Jurors.**—*Okershauser v. State*, 136 Wis. 111, 116 N. W. 769.

67. *Johr v. People*, 26 Mich. 427.

[a] **Reason for Rule.**—There is a difference between civil and criminal cases. In the latter, public policy demands that there be a legal jury. So in a civil case alienage may be waived. But not in a criminal case. *Johr v. People*, 26 Mich. 427; *Hill v. People*, 16 Mich. 351.

[b] **Distinguishing "Positive Disqualification" and "Ground for Challenge."**—On review of many cases in various jurisdictions the court concludes that the true rule is, that even in capital cases there may be a waiver of anything which "was not a positive and absolute disqualification to them to serve as jurors, but only a ground for challenge. If it were a positive disqualification then the trial would have been a nullity, precisely the same as though it had been had before ten men only." *State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424.

[c] **In an early capital case, a judgment was reversed because an alien served, on the theory that in such cases a defendant is presumed to stand on all his rights.** *Schumaker v. State*, 5 Wis. 324. See also *State v. Vogel*, 22 Wis. 471.

68. *State v. Allen*, 46 Conn. 531.

(II.) **What Constitutes Generally.**—The general rule is that one who accepts a jury waives all objections to the jurors.⁶⁹ Thus, by signifying his satisfaction with the jury, one waives a challenge theretofore made and overruled,⁷⁰ as does he by withdrawing his challenge and accepting the juror after the challenge has been sustained but before the juror has retired.⁷¹ It is sometimes held that a formal objection must be made to the completed jury or error in rulings on previous challenges will be deemed waived.⁷² But the more usual holding is that one does not waive his rights by going on with the trial after his objection to the individual juror has been overruled.⁷³

There is no waiver by merely permitting the juror to act where the

69. *Ala.*—*Rash v. State*, 61 *Ala.* 89 (applied in felony case); *Battle v. State*, 54 *Ala.* 93, that juror was a grand juror waived. *Ind.*—*Gillooley v. State*, 58 *Ind.* 182 (that juror not freeholder or householder waived); *Kingen v. State*, 46 *Ind.* 132; *Estep v. Waterous*, 45 *Ind.* 140; *Croy v. State*, 32 *Ind.* 384; *Bradford v. State*, 15 *Ind.* 347. *Ia.* *State v. McIntosh*, 109 *Iowa* 209, 80 *N. W.* 349. *Tenn.*—*Walker v. State*, 118 *Tenn.* 375, 99 *S. W.* 366 (non-residence waived); *Goad v. State*, 106 *Tenn.* 175, 61 *S. W.* 79, conviction of crime waived. *Tex.*—*Tweedy v. Briggs*, 31 *Tex.* 74; *Jefferson v. State*, 69 *Tex. Crim.* 60, 152 *S. W.* 908; *Hannaman v. State* (*Tex. Crim.*), 33 *S. W.* 538; *Stratton v. Riley* (*Tex. Civ. App.*), 154 *S. W.* 606; *International, etc. R. Co. v. Woodward*, 26 *Tex. Civ. App.* 389, 63 *S. W.* 1051.

70. *Grand Rapids Booming Co. v. Jarvis*, 30 *Mich.* 308; *Davey v. Janesville*, 111 *Wis.* 628, 87 *N. W.* 813.

[a] Where an unconditional affirmative answer is given by counsel to the court's question as to whether they are satisfied with the jury, made after the jury is complete but before it is sworn, all previous objections to qualifications are waived. *Cornell v. State*, 104 *Wis.* 527, 80 *N. W.* 745.

[b] Where defendant's counsel announce, "We will accept the jury," all objections to qualifications previously made are withdrawn. *Flynn v. State*, 97 *Wis.* 44, 72 *N. W.* 373.

[c] **Objection Offered To Be Withdrawn, But Declined.**—After a challenge for actual bias has been overruled, and the state has offered to withdraw its objection to the challenge and permit defendant to again challenge, but he refuses to avail himself of the offer, he waives his right

to object even though the court may have been in error in overruling the challenge in the first instance. *State v. Jahns*, 61 *Wash.* 636, 112 *Pac.* 747.

That the acceptance of the jury waives objections to form of challenge to the jurors, see *infra*, VII, F, 4, d, (V).

That the error in rejecting is harmless where jury selected is unimpeachable, see *infra*, VII, F, 4, d, (V).

Failure to challenge generally as waiver, see *infra*, VII, E, 4, b, (III).

71. *Doyle v. Com.*, 100 *Va.* 808, 40 *S. E.* 925.

72. *Milwaukee Steel T. & D. Co. v. American Cent. Ins. Co.*, 164 *Wis.* 298, 159 *N. W.* 938 (*following Cornell v. State*, 104 *Wis.* 527, 80 *N. W.* 745; *Emery v. State*, 101 *Wis.* 627, 78 *N. W.* 145); *Gatzow v. Buening*, 106 *Wis.* 1, 81 *N. W.* 1003, 80 *Am. St. Rep.* 17, 49 *L. R. A.* 475.

73. *Blake v. Millsbaugh*, 1 *Johns. (N. Y.)* 316.

[a] Even where the judge asked the parties if they had any objection to the jury after the whole jury was drawn, the party's negative answer must be understood to mean he had no additional objection to offer. *Hathaway v. Helmer*, 25 *Barb. (N. Y.)* 29.

[b] **Need Not Take a Nonsuit.**—Defendant having objected and taken an exception when his challenge was overruled, need not take a nonsuit, with leave, etc., but may proceed with the trial. *Fulweiler v. St. Louis*, 61 *Mo.* 479.

[c] **Objection to question propounded to juror was saved** where while the court was considering it the attorney moved to discharge the panel because of the nature of questions asked. The motion being overruled, the attorney excepted and stated his

juror has been guilty of making false answers on his re-examination, which if truly answered would have resulted in his being excluded.⁷⁴ One waives his challenge by failing to take the necessary steps to have it determined;⁷⁵ and it may be waived by interposing another challenge on another ground.⁷⁶ The challenge is waived by a subsequent plea of "guilty."⁷⁷ One cannot object to a challenge for cause by the opposite party on a ground by which he has excluded jurors himself;⁷⁸ nor after accepting certain jurors can he object to others subject to the same disqualification.⁷⁹ One does not waive his right to challenge for cause by a challenge to the array.⁸⁰ After challenge for principal cause has been tried and disallowed, the juror may be challenged to the favor.⁸¹ By consenting⁸² to the asking of the statutory questions

objection was to the question. *Withen v. Jeffery*, 259 Ill. 372, 102 N. E. 778.

Discharge of jury because of disqualifications of jurors, see *infra*, X, E, 5.

74. *People v. Bishop*, 66 App. Div. 415, 73 N. Y. Supp. 226.

75. *People v. Doe*, 1 Mich. 451, counsel merely challenged "for favor" and then refused to take any further step, either to demand triers or to ask questions.

[a] **Matter Must Be Submitted to Court.**—*Crider v. Lifsey*, 10 Heisk. (Tenn.) 456.

[b] **The determination of the qualification of a juror should be before the trial is entered upon, or the parties may be held to have waived the ground of disqualification or challenge.** *Citizens' Light, etc. Co. v. Lee*, 182 Ala. 561, 62 So. 199. Time to challenge, see generally *infra*, VII, E, 4, c.

[c] **One who has been denied generally the right to challenge is entitled to a reversal though he did not challenge a particular juror and have the challenge overruled, however.** *State v. Fulton*, 66 N. C. 632, the situation is not analogous to a refusal to admit evidence.

76. *Ford v. Umatilla*, 15 Ore. 313, 16 Pac. 33.

[a] **Juror having been questioned at length as to his competency and then having stated he was over age, a challenge on that ground alone may be considered to have waived objections as to competency.** *Keeler v. State*, 73 Neb. 441, 103 N. W. 4.

[b] **First Challenge on Ground Not Prejudicial.**—Where a challenge to a juror is made for a cause which could

not be prejudicial to the party, and the challenge is interposed as a mere technical right under the statute, the party must stand on his strict right, and if he takes a subsequent step and objects to the juror for other reasons, he waives his right to insist on the first objection. *Ford v. Umatilla*, 15 Ore. 313, 16 Pac. 33.

77. *State v. Vaughn*, 95 S. C. 455, 79 S. E. 312, jury were retained to fix the punishment.

78. *State v. Boon*, 80 N. C. 461.

79. *State v. Holmes*, 63 N. C. 18, after accepting three colored men, cannot object to a fourth solely on that ground.

[a] **Waives Right To Question by Not Asking To Question Accepted Jurors.**—Defendant's counsel having accepted six jurors who had been sworn and having thereafter learned that defendant's defense was based on insanity induced by drunkenness, waives his right to question the jurors as to their views on that defense by not asking permission to further question or challenge the jurors already accepted. *People v. Ward*, 105 Cal. 335, 38 Pac. 945.

80. *State v. Weeden*, 133 Mo. 7, 34 S. W. 373; *State v. Clark*, 121 Mo. 500, 26 S. W. 562.

But challenges must not be upon same grounds, see *supra*, VII, E, 4, a, (II).

81. *State v. Porter*, 45 La. Ann. 661, 12 So. 832; *Carnal v. People*, 1 Park. Crim. (N. Y.) 272. *Contra*, *People v. Donaldson*, 2 Edm. Sel. Cas. (N. Y.) 78.

Order of interposing, see *supra*, VII, E, 2.

to the jurors in a body one does not waive his right to challenge the individual jurors.⁸²

In determining whether there has been a waiver, most courts regard more lightly the disqualifications which are purely statutory than those which go to the juror's intelligence or impartiality.⁸³

(III.) Failure To Challenge.⁸⁴ — The general rule is that if a party fails to challenge a disqualified juror he waives all objections to him.⁸⁵ Especially is a challenge waived where the party fails to urge it upon

82. *Jackson v. State*, 103 Ga. 417, 30 S. E. 251.

83. *Hickey v. State*, 12 Neb. 490, 11 N. W. 744; *Wilcox v. Saunders*, 4 Neb. 569.

[a] "Propter Defectum" Distinguished From "Propter Affectum," etc. There has always been a tendency to treat less strictly the want of disqualifications properly reached by a challenge propter defectum than those subjecting to challenges propter affectum and propter delictum. This is because lack of merely statutory qualifications, such as citizenship, age, sex, etc., which do not affect the ability of the juror to do his duty intelligently and impartially, are not so apt to do injury to the party as where the juror is incompetent because of his bias, partiality, or criminality, etc. *Brewer v. Jacobs*, 22 Fed. 217.

[b] Where an objection is propter defectum (1) the ancient rule of the common law adopted by this court at an early day and uniformly applied, is that even though unknown to the party complaining and his counsel when the juror is accepted, the acceptance once made is conclusive. *Walker v. State*, 118 Tenn. 375, 99 S. W. 366; *Goad v. State*, 106 Tenn. 175, 61 S. W. 79; *Draper v. State*, 4 Baxt. 246. (2) But where a juror has prejudged the case a different rule prevails. *Draper v. State*, 4 Baxt. (Tenn.) 246.

[c] Objection That No Legal Jury. That a juror was not a freeholder or householder comes too late after verdict, not being a disqualification which vitiates the verdict on the theory that there was no legal jury. *Frank v. State*, 39 Miss. 705.

84. That challenge must be specific, and is waived as to any particular ground which is not embraced within the challenge made, see *infra*, VII, E, 4, d, (IV).

Failure to offer proof sustaining chal-

lenge as being a waiver thereof, see *infra*, VII, E, j.

85. U. S.—*Turner v. United States*, 66 Fed. 280, 13 C. C. A. 436; *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337. Ala.—*Howard v. State*, 108 Ala. 571, 18 So. 813; *Carson v. Pointer*, 11 Ala. App. 462, 66 So. 910. Ariz.—*Vincent v. Smith*, 13 Ariz. 346, 114 Pac. 557. Conn.—*State v. McGee*, 80 Conn. 614, 69 Atl. 1059. Ga.—*Parris v. State*, 125 Ga. 777, 54 S. E. 751. Ky.—*Combs v. Com.*, 97 Ky. 24, 29 S. W. 734. La.—*State v. Robinson*, 37 La. Ann. 673; *Cressap v. Winchester*, 6 Rob. 458. Mich.—*The Milwaukee v. Hale*, 1 Dougl. 306. Mo.—*Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678; *State v. Dusenberry*, 112 Mo. 277, 20 S. W. 461; *State v. Jackson*, 96 Mo. 200, 9 S. W. 624. Neb.—*Hickey v. State*, 12 Neb. 490, 11 N. W. 744. N. J.—*Dickerson v. North Jersey St. R. Co.*, 68 N. J. L. 45, 52 Atl. 214. N. Y.—*Code Civ. Proc.*, §1180 See *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Thayer*, 132 App. Div. 593, 116 N. Y. Supp. 821, affirming 115 N. Y. Supp. 855. N. C.—*Briggs v. Byrd*, 34 N. C. 377. Ohio.—*Kenrick v. Repard*, 23 Ohio St. 333; *Woodward v. Stein*, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rec. 352. Tenn.—*Isham v. State*, 1 Sneed 111. Wash.—*State v. Lewis*, 31 Wash. 75, 71 Pac. 778. W. Va.—*State v. Cooper*, 74 W. Va. 472, 82 S. E. 358. Wis.—*Schwantes v. State*, 127 Wis. 160, 106 N. W. 237. Can. Reg. v. Earl, 10 Manitoba 303.

[a] Compared to Failure To Plead. The omission to challenge is a waiver of all objections just as a failure to plead a defense waives it. The challenge does not go to the jurisdiction. *Clark v. Van Vrancken*, 20 Barb. (N. Y.) 278.

[b] Rule Applied Where Court Called for Objection.—Objection is clearly waived where the court called upon the attorneys to say whether they

the ground therefor being called to his attention by the court.⁸⁶ So, if the incompetency appears on the voir dire, it is waived by failure to challenge.⁸⁷ That a juror chosen is an alien,⁸⁸ or is a non-resident,⁸⁹ or lacks proper property qualifications,⁹⁰ or is related within the pro-

had any objections to the jurors, or any of them, and no objection was made. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

[c] **Should Object and Except to Ruling Thereon.**—Where defendant neither objected to the acceptance of a juror on the panel, nor took an exception to the ruling thereon, he cannot raise the question of the juror's competency on a motion for a new trial. *State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200.

86. *Louisville & N. R. Co. v. Cook*, 168 Ala. 592, 53 So. 190, court requested party to challenge and he declined.

[a] **Juror Stated Disqualification and Court's Offer To Excuse Declined.** A juror having stated that he was employed by the company whose property was alleged to have been stolen by defendant, the court ordered him excused, but the defendant objecting the court retained him. Right to challenge the juror for that cause was thereby waived. *Allen v. State*, 134 Ala. 159, 32 So. 318.

87. *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749.

[a] **Statement as to Age.**—Failure to challenge waives the incompetency of a juror who stated in open court that his father said "he was not twenty-one." *State v. Lambert*, 93 N. C. 618.

[b] **Juror Disclosing Knowledge Which He Used in Arriving at Verdict.** A juror on his voir dire having disclosed that another railroad had constructed its road across his land and that he knew the inconvenience thereof, defendant in condemnation proceedings cannot complain of the juror's having used that knowledge in fixing the amount he voted to award, where there was no showing that the juror could not have been excluded. *Beckman v. Lincoln & N. W. R. Co.*, 85 Neb. 228, 122 N. W. 994, 133 Am. St. Rep. 655.

88. *U. S.*—*Hollingsworth v. Duane*, 4 Dall. 353, 1 L. ed. 864. *Wall. Sr.* 147, 12 Fed. Cas. No. 6,618. *Cal.*

People v. Evans, 124 Cal. 206, 56 Pac. 1024; *People v. Chung Lit*, 17 Cal. 320. *Colo.*—*Brown v. People*, 20 Colo. 161, 36 Pac. 1040, in case not capital. *La.* *State v. Nolan*, 13 La. Ann. 276. *Mont.* *Territory v. Hart*, 7 Mont. 42, 14 Pac. 768. *N. M.*—*Territory v. Baker*, 4 N. M. 236, 13 Pac. 30; *Territory v. Anderson*, 4 N. M. 213, 13 Pac. 21. *Ore.* *State v. McDonald*, 8 Ore. 114. *S. C.* *State v. Quarrel*, 2 Bay 150, 1 Am. Dec. 637. *Wis.*—*Bonneville v. State*, 53 Wis. 680, 11 N. W. 427; *State v. Vogel*, 22 Wis. 471, in civil cases and cases not capital. See also *Brown v. La Crosse City Gas L. & C. Co.*, 21 Wis. 51. *Eng.*—*Rex v. Sutton*, 8 Barn. & C. 417, 15 E. C. L. 208, 108 Eng. Reprint 1097. *Can.*—*Stephenson v. Fraser*, 24 N. Bruns. 482.

[a] **Habeas corpus does not lie on the theory that the conviction is void** because an alien served on the jury and that defendant has been denied his common-law right of trial by jury. *Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. ed. 432.

As ground of challenge, see *infra*, VII, F, 8, e.

89. *U. S.*—*Queen v. Hepburn*, 7 Cranch 290, 3 L. ed. 348. *Ala.*—*Herrndon v. State*, 2 Ala. App. 118, 56 So. 85. *Cal.*—*People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245; *Thompson v. Paige*, 16 Cal. 77. *Fla.*—*State v. Madoil*, 12 Fla. 151. *Ga.*—*Daniel v. State*, 11 Ga. App. 799, 76 S. E. 162, "being propter defectum." *N. M.*—*Territory v. Abeita*, 1 N. M. 545. *N. C.*—*State v. White*, 68 N. C. 158. *Tenn.*—*Walker v. State*, 118 Tenn. 375, 99 S. W. 366. *Tex.* *Jefferson v. State*, 69 Tex. Crim. 60, 152 S. W. 908; *Stratton v. Riley* (Tex. Civ. App.), 154 S. W. 606. *Wis.*—*Rockwell v. Elderkin*, 19 Wis. 367.

As ground of challenge, see *infra*, VII, F, 8, b.

90. *U. S.*—*Brewer v. Jacobs*, 22 Fed. 217. *Fla.*—*State v. Madoil*, 12 Fla. 151. *N. Y.*—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967.

[a] **Juror not freeholder or householder is waived.** *U. S.*—*Brewer v.*

hibited degree,⁹¹ and similar and other grounds of challenge and disqualifications,⁹² are waived by a failure to interpose a timely challenge

Jacobs, 22 Fed. 217. **Ala.**—Hamner v. Eddins, 3 Stew. 192. **N. C.**—State v. Crawford, 3 N. C. 298. **Ohio.**—Shoemaker v. State, 12 Ohio 43. **Tenn.** Draper v. State, 4 Baxt. 246; Calhoun v. State, 4 Humph. 477. **Tex.**—Schuster v. La Londe, 57 Tex. 28; International, etc. R. Co. v. Woodward, 26 Civ. App. 389, 63 S. W. 1051.

As ground of challenge, see *infra*, VII, F, 9, b.

91. **Ala.**—Braham v. State, 143 Ala. 28, 38 So. 919. **Fla.**—Morrison v. McKinnon, 12 Fla. 552. **Mass.**—Woodward v. Dean, 113 Mass. 297. **N. Y.** Eggleston v. Smiley, 17 Johns. 133; People v. Mack, 35 App. Div. 114, 54 N. Y. Supp. 698, 13 N. Y. Crim. 401, cited with approval in *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967.

As ground of challenge, see *infra*, VII, F, 22.

92. See *infra*, this note.

[a] **Non-payment of poll tax if assumed to be disqualifying is waived.** James v. State, 68 Ark. 464, 60 S. W. 29.

[b] **Jurors did not pay taxes is waived.** State v. Fisher, 2 Nott & McC. (S. C.) 261.

[c] **Juror not elector is waived.** Shoemaker v. State, 12 Ohio 43.

[d] **Juror not registered voter is waived.** State v. McLean, 21 La. Ann. 546.

[e] **Juror a minor is waived.** U. S. Brewer v. Jacobs, 22 Fed. 217. **La.** State v. Garig, 43 La. Ann. 365, 8 So. 934. **Mass.**—Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258.

[f] **Jurors over age is waived.** Ga. Manning v. State, 11 Ga. App. 766, 76 S. E. 70, it is proper defectum. But see *Staten v. State*, 141 Ga. 82, 80 S. E. 850, holding it is no ground of challenge. **Mich.**—McGrail v. Kalamazoo, 94 Mich. 52, 53 N. W. 955. **Miss.** Williams v. State, 37 Miss. 407. **N. M.** United States v. Gomez, 7 N. M. 554, 37 Pac. 1101; United States v. Folsom, 7 N. M. 532, 38 Pac. 70. **N. Y.**—Seacord v. Burling, 1 How. Pr. 175; People v. Morrissey, 1 Sheld. 295; People v. Thayer, 132 App. Div. 593, 116 N. Y. Supp. 821, affirming 115 N. Y. Supp. 855, cited with approval in *People v.*

Cosmo, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967.

[g] **Illiteracy of juror is waived.** **Ia.**—State v. Pickett, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302, unable to read or write. **La.**—State v. Harris, 30 La. Ann. 90, unable to understand evidence and law. **N. J.**—Dickerson v. North Jersey St. R. Co., 68 N. J. L. 45, 52 Atl. 214, did not understand English. **N. C.**—State v. Perkins, 66 N. C. 126. **Ohio.**—Dokes v. Soards, 8 Ohio Dec. 621, 9 Wkly. L. Bul. 76, lack of knowledge of English. **Wis.**—Bonneville v. State, 53 Wis. 680, 11 N. W. 427, could not speak English.

[h] **Juror a grand juror is waived.** **Fla.**—Denmark v. State, 43 Fla. 182, 31 So. 269; Gavin v. State, 42 Fla. 553, 29 So. 405. **Ia.**—State v. McCarthy, 44 La. Ann. 323, 10 So. 673; State v. Jackson, 37 La. Ann. 897. **S. C.**—State v. O'Driscoll, 2 Bay 153. **Tenn.**—Gillespie v. State, 8 Yerg. 507, 29 Am. Dec. 137. **Eng.**—Reg. v. Sullivan, 8 A. & E. 831, 8 L. J. M. C. 3, 1 P. & D. 96, 1 W. W. & H. 610, 35 E. C. L. 865, 112 Eng. Reprint 1053.

[i] **Juror, an atheist, is waived.** State v. Davis, 80 N. C. 412; McClure v. State, 1 Yerg. (Tenn.) 206.

[j] **Juror convicted of crime is waived.** **Md.**—Bussey v. State, 85 Md. 115, 36 Atl. 257. **Mass.**—Russell v. Quinn, 114 Mass. 103. **Tenn.**—Goad v. State, 106 Tenn. 175, 61 S. W. 79.

[k] **Service within prohibited time is waived.** Bloodworth v. State, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

[l] **Service on former jury in same case is waived.** De Mateo v. Perano, 80 N. J. L. 437, 78 Atl. 162; *In re Lindsley*, 46 N. J. Eq. 358, 19 Atl. 726.

[m] **Juror a county officer is waived.** Cureton v. State, 117 Ark. 655, 174 S. W. 810.

[n] **Disqualification because deputy sheriff is waived.** Stedman v. Batchelor, 49 Hun 390, 3 N. Y. Supp. 580, 19 N. Y. St. 518.

[o] **That juror's name not on list nor in jury box is proper defectum and waived.** Embry v. State, 138 Ga. 464, 75 S. E. 604.

[p] **That juror was security on ap-**

based upon these grounds:⁹³ the mere inclusion of an incompetent person on the jury does not vitiate the verdict.⁹⁴ Nor is one's failure to challenge excused by his apprehension that the jury would then be filled in an improper manner.⁹⁵ nor by the fact that he supposed his right to challenge was exhausted.⁹⁶ Ignorance of the disqualification does not always excuse the failure to challenge.⁹⁷ Nor does the party's

peal is waived. *Glover v. Woolsey*, Dudley (Ga.) 85.

[g] That a juror was disqualified by reason of bias or prejudice should be presented by a challenge to the juror and not by a motion for a new trial. *Patswald v. United States*, 5 Okla. 351, 49 Pac. 57.

[r] Expressions of opinion are waived. *State v. Howard*, 17 N. H. 171.

[s] Jurors Interested in Result. *Pearson v. Wightman*, 1 Mill (S. C.) 336, 12 Am. Dec. 636.

[t] The Juror Was Security for Costs.—The court says the parties are presumed to be familiar with the files of the case, and must be presumed to have known this fact. *Bradshaw v. Hubbard*, 6 Ill. 390.

[u] Juror in Suit Against County, Was a Special County Commissioner. *Hallock v. Franklin County*, 2 Mete. (Mass.) 558.

[v] Juror Was Alderman of Defendant City.—*Walker v. Ann Arbor*, 111 Mich. 1, 69 N. W. 87.

Grounds of challenge generally, see *infra*, VII, F.

93. Time to challenge, see *infra*, VII, E, 4, c.

94. Md.—*Busey v. State*, 85 Md. 115, 36 Atl. 257. N. Y.—*Clark v. Van Vrancken*, 20 Barb. 278. N. C.—*State v. Upton*, 170 N. C. 769, 87 S. E. 328; *State v. Ward*, 9 N. C. 443. Pa.—*Com. v. Penrose*, 27 Pa. Super. 101. Wis.—*Schwantes v. State*, 127 Wis. 160, 106 N. W. 237.

[a] Even a disqualification *propter delictum* does not render the verdict void where the party did not challenge. *Raub v. Carpenter*, 187 U. S. 159, 23 Sup. Ct. 72, 47 L. ed. 119.

[b] In Illinois (1) the rule now is that if the juror be an alien, or over age, or otherwise exempt, either party may challenge for cause, but failing so to do the verdict is not a nullity. Formerly alienage, in capital cases was considered ground for setting aside verdict. See *Guykowski v. People*, 2

Ill. 476, and *Greenup v. Stoker*, 3 Gilman 202. (2) This rule, however, did not extend to jurors who were exempt because over age. See *Davis v. People*, 19 Ill. 74. (3) The mere knowledge or want of knowledge is not important. For a further discussion see *Chase v. People*, 40 Ill. 352, reviewing all the Illinois cases. See also *Davison v. People*, 90 Ill. 221. (4) So though one was entitled to a "well informed" jury he cannot stand by and fail to challenge and then take advantage of a juror's illiteracy. *West Chicago St. R. Co. v. Huhnke*, 82 Ill. App. 404.

95. *Miller v. Wilson*, 24 Pa. 114, the regular panel had been dismissed and counsel said he would not challenge because the jury would then be filled with bystanders.

96. *Alexander v. Dunn*, 5 Ind. 122.

97. Cal.—*People v. Chung Lit*, 17 Cal. 320. Ia.—*State v. Carpenter*, 124 Iowa 5, 98 N. W. 775; *State v. Pickett*, 103 Iowa 714, 43 N. W. 346, 39 L. R. A. 302; *Faville v. Shehan*, 68 Iowa 241, 26 N. W. 131. Ohio.—*Kenrick v. Repard*, 23 Ohio St. 333. Va.—*Hite v. Com.*, 96 Va. 489, 31 S. E. 895. Can.—*Reg. v. Earl*, 10 Manitoba 303.

[a] The following grounds of challenge were waived even though the party was ignorant of them at time of trial: (1) Want of property qualifications (*Brewer v. Jacobs*, 22 Fed. 217), (2) that juror was member of grand jury (*Denmark v. State*, 43 Fla. 182, 31 So. 269; *Gavin v. State*, 42 Fla. 553, 29 So. 405), (3) or is a deputy sheriff (*Stedman v. Batchelor*, 49 Hun 390, 3 N. Y. Supp. 580, 19 N. Y. St. 518 [no prejudice appeared]), (4) or that juror is not a freeholder or householder (*Brewer v. Jacobs*, 22 Fed. 217), (5) or is a minor (U. S.—*Brewer v. Jacobs*, 22 Fed. 217. La.—*State v. Garig*, 43 La. Ann. 365, 8 So. 934. Mass.—*Wassum v. Feeney*, 121 Mass. 93, 23 Am. Rep. 258), (6) or an alien (*Brown v. People*, 20 Colo. 161, 36 Pac. 1040 [case not capital]), (7) or disqualified by reason of relationship (*Woodward v.*

disbelief that the juror is disqualified.⁹⁸ That the party and his counsel were self-deceived does not excuse their failure to challenge.⁹⁹

(IV.) **Failure To Use Due Diligence To Discover Qualification.**¹ Though it is said that the accused has a right to presume that the jurors called to try him are competent, and so he need not anticipate possible objections unless he has notice that they exist, or has some reason to suppose that they may exist,² on the other hand the state makes no guaranty as to the competency of jurors,³ and the parties must use due diligence to ascertain whether the jurors possess the usual qualifications of jurors.⁴ Some cases hold that one should make

Dean, 113 Mass. 297), (8) or the expression of an opinion (*State v. Howard*, 17 N. H. 171), (9) that juror did not understand English language (*Dickerson v. North Jersey St. R. Co.*, 68 N. J. L. 45, 52 Atl. 214), (10) or had served on former trial of same case. *De Mateo v. Perano*, 80 N. J. L. 437, 78 Atl. 162. To same effect, see *In re Lindsley*, 46 N. J. Eq. 358, 19 Atl. 726.

Failure to use due diligence to discover disqualification as waiver, see *infra*, VII, E, 4, b, (IV).

Knowledge of disqualification as waiver, see *infra*, VII, E, 4, b, (VII).

98. *Nerrick v. Reppard*, 23 Ohio St. 333.

99. *Watts v. Ruth*, 30 Ohio St. 32, from appearances and known fact that juror was married party and counsel assumed he was of full age.

1. Failure to discover disqualification as waiver, see *infra*, VII, E, 4, b, (V).

2. *Rice v. State*, 16 Ind. 298.

Generally as to presumption that juror is competent and burden of proof as to the contrary, see *infra*, VII, E, 4, j, (III).

3. *State v. Pickett*, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302.

[a] **Presumption of Competency Does Not Excuse Failure To Challenge and Examine.**—The presumption that the officials charged with the duty of selection have made a proper selection does not relieve litigants from the duty of examination and challenge. *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722.

[b] The presumption that the court who selected the venire did so in a proper manner and put only competent men thereon, may be destroyed by challenge and proof offered at the time of

trial. If the party is silent he cannot thereafter raise the question in another court. *Cody v. State*, 3 How. (Miss.) 27.

[c] **Presumption of Competency Does Not Affect Knowledge of Disqualification.**—Though the state is presumed to select competent jurors, if the defendant in fact knew of the disqualification, he waived it. *State v. Groome*, 10 Iowa 308.

4. Ark.—*James v. State*, 68 Ark. 464, 60 S. W. 29. Fla.—*Webster v. State*, 47 Fla. 108, 36 So. 584; *Whitner v. Hamlin*, 12 Fla. 18. Ga.—*Burns v. State*, 80 Ga. 544, 7 S. E. 88. Ind. *Block v. State*, 100 Ind. 357. Mo. *Orr v. Bradley*, 126 Mo. App. 146, 103 S. W. 1149. S. C.—*Mew v. Charleston, etc. Ry. Co.*, 55 S. C. 90, 32 S. E. 828, following *State v. Robertson*, 54 S. C. 147, 31 S. E. 868, and holding that though the juror has a constitutional disqualification the verdict will not be set aside and a new trial granted where due diligence was not used to discover the disqualification. Utah.—*People v. Lewis*, 4 Utah 42, 5 Pac. 543.

[a] The object of having the jurors drawn for the term in open court is so litigants may be present, ascertain the names, and inquire about the qualifications, characters, connections, relations, etc. *Brewer v. Jacobs*, 22 Fed. 217.

[b] The reason for giving the prisoner a copy of the panel several days before trial is that he may inform himself. His negligence in failing so to do deprives him of any right. *State v. Quarrel*, 2 Bay (S. C.) 150, 1 Am. Dec. 637. See also 16 STANDARD PROC. 1006.

[c] Where one does not make inquiry, from which he could easily have learned the disqualifying facts, he can-

inquiry before the trial commences.⁵ Reasonable diligence at least requires that the juror be put on his voir dire,⁶ and it is the duty of parties to ascertain by proper examination, the competency of jurors;

not complain after verdict. *Poindexter v. Com.*, 33 Gratt. (74 Va.) 766.

[d] Thus (1) a physical infirmity should have been discovered (*Reed v. State*, 75 Neb. 509, 106 N. W. 649 [defective eyesight]; *Alm v. Andrews Bros. Co.*, 9 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 514 [deafness]), (2) as should the fact that a juror was under age (*La.—State v. Button*, 50 La. Ann. 1071, 23 So. 868, 69 Am. St. Rep. 470; *State v. Garig*, 43 La. Ann. 365, 8 So. 934. *Md.—Johns v. Hodges*, 60 Md. 215. *Ohio.—Watts v. Ruth*, 30 Ohio St. 32), (3) or was not an elector (*Ind.—Patterson v. State*, 70 Ind. 341. *Ohio.—Watts v. Ruth*, 30 Ohio St. 32; *Eastman v. Wight*, 4 Ohio St. 156. *S. C.—Mew v. Charleston*, etc. Ry. Co., 55 S. C. 90, 32 S. E. 828 [failure to examine books]), (4) or a taxpayer. *State v. Fisher*, 2 Nott & McC. (S. C.) 261.

[e] So also that a juror was a grand juror (1) should have been discovered (*Cal.—In re Jones' Estate*, 166 Cal. 108, 135 Pac. 288 [records of court, easily accessible would show]. *Ga.—Sapp v. State*, 116 Ga. 182, 42 S. E. 410; *Britt v. State*, 112 Ga. 583, 37 S. E. 886; *Jones v. State*, 95 Ga. 497, 20 S. E. 211. *La.—State v. Smith*, 41 La. Ann. 688, 6 So. 546. *Ohio.—Beek v. State*, 20 Ohio St. 228; *Stewart v. State*, 15 Ohio St. 155. *S. C.—State v. O'Driscoll*, 2 Bay 153 [prisoner had copy of list on his indictment]. *Tenn.—Gillespie v. State*, 8 Yerg. 507, 27 Am. Dec. 137 [record evidence in case shown]. *Utah.—People v. Lewis*, 4 Utah 42, 5 Pac. 543. *Va.—Bristow v. Com.*, 15 Gratt. (56 Va.) 634 [where juror had list, *distinguishing* *Dilworth v. Com.*, 12 Gratt. (53 Va.) 689, 65 Am. Dec. 264, where he had no list and used due diligence]. But see *Bennet v. State*, 24 Wis. 57), (2) as should the fact that he was foreman of the coroner's jury (*Young v. State*, 90 Md. 579, 45 Atl. 531), (3) or that he served in a former trial of the same case (*Ga.—White Sewing Mach. Co. v. Horkan*, 17 Ga. App. 48, 86 S. E. 257. *Ohio.—Hayward v. Calhoun*, 2 Ohio St. 164 [it is matter of record]. *S. C.—State v. Robertson*, 54 S. C. 147, 31 S. E. 868), (4) or that he was on plaintiff's

cost bond and so disqualified under the statute. *Vincent v. Smith*, 13 Ariz. 346, 114 Pac. 557.

[f] An objection that the name of a juror was not in the box or on the list is waived. It could have been as easily ascertained before as after verdict, by ordinary diligence in looking over the list. *Osgood v. State*, 63 Ga. 791; *Gormley v. Laramore*, 40 Ga. 253.

[g] Mistakes as to Identity of Jurors Should Be Discovered.—*Ga.—Burns v. State*, 80 Ga. 544, 7 S. E. 88. *Ia.—State v. Matheson*, 130 Iowa 440, 103 N. W. 137, 114 Am. St. Rep. 427. *Miss.—Tolbert v. State*, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 454. *Compare* *Munshower v. State*, 56 Md. 514, where it is said mere mistake in the middle name of a juror is no ground for arrest of judgment where there is no mistake as to identity of person.

[h] Juror Defendant in Another Suit by Plaintiff.—It was not due diligence for plaintiff not to discover before the trial that the juror was defendant in a certain ejectment suit brought by plaintiff. *Wagoner v. Jaeger*, 49 W. Va. 61, 38 S. E. 528.

[i] Previous Conviction of Felony. Failure of counsel to ascertain the incompetency of a juror based on his previous conviction of a felony waives the objection. *Reed v. State*, 75 Neb. 509, 106 N. W. 649; *Turley v. State*, 74 Neb. 471, 104 N. W. 934. See also *Busey v. State*, 85 Md. 115, 36 Atl. 257.

[j] Where a challenged juror took his seat in the box the defendant should have immediately discovered that fact and objected to his presence on the jury before the jury was sworn. *Munson v. State*, 34 Tex. Crim. 498, 31 S. W. 387.

5. *Minot v. Bowdoin*, 75 Me. 205; *Sprague v. Brown*, 21 R. I. 329, 43 Atl. 636; *Fiske v. Paine*, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498; *State v. Cosgrove*, 16 R. I. 411, 16 Atl. 900; *Ryan v. Riverside*, etc. Mills, 15 R. I. 436, 8 Atl. 246.

6. *Wilder v. State*, 25 Ohio St. 555. See also *infra*, VII, E, 4, f.

failure to do so waives the objection.⁷ These rules apply in both

7. U. S.—*Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337. **Ariz.** *Vincent v. Smith*, 13 Ariz. 346, 114 Pac. 557. **Cal.**—*In re Jones' Estate*, 166 Cal. 108, 135 Pac. 288. **Fla.**—*Webster v. State*, 47 Fla. 108, 36 So. 584; *Ferrell v. State*, 45 Fla. 26, 34 So. 220; *Denmark v. State*, 43 Fla. 182, 31 So. 269; *Gavin v. State*, 42 Fla. 553, 29 So. 405; *Whitner v. Hamlin*, 12 Fla. 18. **Ill.**—*Chase v. People*, 40 Ill. 352; *Wickersham v. People*, 2 Ill. 128. **Ia.** *State v. Matheson*, 130 Iowa 440, 103 N. W. 137, 114 Am. St. Rep. 427; *State v. Greenland*, 125 Iowa 141, 100 N. W. 341; *In re Goldthorp's Estate*, 115 Ia. 430, 88 N. W. 944; *State v. Funck*, 17 Iowa 365. **Ky.**—*Crosthwaite v. Crosthwaite*, 151 Ky. 364, 151 S. W. 945. **La.** *State v. Button*, 50 La. Ann. 1071, 23 So. 868, 69 Am. St. Rep. 470; *State v. Whitesides*, 49 La. Ann. 352, 21 So. 540; *State v. Garig*, 43 La. Ann. 365, 8 So. 934; *State v. Smith*, 41 La. Ann. 688, 6 So. 546. **Me.**—*State v. Bowden*, 71 Me. 89. **Md.**—*Busey v. State*, 85 Md. 115, 36 Atl. 257; *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722. **Mass.** *Fowler v. Middlesex*, 6 Allen 92; *Jeffries v. Randall*, 14 Mass. 205. **Miss.** *Williams v. State*, 37 Miss. 407. **Mo.** *Pitt v. Bishop*, 53 Mo. App. 600. **N. J.** *Dickerson v. North Jersey St. R. Co.*, 68 N. J. L. 45, 52 Atl. 214. **N. Y.** *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Mack*, 35 App. Div. 114, 54 N. Y. Supp. 698, 13 N. Y. Crim. 401. **N. C.** *State v. Maultsby*, 130 N. C. 664, 41 S. E. 97. **Ohio.**—*Wilder v. State*, 25 Ohio St. 555; *Kenrick v. Reppard*, 23 Ohio St. 333; *Woodward v. Stein*, 5 Ohio Dec. (Reprint) 171, 3 Am. L. Rep. 352; *Schneider v. State*, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565. **Okla.** *Humphrey v. State*, 11 Okla. Crim. 287, 146 Pac. 230; *Horton v. State*, 10 Okla. Crim. 294, 136 Pac. 177. **Pa.**—*Com. v. Penrose*, 27 Pa. Super. 101. **Tex.**—*Russell v. State*, 44 Tex. Crim. 465, 72 S. W. 190. **Utah.**—*Hern v. Southern Pac. Co.*, 29 Utah 127, 81 Pac. 902; *People v. Lewis*, 4 Utah 42, 5 Pac. 543. **Wash.**—*Clarke v. Territory*, 1 Wash. Ter. 68. **Wis.**—*State v. Vogel*, 22 Wis. 471.

[a] **Failure To Obey Court's General Directions.**—One waives his right by failing to move the court to ex-

amine the jurors on oath, and by failing to challenge notwithstanding a direction by the court that jurymen coming under a certain class should leave the box; which direction was disobeyed and the disobedience not learned until after verdict. *Daniels v. Lowell*, 139 Mass. 56, 29 N. E. 222.

[b] **Disqualifications Waived by Failure To Examine Juror.**—(1) That juror not freeholder or householder (*Ind.*—*Gillooley v. State*, 58 Ind. 182; *Kingen v. State*, 46 Ind. 132; *Estep v. Waterous*, 45 Ind. 140; *Croy v. State*, 32 Ind. 384; *Bradford v. State*, 15 Ind. 347. **Tex.**—*Corley v. State* [Tex. Crim.], 65 S. W. 1073; *Lester v. State*, 2 Tex. App. 432. **W. Va.**—*Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957), (2) or not an elector (*Ind.* *Patterson v. State*, 70 Ind. 341. **Ia.** *Faville v. Shehan*, 68 Iowa 241, 26 N. W. 131. **Kan.**—*State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424. **La.**—*State v. McLean*, 21 La. Ann. 546. **Va.** *Poindexter v. Com.*, 33 Gratt. [74 Va.] 766, capitation tax not paid), (3) or not on assessment roll (*People v. Mortier*, 58 Cal. 262; *People v. Sanford*, 43 Cal. 29), (4) that juror an alien (*People v. Chung Lit*, 17 Cal. 320; *Territory v. Baker*, 4 N. M. 236, 13 Pac. 30; *Territory v. Anderson*, 4 N. M. 213, 13 Pac. 21), (5) or nonresident (*Ia.* *State v. Burke*, 107 Iowa 659, 78 N. W. 677. **La.**—*State v. Kennedy*, 8 Rob. 590. **Neb.**—*Hickey v. State*, 12 Neb. 490, 11 N. W. 744; *Wilcox v. Saunders*, 4 Neb. 569. **Ohio.**—*Hull v. Albros*, 3 Disn. 147, 13 Ohio Dec. 91. **S. C.** *Todd v. Gray*, 16 S. C. 635. **W. Va.** *Zickefoose v. Kuykendall*, 12 W. Va. 23), (6) or over age (*Williams v. State*, 37 Miss. 407; *Blair v. Paterson*, 131 Mo. App. 122, 110 S. W. 615; *Pitt v. Bishop*, 53 Mo. App. 600), (7) or under age (*Watts v. Ruth*, 30 Ohio St. 32; *Hite v. Com.*, 96 Va. 489, 31 S. E. 895), (8) that juror unable to read or write (*Ia.*—*State v. Greenland*, 125 Iowa 141, 100 N. W. 341; *State v. Pickett*, 103 Iowa 714, 73 N. W. 346, 39 L. R. A. 302. **Mo.**—*Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 990; *Orr v. Bradley*, 126 Mo. App. 146, 103 S. W. 1149. **Tex.**—*San Antonio, etc. R. Co. v. Gray* (Tex. Civ. App.), 66 S. W. 229.

[c] **Want of knowledge of English**

civil and criminal cases in most jurisdictions,⁸ and apply in civil cases even where waiver would not be permitted in criminal cases.⁹ They apply to jurors summoned on special venire, as well as to the regular jurors,¹⁰ and in inquisitions of lunacy.¹¹ Preliminary examination by the judge prior to the jurors being called in the particular case does not excuse one from his duty to examine.¹² That the statute prohibits asking the juror as to the particular disqualification does not excuse

language waived by failure to examine or challenge. *Dokes v. Soards*, 8 Ohio Dec. 621, 9 Wkly. L. Bul. 76.

[d] **Failure to examine as to expression of opinion** waives objection on ground that juror had formed an opinion, etc. *Ark.*—*Smith v. State*, 59 Ark. 132, 26 S. W. 712, 43 Am. St. Rep. 20; *Brown v. St. Louis, I. M. & S. Ry. Co.*, 52 Ark. 120, 12 S. W. 203; *Werner v. State*, 44 Ark. 122; *Casat v. State*, 40 Ark. 511; *Daniel v. Guy*, 23 Ark. 50; *Meyer v. State*, 19 Ark. 156. *Cal.* *People v. Fair*, 43 Cal. 137, *overruling* *People v. Plummer*, 9 Cal. 298. *Neb.* *Everton v. Esgate*, 24 Neb. 235, 38 N. W. 794. *Ohio.*—*Parks v. State*, 4 Ohio St. 234; *Simpson v. Pitman*, 13 Ohio 365; *Schneider v. State*, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565.

[e] **Prejudice by Newspaper Articles.**—Failure to examine jurors thereon would waive any claim that they had been prejudiced by the publication of newspaper articles prior to the trial. *State v. Gordon*, 32 N. D. 31, 155 N. W. 59.

[f] **Prejudice Against Particular Defense Must Be Inquired Into.**—While the accused is under no obligation to disclose the character of his defense during the examination of the jurors, if he choose to hold it in reserve he cannot complain that the jurors' attention was not directed to it, so as to disclose whether the jurors had any disqualifying opinion in regard to such defense. *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556.

[g] The only real question at issue being the sanity of defendant, it was the duty of defendant to push the examination of the jurors so as to find out whether the jurors had any disqualifying opinion as to that defense. *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556.

As to examination of jurors, see *infra*, VII, E, 4, i.

That the right is a privilege and not a duty so that defendant cannot com-

plain of prosecution's failure to examine, see *infra*, VII, E, 4, i, (I).

8. *McGill v. State*, 34 Ohio St. 228.

9. *Johr v. People*, 26 Mich. 427; *The Milwaukee v. Hale*, 1 Dougl. (Mich.) 306.

10. *Kenrick v. Reppard*, 23 Ohio St. 333.

11. *In re Lindsley*, 46 N. J. Eq. 358, 19 Atl. 726.

12. *People v. Evans*, 124 Cal. 206, 56 Pac. 1024, court stated general qualifications.

[a] **Examination on First Day of Term.**—Though the practice is to examine the jurors upon the first day of the term as to their citizenship, property qualifications and previous service, this examination is in no sense an examination of the juror on voir dire, and does not relieve the party from his duty to examine the juror. *Brewer v. Jacobs*, 22 Fed. 217. See also *Territory v. Baker*, 4 N. M. 236, 13 Pac. 30.

[b] **Examination by Judge for Purpose of Assigning to Divisions.**—The custom is for the judge of one division to question the jurors generally as to their qualifications before assigning them to different divisions for service, and counsel do not appear at such examination but trust the matter to the judge. *Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 990.

[c] Though the statute requires the judge to inquire, *sua sponte*, whether jurors have served as talesmen within twelve months, and to excuse such as say they have unless both parties consent to their serving, the mere fact that a juror does not disclose that he has so served, when so questioned by the court, does not relieve the party from his duty to examine. *Wilder v. State*, 25 Ohio St. 555, but compare *Watts v. Ruth*, 30 Ohio St. 32, where the court says arguendo that failure to use due diligence applies to each and every element that goes to constitute a qualified juror save such as the stat-

one for lack of diligence in discovering the disqualification.¹³ The rule requiring one to use due diligence does not require more than bringing the matter to the trial court's attention on the voir dire examination.¹⁴ If the general trend of the examination ought to bring out the matter it is sufficient to take the case out of the rule as to waiver, though specific questions be not asked, covering minute phases of the subject;¹⁵ but where the situation is that one could have cleared up, by the asking of obvious questions, the whole matter of the juror's competency, he waives his right by neglecting to question further,¹⁶ and this rule is not changed by the fact that the party is entitled to ask questions for the sole purpose of determining as to peremptories.¹⁷

(V.) **Failure To Discover Disqualification.**¹⁸ — The mere failure to discover disqualifications of jurors is not, of itself, a failure to use due diligence, according to some authorities;¹⁹ but others hold that it is

ute requires the court to ascertain sua sponte.

Effect of false statements on examination by the court, see *infra*, VII, E, 4, b, (V).

13. *Sinsheimer v. Edward Weil Co.*, 61 Tex. Civ. App. 209, 129 S. W. 187, the statute forbids asking a juror whether he has been convicted or indicted for certain offenses. But this does not excuse use of diligence to discover those facts from other sources.

14. *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311, relationship inquired into by court on party's request.

[a] **Investigation as to Members of Defendant Company.**—They must properly call attention to the court of any fact known to them which may be ground. But they are not obliged when suing a mutual fire insurance company to make investigation to find out who are the members thereof to avoid getting them and their kinsmen on the jury. *Moore v. Farmers Mut. Ins. Assn.*, 107 Ga. 199, 33 S. E. 65.

As to examination on voir dire, see *infra*, VII, E, 4, i.

15. *Pearcy v. Michigan Mut. Life Ins. Co.*, 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673.

[a] **General Question Sufficient To Bring Out Related Matter.**—A general question as to whether the jurymen held a policy of insurance in the defendant company was sufficiently specific to indicate that information as to his interest in the company was desired and should have brought out the fact that his wife held a policy on the juror's life taken out by him for her benefit. *Pearcy v. Michigan*

Mut. Life Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673.

16. **U. S.**—*United States v. Smith*, 1 Sawy. 277, 27 Fed. Cas. No. 16,341. **Cal.**—*McKernan v. Los Angeles Gas & Elec. Co.*, 16 Cal. App. 280, 116 Pac. 677. **Ill.**—*Wolff Mfg. Co. v. Wilson*, 46 Ill. App. 381. **Ky.**—*Crosthwaite v. Crosthwaite*, 151 Ky. 364, 151 S. W. 945. **Mich.**—*People v. Lange*, 56 Mich. 550, 23 N. W. 217. **Mo.**—*Orr v. Bradley*, 126 Mo. App. 146, 103 S. W. 1149. **Mont.**—*State v. Mott*, 29 Mont. 292, 74 Pac. 728. **Neb.**—*Blakely v. Omaha & C. B. St. R. Co.*, 94 Neb. 119, 142 N. W. 525. **Ohio.**—*Schneider v. State*, 2 Ohio Cir. Ct. 420, 1 Ohio Cir. Dec. 565. **Tex.**—*Hughes v. State* (Tex. Crim.), 60 S. W. 562; *Kirk v. State* (Tex. Crim.), 37 S. W. 440; *Texas M. R. Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 90. **Va.**—*Gray v. Com.*, 92 Va. 772, 22 S. E. 858. **W. Va.**—*Zickefoose v. Kuykendall*, 12 W. Va. 23.

17. *Blakely v. Omaha & C. B. St. R. Co.*, 94 Neb. 119, 142 N. W. 525.

As to right to so question, see *infra*, VII, E, 4, i; 5, m, (I).

18. **Failure to use due diligence to discover disqualifications**, see *supra*, VII, E, 4, b, (IV).

19. *Block v. State*, 100 Ind. 357 (questioning as to principal grounds for challenge is sufficient); *Lafayette Plankroad Co. v. New Albany & Salem R. Co.*, 13 Ind. 90, 74 Am. Dec. 246 (party may presume juror understands English language); *McGill v. State*, 34 Ohio St. 228.

[a] **It would require the accused to give offense to every juror by making**

one's duty to discover disqualifications,²⁰ even where the juror has made false answers.²¹ Defendant and his counsel are not chargeable with notice of irregularities for which some one else is responsible;²² nor can they be charged with any lack of diligence where failure to discover the facts was through any fraud or concealment by the adverse party.²³ False or misleading statements made by the juror may excuse the failure of the party to discover the grounds for challenge, and warrant the granting of a new trial;²⁴ and by the weight of author-

objections in the nature of "random imputations" against him. *Brown v. State*, 28 Ga. 433.

20. *Carson v. Pointer*, 11 Ala. App. 462, 66 So. 910.

[a] **Juror To Be Witness Not Discovered Until After Acceptance.**—After the jury has been accepted and sworn the state cannot, over the defendant's objection, challenge a juror who is to be a witness for the defendant though the state did not discover that fact until after the juror was sworn. *Moor-ing v. State*, 129 Ala. 66, 29 So. 664.

[b] **That Juror, an Officer, Discovered After Jury Sworn.**—The rule that whether by ignorance or from inadvertence defendant fails to challenge the juror before he is sworn, he waives his right to thereafter complain of incompetency, applies to a juror who was the officer before whom the preliminary examination was held and who disclosed that fact after he was sworn stating he had not theretofore recognized defendant. *Henry v. State*, 77 Ala. 75.

21. *Carson v. Pointer*, 11 Ala. App. 462, 66 So. 910, juror falsely stated he resided in the county.

[a] **Statement on Voir Dire Subsequently Corrected.**—It was proper to refuse to discharge a juror who stated on his voir dire that his unexpressed opinion was not founded on conversation with any witness, but who corrected that statement upon a physician being called to give his expert testimony, said physician being the one with whom the juror had conversed. *State v. Morea*, 2 Ala. 275.

[b] **Statement That Juror Not Grand Juror Corrected on Reading of Indictment.**—Though jurors answered in the negative when asked if they had been upon the grand jury which found the indictment, it was held too late to challenge for cause, when upon the indictment being read one of the jurors stated that his memory was refreshed

and that he now recalled he was on the grand jury. *Harris v. State*, 177 Ala. 17, 59 So. 205.

22. *Stripling v. State*, 77 Ga. 108, 3 S. E. 277.

[a] **Person Not Drawn Permitted To Serve.**—By fault of either clerk, sheriff, or some one not connected with defense a person not drawn to serve was permitted to serve under the name of another person who had been properly drawn. Facts were brought to court's attention as soon as discovered which was not till after verdict. Neither counsel nor defendant knew either juror personally. New trial was granted. *Stripling v. State*, 77 Ga. 108, 3 S. E. 277.

[b] **Failure To Discover Juror Was Not One Summoned.**—Party was not chargeable with lack of diligence in failing to discover that the juror who responded to his name when called, and who actually served on the case, was not the juror who had been summoned, but was his father and bore the same name. *McGill v. State*, 34 Ohio St. 228.

23. *Faville v. Shehan*, 68 Iowa 241, 26 N. W. 131.

[a] **Fraud, Collusion or Wrongful Intention.**—It seems to be conceded that fraud, collusion or wrongful intention in putting a disqualified juror on the jury would be ground for new trial. *Steele v. Malony*, 1 Minn. 347.

[b] **Fraud Practiced Despite Vigilance Vitiates the Verdict.**—If any fraud or imposition has been practiced on a party whereby he was prevented from having a trial by an impartial jury, and which could not have been prevented by proper vigilance on his part, the verdict will be set aside. *Hayward v. Calhoun*, 2 Ohio St. 164.

24. *Ariz.*—*Vincent v. Smith*, 13 Ariz. 346, 114 Pac. 557. *Ark.*—*Casat v. State*, 40 Ark. 511; *Meyer v. State*, 19 Ark. 156. *Cal.*—*People v. Plummer*, 9 Cal. 298. *Ind.*—*Pearcy v. Michigan Mut.*

ity, if the statement made by the juror is false, it is not material that

Life Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; *Holloway v. State*, 53 Ind. 554; *Croy v. State*, 32 Ind. 384; *Rice v. State*, 16 Ind. 298. **Kan.** *Lane v. Scoville*, 16 Kan. 402; *Moore v. Cass*, 10 Kan. 293. **Ky.**—*Taylor v. Combs*, 20 Ky. L. Rep. 1828, 50 S. W. 64. **La.**—*State v. Giron*, 52 La. Ann. 491, 26 So. 985; *State v. Button*, 50 La. Ann. 1071, 23 So. 868, 69 Am. St. Rep. 470; *State v. Whitesides*, 49 La. Ann. 352, 21 So. 540; *State v. Kennedy*, 8 Rob. 590. **Me.**—*State v. Bowden*, 71 Me. 89. **Miss.**—*Dennis v. State*, 91 Miss. 221, 44 So. 825. See also *Gammoms v. State*, 85 Miss. 103, 37 So. 609 (which distinguishes *Jeffries v. State*, 74 Miss. 675, 21 So. 526, where the juror had concealed the expression of a decided opinion that defendant was not justified in killing deceased); *Sheppric v. State*, 79 Miss. 740, 31 So. 416. *Compare Schrader v. State*, 84 Miss. 593, 36 So. 385, where the court states the same rule but refused to reverse, the juror having made full disclosure and not having been challenged. **Mo.**—*State v. Mace*, 262 Mo. 143, 170 S. W. 1105; *State v. Gonce*, 87 Mo. 627. See also *State v. Wyatt*, 50 Mo. 309, where a new trial was granted though the juror said he was thinking of another man when he expressed his opinion. **Mont.**—*State v. Mott*, 29 Mont. 292, 74 Pac. 728. See also *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808. **Okla.**—*Ellis v. Territory*, 13 Okla. 633, 76 Pac. 159. **Tex.**—*Hughes v. State* (Tex. Crim.), 60 S. W. 562; *Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612. See also *Sewell v. State*, 15 Tex. App. 56. **Utah.**—*State v. Mickle*, 25 Utah 179, 70 Pac. 856; *State v. Thompson*, 24 Utah 314, 67 Pac. 789; *State v. Morgan*, 23 Utah 212, 64 Pac. 356; *United States v. Christensen*, 7 Utah 26, 24 Pac. 618; *People v. Reese*, 3 Utah 72, 2 Pac. 61. See also *Hern v. Southern Pac. Co.*, 29 Utah 127, 81 Pac. 902, wherein the juror not having misled the party the rule did not apply. **Wash.**—*Heasley v. Nichols*, 38 Wash. 485, 80 Pac. 769; *State v. Hall*, 24 Wash. 255, 64 Pac. 153. **Wis.**—*Carthaus v. State*, 78 Wis. 560, 47 N. W. 629.

Accident and Surprise.—Where the juror fails to disclose material facts in respect to his relations with the parties, in answer to questions adequate to elicit the same, the party so asking is entitled to a new trial on the ground of accident and surprise which ordinary prudence could not have guarded against. So held where juror concealed the fact, unknown to defendant and his counsel, that the juror and others had a suit against plaintiff which had been continued over the term on plaintiff's agreement to settle the same as soon as certain arrangements with a third party could be perfected. *Tarpey v. Madsen*, 26 Utah 294, 73 Pac. 411.

[b] Must Be a Falsehood as Distinguished From Difference of Opinion. Where the juror denied he had an "intimate acquaintance" with one party the other could not claim to have been misled since what constitutes such an acquaintance is a matter on which the minds of men differ and the party should have interrogated further and learned whether the acquaintance was such as might bias the juror. *Moore v. Cass*, 10 Kan. 288.

[c] Mere Hypothetical Opinion Concealed Is Not Ground.—Even if a juror had expressed an opinion and said he had not a new trial is properly refused where the opinion so expressed was purely hypothetical and not such as would have disqualified him. *State v. Gile*, 8 Wash. 12, 35 Pac. 417.

[d] Misstatement as to Belief Regarding Capital Punishment.—Where juror failed to make known the fact that he was opposed to capital punishment based on circumstantial evidence, and had answered generally that he was not opposed to such punishment, the challenge was not waived, but might be interposed after he was sworn. *State v. Pritchard*, 16 Nev. 101.

[e] Statement of Want of Knowledge Does Not Excuse Discovery That Juror Was Grand Juror.—That the juror stated he knew nothing about the case does not excuse failure to discover that he was a member of the grand jury that found the bill. He may not have been present at the finding of

[a] Concealment Amounting to "Ac-

he made it through inadvertence, or mistake, and with no wilful intent to deceive;²⁵ but inadvertent misstatements have been held no ground for a new trial.²⁶ The party must have examined the juror and have been deceived by his answers.²⁷

To bring the case within the rule, the questions propounded to the juror must have been sufficiently specific to bring out the facts claimed to have been concealed;²⁸ and this rule applies where general questions

the bill. *State v. Smith*, 41 La. Ann. 688, 6 So. 546.

[f] **Juror Disclosed Was Grand Juror After Trial Began.**—Where by the negligence or inadvertence of the juror the fact was not discovered until the first witness was called, that the juror had been one of the grand jurors who found the indictment, and the matter was brought to the court's attention by the juror himself, it is not a case where either the court or counsel on either side are to blame. *Stewart v. State*, 15 Ohio St. 155.

[g] **Jurors who said they had formed a "kind of opinion,"** or had expressed an opinion and that evidence would be needed to change it, but that they had no prejudice against accused at the time, have not misled the defendant, but have furnished foundation for the exercise of challenges either peremptory or for cause. *Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749.

[h] **Party Estopped To Question Juror's Answer.**—It is no ground for a new trial that the juror falsely answered that he had not formed or expressed an opinion, though the party did not discover the contrary till after verdict. The holding is based in part on the theory that since the party chose to put the juror to answer on his voir dire, he was precluded from going into evidence either then or later, to disprove the answer. *Temple v. Sumner, Smith* (N. H.) 226.

25. *State v. Taylor*, 64 Mo. 358; *State v. Burnside*, 37 Mo. 343; *Territory v. Kennedy*, 3 Mont. 520.

[a] **Mistake of Law as to Relationship.**—Juror having denied relationship which existed a new trial was granted though it appears the juror was acting under a mistaken idea of the law. *Stringfellow v. State*, 42 Tex. Crim. 588, 61 S. W. 719.

26. *Frank v. State*, 39 Miss. 705 (so held in a capital case, but as to a matter which the court also held im-

material); *Reynolds v. Richmond & M. Ry. Co.*, 92 Va. 400, 23 S. E. 770, juror's belief erroneous but party knew facts.

[a] **Incidental Acquaintanceship Forgotten.**—Though a juror said he had no acquaintance with and knew nothing about defendants and it afterward appeared that one defendant, some years before, while acting in an official capacity, had served legal processes on the juror, whose affidavit on motion for new trial stated he had forgotten the incident at the time of his examination, he was competent. *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629.

Knowledge of party as taking case out of rule, see *infra*, VII, E, 4, b, (VII).

27. *Casat v. State*, 40 Ark. 511; *Meyer v. State*, 19 Ark. 156.

[a] **Applied to Expressed Opinion.** If a party did not examine "and was not misled or deceived," in reference to a juror's having expressed his opinion, that he had done so cannot be made ground for new trial. *Brown v. St. Louis, I. M. & S. Ry. Co.*, 52 Ark. 120, 12 S. W. 203.

[b] **Failure To Discover Juror Was Grand Juror Not Excused.**—Mere general questions to all the jurors as to whether they were related to, or acquainted with the defendant or the prosecuting witness and whether they had formed or expressed an opinion was not sufficient to entitle defendant to a new trial because one of the jurors did not disclose that he was a member of the grand jury. *People v. Lewis*, 4 Utah 42, 5 Pac. 543.

28. *People v. Lewis*, 4 Utah 42, 5 Pac. 543.

[a] **Question Not Sufficient To Bring Out Fact.**—Where juror truthfully answered that he was not related to a party he is not guilty of concealing the fact that he had in company with that party been guests, the night before, at the home of a third

have been asked by the court,²⁹ though in so far as the jurors have answered the questions, it has been held that the party may rely on the truth of the answers.³⁰ The rule that parties may rely on the truth of the juror's statements does not excuse their failure to bring out facts known to them,³¹ or which they should have known,³² though it has been held that in such a case the order granting a new trial because of the juror's concealment will not be reversed.³³ The verdict

person who was related to both juror and the party. *Chesapeake & O. R. Co. v. Jesse*, 159 Ky. 450, 167 S. W. 407.

[b] **Form of Question Too General To Bring Out Fact of Relationship.** Where the plaintiff made his challenge in general form: "If any juror in this box is related to anyone of the defendants, by blood or marriage, he is requested to retire from the jury box," and no juror retired but it was later learned that one juror was remotely related, the court said that the error arose largely from the form of the challenge and plaintiff's failure to discover the relationship was his own fault. *Spicer v. Fulghum*, 67 N. C. 18.

Form and sufficiency of challenge generally, see *infra*, VII, E, 4, d.

29. *Territory v. Baker*, 4 N. M. 236, 13 Pac. 30, mere general question held not to excuse failure to question as to citizenship, but there was some evidence that counsel knew or suspected the facts.

[a] **Jurors Examined Generally Before Trial—Question Misunderstood.** Where the judge questioned the jurors generally before assigning them to different divisions, a failure of the juror to understand the question put and his consequent failure to indicate his disqualification does not excuse the party from his duty to ascertain the lack of qualification before verdict. *Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 990.

30. *Hudspeth v. Herston*, 64 Ind. 133.

[a] **Juror Through Lack of Knowledge Did Not Stand Aside.**—A new trial was granted where the juror through want of knowledge had not admitted the existence of his relationship to a party, when the judge ordered all jurymen within the prohibited degree to stand aside. *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473.

[b] **Civil and Criminal Cases Distinguished as to Grounds.**—The jurors having been interrogated by the court as to their service during the preceding six months, and having either answered negatively or indicated no dissent, the court said that in a civil case the complaining party would clearly have been entitled to a new trial, but the ground itself was not a disqualification in criminal cases. *Benton v. State*, 52 Tex. Crim. 360, 107 S. W. 838.

31. **Ia.**—*State v. Baker*, 157 Iowa 126, 135 N. W. 1097, 138 N. W. 841. **Mont.** *State v. Mott*, 29 Mont. 292, 74 Pac. 728. **Okla.**—*Ellis v. Territory*, 13 Okla. 633, 76 Pac. 159. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612. **Utah.**—*Tarpey v. Madson*, 26 Utah 294, 73 Pac. 411; *State v. Mickel*, 25 Utah 179, 76 Pac. 856; *State v. Thompson*, 24 Utah 314, 67 Pac. 789; *State v. Morgan*, 23 Utah 212, 64 Pac. 356; *People v. Reese*, 3 Utah 72, 2 Pac. 61.

[a] **Employment Not Disclosed, Juror Believing It Ended.**—Where plaintiff knew the facts before the case was submitted to the jury, a verdict will not be set aside though a juror failed to disclose that he was in the employ of the defendant at the time he was summoned as a juror, but not an employee regularly upon the pay roll and believed that his summons ended the employment. *Reynolds v. Richmond & M. Ry. Co.*, 92 Va. 400, 23 S. E. 770.

32. *Buck v. Hughes*, 127 Ind. 46, 26 N. E. 558, juror said he had not been juror at former trial, but plaintiff was present at that trial and should have known his statement was false.

33. *Lane v. Seoville*, 16 Kan. 402, parties could readily have discovered that juror had served on former jury but he said he knew nothing of the case.

need not necessarily be set aside where the concealment by the juror was of an immaterial matter.³⁴

(VI.) **Notice of Disqualification.**—A reasonable notice of disqualification such as should lead to further inquiry is sufficient to charge one with knowledge of the facts.³⁵ Though it has been held that there is no waiver on the theory of constructive notice from the court's records alone,³⁶ the contrary has also been held;³⁷ and the fact that matters are of record has often been considered in determining that the party has not used due diligence.³⁸

(VII.) **Knowledge of Disqualification.**—No matter how good one's cause of challenge may be, it is clearly waived where no objection is made when the jury is impaneled, especially when he knew the facts constituting the grounds of challenge.³⁹ It must appear that neither the

34. *Frank v. State*, 39 Miss. 705.

[a] **Matter Concealed Had No Bearing on Competency.**—Where a juror admitted he had been in jail with defendant, but his answers indicated that he had been a casual visitor when in fact he had been confined in the jail, the material point was as to information he received and as to this the parties disagreed, and the cause of the juror's presence in the jail had no possible bearing on his competency as a juror. *State v. Baker*, 157 Iowa 126, 135 N. W. 1097, 138 N. W. 841.

[b] **No Injury or Improper Motive Appearing.**—Though a juror has been examined on voir dire and has qualified himself by untrue answers as to his age and property, that will not be sufficient to grant a new trial in the absence of any showing of injury to the party complaining, or that the juror acted from improper motives. *Brewer v. Jacobs*, 22 Fed. 217.

35. *Brown v. Reed*, 81 Me. 158, 16 Atl. 504.

Knowledge of disqualification as waiver, see *infra*, VII, E, 4, b, (VII).

36. *Williams v. McGrade*, 18 Minn. 82.

37. *Mt. Desert v. Cranberry Isles*, 46 Me. 411, that juryman was from a town which by change in boundary lines had become outside the county, must be presumed to have been known and so waived. The venires are a matter of public record, open to inspection and the parties were constructively notified.

38. *Denmark v. State*, 43 Fla. 182, 31 So. 269; *Gavin v. State*, 42 Fla. 553, 29 So. 405.

[a] **Mere Record Distinguished From**

Notice or Negligence.—If objection was a matter of record and any negligence was chargeable to the party in not ascertaining the matter from the record, it would constitute a waiver. But there was no waiver on the theory of constructive notice alone. So it was held that there was no waiver although the records disclosed that same juror had served on former trial of same case, but parties and counsel had no actual notice thereof. *Williams v. McGrade*, 18 Minn. 82.

[b] **Record of Service on Lower Court Jury.**—One has not used the means in his power to prevent the service on the jury of one who served in the same capacity in a lower court trial of the same case. The record showed the fact and there was no evidence showing that the party did not have access to the record. *Hayward v. Calhoun*, 2 Ohio St. 164.

[c] **Grand jury records easily accessible** should be examined to see what jurors were grand jurors. *Cal. In re Jones' Estate*, 166 Cal. 108, 135 Pac. 288. **S. C.**—*State v. O'Driscoll*, 2 Bay 153. **Tenn.**—*Gillespie v. State*, 8 Yerg. 507, 29 Am. Dec. 137.

[d] **Failure To Compare Lists on Court's Suggestion.**—One waives objection that juror was one of grand jury who brought in indictment where he and his counsel fail to compare the lists, especially since the court called attention to the advisability of such an examination. *Sapp v. State*, 116 Ga. 182, 43 S. E. 410.

39. **U. S.**—*Brewer v. Jacobs*, 22 Fed. 217; *United States v. Smith*, 1 Sawy. 277, 27 Fed. Cas. No. 16,341. **Ala.**—*Brown v. State*, 52 Ala. 345. **Cal.**

People v. Stonecifer, 6 Cal. 405. **Ga.** Georgia R. Co. v. Cole, 73 Ga. 713. **Ind.** Stevens v. Stevens, 127 Ind. 560, 26 N. E. 1078; Coleman v. State, 111 Ind. 563, 13 N. E. 100; Croy v. State, 32 Ind. 384. **Ia.**—State v. Groome, 10 Iowa 308. **Kan.**—Lane v. Scoville, 16 Kan. 402. **Ky.**—Crosthwaite v. Crosthwaite, 151 Ky. 364, 151 S. W. 945; O'Brian v. Com., 9 Bush 333, 15 Am. Rep. 715. **La.**—State v. Shay, 30 La. Ann. 114. **Me.**—State v. Bowden, 71 Me. 89. **Md.**—Young v. State, 90 Md. 579, 45 Atl. 531; Busey v. State, 85 Md. 115, 36 Atl. 257. **Mass.**—Hallock v. Franklin County, 2 Mete. 558; Fox v. Hazelton, 10 Pick. 275; Amherst v. Hadley, 1 Pick. 38; Com. v. Norfolk County, 5 Mass. 435. **Mich.**—Walker v. Ann Arbor, 111 Mich. 1, 69 N. W. 87; Palmer v. Highway Comr., 49 Mich. 45, 12 N. W. 903; The Milwaukie v. Hale, 1 Dougl. 306. **N. J.**—*In re* Lind- sley, 46 N. J. Eq. 358, 19 Atl. 726. **N. Y.**—People v. Cosmo, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967. **Okla.**—Humphrey v. State, 11 Okla. Crim. 287, 146 Pac. 230; Horton v. State, 10 Okla. Crim. 294, 136 Pac. 177; Robinson v. Territory, 16 Okla. 241, 85 Pac. 451; Queenan v. Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324, *affirmed* in 190 U. S. 548, 23 Sup. Ct. 762, 47 L. ed. 1175. **S. C.**—Garrett v. Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70. **Tex.** Powers v. State, 69 Tex. Crim. 494, 154 S. W. 1020; Russell v. State, 44 Tex. Crim. 465, 72 S. W. 190; Garcia v. State (Tex. Crim.), 63 S. W. 309. **Vt.**—Quinn v. Halbert, 52 Vt. 353. **W. Va.**—Zickefoose v. Kuykendall, 12 W. Va. 23. **Wis.**—Okershauser v. State, 136 Wis. 111, 116 N. W. 769. **Can.** LeBlanc v. McRae, 11 Nova Scotia 240 (especially where the trial judge is satisfied with the verdict); Hart v. Pryor, 10 Nova Scotia 53.

Failure to challenge as waiver, see generally *supra*, VII, E, 4, b, (III).

Time to challenge, see *infra*, VII, E, 4, c.

[a] Grounds Waived by Failure To Challenge When Knowing of Same.

(1) That juror is non compos mentis (Oliver v. Herron, 106 Ala. 639, 17 So. 387), (2) or is an alien (S. C.—State v. Quarrel, 2 Bay 150, 1 Am. Dec. 637. **Vt.**—Richards v. Moore, 60 Vt. 449, 15 Atl. 119; Hammond v. Noble, 57 Vt.

193; Quinn v. Halbert, 52 Vt. 353. **Eng.** Rex v. Despard, 6 L. J. M. C. (O. S.) 102, 2 M. & R. 406, 17 E. C. L. 716, 8 B. & C. 417, 108 Eng. Reprint 1097), (3) or a nonresident (State v. Burke, 107 Iowa 659, 78 N. W. 677), (4) or not on assessment roll (People v. Sanford, 43 Cal. 29), (5) or is over age (State v. Clark, 121 Mo. 500, 26 S. W. 562; Pitt v. Bishop, 53 Mo. App. 600; Sutton v. Petty, 5 N. J. L. 504), (6) or that juror had been grand juror. **Ind.**—Rice v. State, 16 Ind. 298; Barlow v. State, 2 Blackf. 114. **Ky.** O'Brien v. Com., 9 Bush 333, 15 Am. Rep. 715. **La.**—State v. Jackson, 37 La. Ann. 897. **S. C.**—State v. O'Driscoll, 2 Bay 153. (7) So also relationship if known is waived (**Ga.**—Hadden v. Thompson, 118 Ga. 207, 44 S. E. 1001; Futch v. Quinn-Marshall Co., 14 Ga. App. 692, 82 S. E. 55. **Ind.**—Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549. **N. C.**—Baxter v. Wilson, 95 N. C. 137), (8) as is objection that jurors had prejudged case (State v. Howard, 118 Mo. 127, 24 S. W. 41); (9) that juror known to be kin to both prosecutor and defendant waived where no objection until after conviction. Miller v. State, 139 Ga. 716, 78 S. E. 181.

[b] Presumption That Party Knows His Own Relations.—Where objection was based upon relationship to the party making the objection, the court said the relationship "in its tendency, was favorable to the party now taking exceptions to the juror, and adverse to his antagonist." Without deciding whether that was sufficient ground the court refused to reverse because it "was not unreasonable to presume that one knows his own relations," and there was no showing the party did not know of the relationship before verdict. Tilton v. Kimball, 52 Me. 500.

[c] Where the cause of hostility, if it existed, must have been known to the prisoner, he cannot after verdict complain merely on the ground that he did not know the juror had expressed hostility against him. King v. Makaweo, 5 Hawaii 64.

[d] Court's Mistake as to Status of Juror.—Failure to call court's attention to fact that juror was summoned as a bystander, the court ruling that the particular ground alleged did not

party nor his counsel had knowledge of the disqualification.⁴⁰ At most the question of knowledge goes to the merits of an application for a new trial, however.⁴¹ Where a disqualification was not known until after verdict, a new trial may be granted.⁴² Where there is no doubt

apply to jurymen summoned on regular panel, is a waiver. *Brooke v. People*, 23 Colo. 375, 48 Pac. 502.

40. **Fla.**—*Kelly v. State*, 39 Fla. 122, 22 So. 303; *Irvin v. State*, 19 Fla. 872, affidavit must be unequivocal. **Ga.** *Widincamp v. State*, 135 Ga. 323, 69 S. E. 535; *Hadden v. Thompson*, 118 Ga. 207, 44 S. E. 1001; *Anderson v. Green*, 46 Ga. 361; *Futch v. Quinn-Marshall Co.*, 14 Ga. App. 692, 82 S. E. 55. **Ind.**—*Achey v. State*, 64 Ind. 56; *Bradford v. State*, 15 Ind. 347. **Ia.** *State v. Buford*, 158 Iowa 173, 139 N. W. 464, bias of juror. **La.**—*State v. Labauve*, 46 La. Ann. 548, 15 So. 172. **Miss.**—*Fulcher v. State*, 82 Miss. 630, 35 So. 170. **Mo.**—*State v. Nocton*, 121 Mo. 537, 26 S. W. 551; *State v. Howard*, 118 Mo. 127, 24 S. W. 41; *State v. Phillips*, 117 Mo. 389, 22 S. W. 1079; *Pitt v. Bishop*, 53 Mo. App. 600. **Ohio.**—*Parks v. State*, 4 Ohio St. 234; *Eastman v. Wight*, 4 Ohio St. 156; *Toledo, etc. St. R. R. Co. v. Toledo Electric St. R. R. Co.*, 12 Ohio Cir. Ct. 367. **Utah.**—*State v. Mickle*, 25 Utah 179, 70 Pac. 856. **W. Va.**—*Wagner v. Jaeger*, 49 W. Va. 61, 38 S. E. 528.

[a] **Known to Real Party in Interest but Not to Counsel or Nominal Party.**—It was not sufficient to show that neither the nominal party nor his counsel knew. It must be shown that the real party in interest did not know. *Tegarden v. Phillips*, 14 Ind. App. 27, 42 N. E. 549.

[b] **Where one counsel did not know of the disqualification**, but it did not appear that his client or associate counsel did not have knowledge thereof, the verdict will not be set aside. *Rollins v. Ames*, 2 N. H. 349, 9 Am. Dec. 79.

[c] **The Notice Need Not Be Personal to the Party.**—It must appear that neither he nor his attorney knew of the disqualifying fact. *Brown v. Reed*, 81 Me. 158, 16 Atl. 504; *Minot v. Bowdoin*, 75 Me. 205; *State v. Bowden*, 71 Me. 89; *Tilton v. Kimball*, 52 Me. 500; *Jameson v. Androscoggin R. R. Co.*, 52 Me. 412.

[d] **Waived Where Known to Agent and Attorney.**—There was clearly a

waiver where the complaining party's agent who was in attendance at the trial had been informed of a disqualifying relationship, and at least one of his counsel also knew of it. *McLellan v. Crofton*, 6 Me. 307.

[e] **Assuming that friendship for deceased would make one incompetent in a murder trial** it must appear by the affidavits that neither counsel nor defendant were cognizant of that friendship at the time the juror was examined. *State v. Nocton*, 121 Mo. 537, 26 S. W. 551.

[f] **Expression of opinion by juror** (1) must be shown not to have been known or is waived. *State v. Phillips*, 117 Mo. 389, 22 S. W. 1079. (2) A juror having stated frankly that he had formed an unqualified opinion as to the guilt or innocence of accused, a failure to challenge waives the right to object. *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33.

41. *Raub v. Carpenter*, 187 U. S. 159, 23 Sup. Ct. 72, 47 L. ed. 119.

42. **Ind.**—*Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429. **N. H.**—*Page v. Contoocook Valley R. Co.*, 21 N. H. 438. **N. C.** *State v. Lambert*, 93 N. C. 618; *State v. Davis*, 80 N. C. 412. **Can.**—*Lynds v. Hoar*, 10 Nova Scotia 327.

[a] **Applied to Constitutional Qualifications.**—Prior to the constitution of 1895 it had long been the rule that what was cause for challenge to a juror could not after verdict be made ground for a new trial. But under that constitution certain qualifications are prescribed for jurors and if neither the person complaining nor his counsel had knowledge that the juror lacked such qualifications a new trial may be granted. *Mew v. Charleston, etc. Ry. Co.*, 55 S. C. 90, 32 S. E. 828, following *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

[b] **A statute providing that "no irregularity in any writ of venire facias, or in the drawing, summoning, returning or empanelling of jurors shall be sufficient to set aside the verdict, unless the party making the objection was injured by the irregularity, or un-**

of the disqualification, and such disqualification has not been waived by notice or knowledge of the facts, the verdict is considered illegal and void and must be set aside and a new trial granted.⁴³ But dis-

less the objection was made before the returning of the verdict," does not apply where the disqualification of a juror, unknown to the party at the time of trial, is sought to be taken advantage of. Such is not an objection to the writ of venire nor to the drawing, return, summoning or impaneling of the jurors. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

[c] **Failure To Discover Former Service of Juror Excused.**—No waiver where juror was subject to challenge for implied bias because he had served as a juror on a former trial of the same cause. It appeared that the two trials occurred nearly three years apart, that only one of same counsel was concerned in both trials and that neither that counsel nor the injured party had any personal acquaintance with the juror. *Williams v. McGrade*, 18 Minn. 82.

[d] **Though a juror was not an elector and was retained on the panel without the knowledge of a party or his counsel and they have used due diligence to discover the disqualification, the verdict will be set aside.** *Eastman v. Wight*, 4 Ohio St. 156.

[e] **Where talesmen were deputy sheriffs and party had no notice or knowledge thereof, there is no waiver.** *Gaff v. State*, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235.

43. **Ga.**—*Moore v. Farmers Mut. Ins. Assn.*, 107 Ga. 199, 33 S. E. 65; *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777 (quoting with approval *Georgia R. Co. v. Cole*, 73 Ga. 713); *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311. See also *Jordan v. State*, 119 Ga. 443, 46 S. E. 679; *Glover v. Woolsey & Co.*, *Dudley* 85 Me.—*Lane v. Goodwin*, 47 Me. 593; *Hardy v. Sprowle*, 32 Me. 310. **Nev.** *State v. Pritchard*, 16 Nev. 101. **Vt.** *Richards v. Moore*, 60 Vt. 449, 15 Atl. 119; *Hammond v. Noble*, 57 Vt. 193; *Quinn v. Halbert*, 52 Vt. 353; *Briggs v. Georgia*, 15 Vt. 61.

[a] **Applies to All Persons Who Cannot Legally Serve.**—(1) This is the rule as to all persons who cannot legal-

ly serve as jurymen, as aliens, or minors; and it is not discretionary with the judge to refuse the new trial, as in ordinary cases, notwithstanding the fact that neither party knew of the disqualification until after the verdict. *Mann v. Fairlee*, 44 Vt. 672. (2) The theory is that the party is entitled to a trial by a legal jury; that a jury with a person thereon who cannot be a legal jurymen is not a legal jury. One who knew of this disqualification would, however, be deemed to have waived it. *Quinn v. Halbert*, 52 Vt. 353.

[b] **Reason for Rule.—Applied to Relationship.**—This rests upon the general rule that waiver presupposes the party to be affected has knowledge of his rights and does not wish to enforce them. So he could not waive the statutory disqualification that juror was within the forbidden degree of consanguinity where he did not know of it until after trial. The court had told the jurymen that any within the prohibited degree must stand aside, but the juror was not himself aware of the relationship. *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473, distinguishing the case from those in other jurisdictions where there is no statute which "rigidly prescribes" the limits of disqualification.

[c] **Even where the evidence in behalf of the state warranted a verdict of guilty it must be set aside, where prosecutor and juror were third cousins by marriage and so within the prohibited ninth degree, there being no counter showing to defendant's affidavit of the relationship and of the want of knowledge thereof on the part of himself and counsel, until after verdict.** *Hubbard v. State*, 5 Ga. App. 599, 63 S. E. 588.

[d] **Does Not Apply When Juror Divested of Freehold.**—If the juror was a freeholder when summoned, the fact that he had divested himself of his freehold before the trial must be raised by challenge. *Orcutt v. Carpenter*, 1 Tyler (Vt.) 250, 4 Am. Dec. 722.

[e] **For Irregularity in Summoning Must Be Some Fraud or Collusion.**—If

qualification of a juror, though unknown, is not a statutory ground for a new trial in some jurisdictions;⁴⁴ and is not usually ground for setting aside the verdict unless the jury was clearly partial.⁴⁵ By statute, in some jurisdictions, on the other hand, the court may, in its discretion, grant a new trial, though the disqualification was known before the verdict.⁴⁶

c. *Time To Challenge*.⁴⁷ — (I.) In General. — The constitutional provision guaranteeing an impartial jury is not violated by a statute

a person legally competent to serve, be irregularly summoned, the objection to him on that account is waived by his acceptance and a new trial will not be granted in the absence of some showing of fraud or collusion on the part of the officer summoning or some one. *Mann v. Fairlee*, 44 Vt. 672.

44. *People v. Boren*, 139 Cal. 210, 72 Pac. 899, the statute does not name it as one of the grounds for new trial. See *Posey v. State*, 86 Miss. 141, 38 So. 324; *Fulcher v. State*, 82 Miss. 630, 35 So. 170.

45. *Sansouwer v. Glenlyon Dye Works*, 28 R. I. 539, 68 Atl. 545; *Sprague v. Brown*, 21 R. I. 329, 43 Atl. 636; *Fiske v. Paine*, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498; *Ryan v. Riverside*, etc. Mills, 15 R. I. 436, 8 Atl. 246; *State v. Congdon*, 14 R. I. 458.

[a] After failure to examine on court's suggestion it must appear that an injustice has been done the party before a new trial will be granted. *Simmons v. McConnell's Admr.*, 86 Va. 494, 10 S. E. 838.

[b] Failure To Have Juror Examined Under the Statute. — After verdict if a party has failed to avail himself of the privilege of having the juror examined, it becomes a question for the court in its discretion to grant a new trial according to the merits. To warrant reversal for refusing it must appear that the party was prejudiced. *Hodges v. Com.*, 89 Va. 265, 15 S. E. 513.

[c] Principal Cause of Challenge Unknown. — A new trial will not be granted for matter that is principal cause of challenge, existing before the juror was sworn and unknown to the prisoner until after verdict unless it appears from the whole case that the prisoner suffered injustice because the juror served. *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982; *Beck v. Thom-*

son, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870; *State v. Howes*, 26 W. Va. 110; *State v. Greer*, 22 W. Va. 800; *State v. Williams*, 14 W. Va. 851.

[d] Denial by Juror Does Not Change Rule. — The rule applies even where the juror was asked as to the disqualifying fact and denied its existence. *State v. McDonald*, 9 W. Va. 456.

[e] Injustice Must Appear From Evidence on Motion. — Great deference is paid to the decision of the trial court, and a new trial will not be granted though the matter complained of as the ground for challenge was not known to the defendant until after verdict unless it appears from the evidence submitted on the motion for a new trial that the prisoner has suffered an injustice. *State v. Hobbs*, 37 W. Va. 812, 17 S. E. 380. See also *State v. Greer*, 22 W. Va. 800.

[f] Where a juror not competent and not drawn, but summoned by mistake, has attended, was accepted and served, it is no ground for a new trial, under the statute, unless that occurs which impugns the fairness of the trial. *Tolbert v. State*, 71 Miss. 179, 14 So. 462, 42 Am. St. Rep. 454.

46. See generally the statutes, and *Brown v. Reed*, 81 Me. 158, 16 Atl. 504. See also the title "New Trial."

[a] The party is not entitled to a new trial as a matter of right, but may have it ordered as a matter of discretion. *Minot v. Bowdoin*, 75 Me. 205.

47. Order of interposing challenges, see *supra*, VII, E, 2.

Time to challenge to array, see *supra*, VII, E, 3, c.

Time to interpose peremptory challenge, see *infra*, VII, E, 5.

Waiver by failure to act promptly upon learning of a disqualification, see *supra*, VII, E, 4, b.

fixing a reasonable time within which challenges for cause must be made.⁴⁸

(II.) **Before Acceptance.** — Challenges to individual jurors for cause should be interposed before the acceptance of the jury as a whole.⁴⁹ But such challenges may be permitted after the juror has once been passed for cause, and tendered to the other side,⁵⁰ or to the court,⁵¹ for examination or otherwise, provided it is done before the jury is sworn.⁵² The right to so challenge may be exercised either before or

48. *People v. Mack*, 35 App. Div. 114, 54 N. Y. Supp. 698, 13 N. Y. Crim. 401.

[a] **Statute Requiring That Certain Objections Be Before Jury Sworn.** The provision of a statute that no exception shall be taken to a juror on account of citizenship, age, or any other legal disability shall be allowed after he is sworn is not unconstitutional as depriving one of his right to a trial by jury. *Kohl v. Lehlback*, 160 U. S. 293, 16 Sup. Ct. 304, 40 L. ed. 432.

49. **Waiver of challenge by acceptance of jury**, see *supra*, VII, E, 4, b, (II).

[a] **Challenges allowed after acceptance of the jury**, must be for some cause not discoverable on the examination, however. *Baker v. State*, 3 Tex. App. 525, following *Horbach v. State*, 43 Tex. 242, as being the latest decision of the supreme court and so overruling apparent inconsistencies in earlier cases, citing *Cooley v. State*, 38 Tex. 636; *Hubotter v. State*, 32 Tex. 479; *Hanks v. State*, 21 Tex. 526. Examination of jurors, see *infra*, VII, E, 4, i.

50. **Ark.**—*Lackey v. State*, 67 Ark. 416, 55 S. W. 213. **La.**—*State v. Roland*, 38 La. Ann. 18. **Neb.**—*Coil v. State*, 62 Neb. 15, 86 N. W. 925. **N. C.** *State v. Green*, 95 N. C. 611, challenge by state allowed after juror tendered to accused.

[a] **The discretion of the court in permitting challenge after the juror has once been passed for cause**, is properly governed to some extent by the nature of the objection. Where a more technical than substantial objection is urged the reason for relaxing the customary order is not so cogent as when the objection goes directly to the bias or prejudice of the juror. *Coil v. State*, 62 Neb. 15, 86 N. W. 925.

[b] **Ground for Challenge First Appearing on Opposite Party's Examination.**—Though the rule is that the de-

fendant challenges before passing to state, failure to challenge before passing juror to state's attorney for examination is not a waiver where defendant's ground for challenge first appeared on the voir dire examination by the state's attorney. *Hankins v. State*, 118 Ark. 419, 176 S. W. 691.

[c] **Expression of Opinion Disclosed on Opposite Party's Examination.** Court properly sustained the state's challenge to a juror who had been passed by the state but upon his examination by the prisoner disclosed that he had formed and expressed the opinion that the prisoner was not guilty. *State v. Jones*, 80 N. C. 415.

[d] **Proper to set aside juror whose alienage is discovered by solicitor general after he is put upon prisoner.** *Johnson v. State*, 58 Ga. 491.

51. *State v. Roland*, 38 La. Ann. 18. **Examination by court**, see *infra*, VII, E, 4, i, (II).

Waiver of right to challenge, see *supra*, VII, E, 4, b.

52. See *infra*, VII, E, 4, c, (III).

[a] **Where (1) a disqualification was discovered after the juror had been passed by both sides, but before the jury was impaneled**, it was clearly within the court's discretion to permit him to be challenged. *State v. Vestal*, 82 N. C. 563. (2) Thus, where the juror by his answers has misled the court and counsel for both sides and has been accepted by both sides, but before the impaneling of the jury is completed he makes known to the court that he had misunderstood a question and is in fact disqualified, he is properly excused on challenge over the other party's objection. *Black v. State*, 46 Tex. Crim. 590, 81 S. W. 302.

[b] **Proper To Permit Challenge and Investigate.**—Before the jury had been sworn in chief but after they had been accepted by both sides and sent to their room, the solicitor general announced to the court that it had just

after a party has exercised his statutory right of striking names peremptorily from the panel.⁵³

(III.) Before Being Sworn.—The general rule is that the challenge for cause must be made before the juror is sworn.⁵⁴ The proper time

come to the prosecution's notice that a certain juror had publicly stated in effect that if he got on the jury he would turn defendant loose. Thereupon the court sat as trier and after introduction of evidence by the state and a statement by the juror on the subject he was found competent, served on the jury and a verdict of guilty was rendered. It was held that the allowance of the investigation was not error. *Holton v. State*, 137 Ga. 86, 72 S. E. 949.

[c] **Applied to Disqualification by Belief as to Capital Punishment.**—After juror has been passed and accepted but before he is sworn, the court may in its discretion permit the state to challenge for cause a juror who volunteers the information that he is not qualified because of his views on capital punishment. *State v. Vann*, 162 N. C. 534, 77 S. E. 295.

[d] **On Conflict as to His Having Expressed Opinion.**—The court properly excused a juror on the state's motion and where the defendant did not object, after he had been accepted but before the jury was sworn, where it appeared that the juror may have expressed a disqualifying opinion though the juror said he had no recollection of having done so but that the affiants were respectable and truthful men and he would not say positively that he had not expressed himself to them as stated in their affidavits. *Taylor v. State*, 11 Lea (Tenn.) 708.

[e] **Discovery of Nonresidence.**—After twelve men had been examined, passed by both sides and had taken their seats but before they were sworn, the prosecuting attorney told the court he had learned it was probable two of the jurors lived outside the county, whereupon the court questioned them, found they were nonresidents and over defendant's objection, sustained the state's challenge for cause. In this there was no error as at that stage of the proceedings either party had the legal right to have the jurors excluded. *Monson v. State*, 45 Tex. Crim. 426, 76 S. W. 570.

[f] **In Civil Case on Juror's Admitting Opinion After Acceptance.**—In a civil case there is no abuse of discretion in excusing a juror on challenge after his acceptance by both sides, where it appears by his voluntary statement that he had formed an opinion. *Grady v. Early*, 18 Cal. 108.

53. *Edelen v. Gough*, 8 Gill (Md.) 87.

[a] **Though the parties have exhausted their peremptories or have stated that they are satisfied with the jury.** The rule may be subject to abuse, but the trial court will guard against that. *Scripps v. Reilly*, 38 Mich. 10.

54. **U. S.**—*United States v. Peaco*, 4 Cranch C. C. 601, 27 Fed. Cas. No. 16,018. **Ala.**—*Roberts v. State*, 68 Ala. 515; *Ripley v. Coolidge*, Minor 11. **Ark.**—*Meyer v. State*, 19 Ark. 156. **Cal.**—*People v. Boren*, 139 Cal. 210, 72 Pac. 899. **Ga.**—*Schnell v. State*, 92 Ga. 459, 17 S. E. 966; *Epps v. State*, 19 Ga. 102; *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497; *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063. **Ky.**—*Combs v. Com.*, 97 Ky. 24, 29 S. W. 734. **La.**—*State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448; *State v. Bunger*, 14 La. Ann. 461; *Nugent v. Trepagnier*, 2 Mart. (O. S.) 205. **Md.**—*Young v. State*, 90 Md. 579, 45 Atl. 531. **Mass.**—*Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534. **Minn.**—*State v. Armington*, 25 Minn. 29. **Mo.**—*State v. Foley*, 144 Mo. 600, 46 S. W. 733. **Neb.**—*Coil v. State*, 62 Neb. 15, 86 N. W. 925. **N. Y.**—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Carpenter*, 36 Hun 315, 16 Abb. N. C. 128, 3 N. Y. Crim. 92. **N. C.**—*State v. Lipscomb*, 134 N. C. 689, 47 S. E. 44; *State v. Davis*, 80 N. C. 412. **Ohio.**—*Beck v. State*, 20 Ohio St. 228. **Tenn.**—*Ward v. State*, 1 Humph. 253; *Gillespie v. State*, 8 Yerg. 507, 29 Am. Dec. 137. **Can.**—*Reg. v. Earl*, 10 Manitoba 363; *Pitfield v. Kimball*, 25 N. Bruns. 193.

[a] **Rule Where Doubtful Whether Challenge to Poll or Array.**—Though it is not quite clear whether an objection

to challenge is between the appearance and the swearing of the juror.⁵⁵ and before the jury is impaneled,⁵⁶ and the trial entered upon.⁵⁷ The common-law practice is to challenge the jurors as they "come to the book to be sworn."⁵⁸ But the court may permit a juror to be challenged after he has been sworn, but before the actual trial of the case has been entered upon.⁵⁹ It may be exercised while the juror is taking the oath.⁶⁰

Statutes sometimes provide that the challenge must be made before the jury is sworn;⁶¹ but the more usual provision is that it should

was to jurymen who served or to veniremen as containing veniremen not qualified the objection is too late after the jury is sworn to try the case. *Thompson v. Com.*, 8 Gratt. (49 Va.) 637.

[b] **Rule Not Affected by Fact That Opposite Party's Peremptories Exhausted.**—It was proper to exclude on plaintiff's motion, even after defendant's peremptories were exhausted, a juror whom plaintiff informed the court he wished to use as a witness though he had not been subpoenaed. The jury had not been sworn but juror had been accepted. *Mundine v. Pauls*, 28 Tex. Civ. App. 46, 66 S. W. 254.

[c] **There is no distinction (1) between regular jurors and talesmen as to the operation of the rule that unless an objection be made before the juror is sworn it is cured by the verdict** (*State v. Bunker*, 14 La. Ann. 461); (2) but the rule does not apply to juries appointed ex parte as on inquest of damages. *Hunter v. Matthews*, 12 Leigh (39 Va.) 228. In such instances the challenge is properly made at the first opportunity as upon the return of the inquisition.

55. *Williams v. State*, 3 Ga. 453.

[a] **The right to challenge for cause continues until the juror is sworn in the case.** *Com. v. Evans*, 212 Pa. 369, 61 Atl. 989; *McFadden v. Com.*, 23 Pa. 12, 62 Am. Dec. 308; *Mundine v. Pauls*, 28 Tex. Civ. App. 46, 66 S. W. 254.

56. *Parks v. State*, 4 Ohio St. 234; *Eastman v. Wight*, 4 Ohio St. 156; *Horbach v. State*, 43 Tex. 242; *Hannaman v. State* (Tex. Crim.), 33 S. W. 538; *International, etc. Co. v. Woodward*, 26 Tex. Civ. App. 389, 63 S. W. 1051; *Ray v. State*, 4 Tex. App. 450.

[a] **It Is Not Within "Apt Time"** Unless so Made.—"A challenge to a juror must be made in 'apt time.' A challenge after the jury is empaneled

is not in apt time." *Baxter v. Wilson*, 95 N. C. 137; *State v. Lambert*, 93 N. C. 618.

57. **U. S.**—*Turner v. United States*, 66 Fed. 280, 13 C. C. A. 436. **Ala.** *Citizens' Light, H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199; *Howard v. State*, 108 Ala. 571, 18 So. 813. **Ga.** *Widincamp v. State*, 135 Ga. 323, 69 S. E. 535.

58. **U. S.**—*United States v. Davis*, 103 Fed. 457. **N. Y.**—*People v. Damon*, 13 Wend. 351. **S. C.**—*State v. Williams*, 2 Hill 381.

59. **La.**—*State v. Nash*, 46 La. Ann. 194, 14 So. 607; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448. **Mass.** *Com. v. Knapp*, 10 Pick. 477, 20 Am. Dec. 534; *Com. v. Twombly*, 10 Pick. 480, note. **Mich.**—*Quay v. Duluth S. S. & A. R. Co.*, 153 Mich. 567, 116 N. W. 1101. **N. Y.**—*People v. Damon*, 13 Wend. 351. **N. C.**—*State v. Adair*, 66 N. C. 298. **S. C.**—*Greer v. Norvill*, 3 Hill 262. **Tex.**—*Ray v. State*, 4 Tex. App. 450. **Va.**—*Tooele v. Com.*, 11 Leigh (38 Va.) 714.

60. *Roberts v. State*, 68 Ala. 515 (wherein a juror disclosed his incompetency for the first time while in the very act of taking the oath by attempting to qualify it by saying before he kissed the book "Yes, to the best of my ability, but I will not convict capitally," and the challenge is properly allowed); *Murphy v. State*, 9 Lea (Tenn.) 373.

61. See generally the statutes.

[a] **Construction of Missouri Statute.**—Rev. St., 1909, §7260, providing (1) that "No exceptions to a juror on account of his citizenship, nonresidence, state or age or other legal disability shall be allowed after the jury is sworn," has uniformly been construed as denying the right of a party in a civil or criminal cause to object to a juror after the jury is sworn for

be made when the juror appears and before he is sworn.⁶² Some statutes, however, provide that the court may permit the challenge after the juror is sworn,⁶³ while others permit the court to allow the challenge at any time before the jury is completed.⁶⁴ Under these statutes the rule is that the challenge will be permitted, provided the party did not know the ground of challenge before the juror was sworn.⁶⁵ Other statutes permit the challenge at any time before any evidence is submitted,⁶⁶ while still others provide that the challenge may be made after the juror is sworn and before evidence submitted, if the ground was not sooner discovered.⁶⁷

Where statute permits raising the question of competency after jury sworn, but before evidence submitted, the party should act at once upon the discovery of the facts and the means of proof.⁶⁸ These

any of the causes mentioned in said section. *State v. Wilson*, 230 Mo. 647, 132 S. W. 238. (2) The phrase "or other legal disability," is broad enough to include the objection that the juror had been convicted of a felony and had not been pardoned. *State v. Wilson*, 230 Mo. 647, 132 S. W. 238. (3) Statute applies where objection is that juror cannot read or write English. *Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 990; *Orr v. Bradley*, 126 Mo. App. 146, 103 S. W. 1149. (4) Where juror is over legal age. *Blair v. Paterson*, 131 Mo. App. 122, 110 S. W. 615; *Pitt v. Bishop*, 53 Mo. App. 600. (5) Where juror is not citizen of county. *State v. Waller*, 88 Mo. 402. (6) The statutes applying specifically to jurors in certain counties and cities are not in conflict with this section. It is a general rule applicable to all juries. *Orr v. Bradley*, 126 Mo. App. 146, 103 S. W. 1149.

62. See generally the statutes, and *Cal.*—*People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 869. *Nev.*—*State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33. *N. Y.*—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967. *N. D.*—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003.

63. See generally the statutes, and *Va. Code*, 1904, §3155; *W. Va. Code*, §4657.

64. See generally the statutes.

[a] **Statutory Right Should Not Be Abridged.**—"The right of challenge should not be confined within narrower limits than the statute absolutely demands, as it is designed to purify the jury by freeing it of all influences that may tend one way or the other

to divert its action from the straight line of impartiality; an end equally desirable to both the state and the accused." *State v. Dumphrey*, 4 Minn. 438.

How far statute applies to peremptory challenges, see *infra*, VII, E, 5.

65. *State v. Pritchard*, 16 Nev. 101.

66. *N. Y. Code Crim. Proc.*, §371. See *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967; *People v. Childs*, 87 App. Div. 474, 84 N. Y. Supp. 853; *Okla. Rev. Laws*, §5851.

How far statute applies to peremptory challenges, see *infra*, VII, E, 5.

67. *Mo. Rev. St.*, 1909, §5221; *State v. Foley*, 144 Mo. 600, 46 S. W. 733; *Mont. Rev. Code*, §9255.

[a] **Georgia Statutes Construed.** *Penal Code*, §999, providing (1) for the hearing of proof of subsequently discovered objections "at any time before the prosecuting counsel submits to the jury any of his evidence in the case," and §1004, providing that newly discovered evidence to disprove a juror's answer "may be heard by the judge at any time before any of the evidence on the main issue is submitted" clearly limit the time for objecting, examination, and excusing, to the time when the jury has entered upon the exercise of its functions. *Simmons v. State*, 88 Ga. 272, 14 S. E. 613. (2) The question may be raised after the jury are sworn and before any other step taken in trial. *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523; *Wesley v. State*, 65 Ga. 731.

68. *Lampkin v. State*, 87 Ga. 516, 13 S. E. 523.

[a] **Statute Has Not Changed Rule.** The rule requiring prompt action on

statutes leave the matter within the discretion of the court,⁶⁹ and there can be no reversal unless the discretion was abused.⁷⁰ If the matter is promptly brought to the court's attention, and relief is denied, reversal follows.⁷¹

The court may exercise its power to exclude a juror subsequently found to be disqualified, over the objection of counsel for both sides,⁷² and the proper practice is to set aside the incompetent juror though both sides have accepted him.⁷³ It has always been permissible to allow a challenge for cause to be interposed, where the cause arose after the juror was sworn.⁷⁴

discovery of disqualifications during progress of the trial is not changed by a provision of the statute permitting challenge for good cause shown after juror sworn, but not after testimony has been partially heard. This provision either does not apply to disqualifications subsequently discovered, or takes away the right to challenge altogether. But in either view the defendant waives the objection by going on with the trial. *Queenan v. Oklahoma*, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. ed. 1175, *affirming* 11 Okla. 261, 71 Pac. 218.

69. *People v. Beckwith*, 103 N. Y. 360, 8 N. E. 662, *affirming* 4 N. Y. Crim. 335.

70. *People v. Beckwith*, 103 N. Y. 360, 8 N. E. 662, *affirming* 4 N. Y. Crim. 335; *Hubotter v. State*, 32 Tex. 479, permitted after acceptance.

71. *Taylor v. Combs*, 20 Ky. L. Rep. 1828, 50 S. W. 64; *State v. Sternberg*, 59 Mo. 410.

[a] **Juror a Grand Juror Learned Before Witnesses Called.**—Where prisoner learned after juror was sworn but before witnesses were called that the juror had been one of the grand jury, and immediately brought the matter to the court's attention, his challenge should have been allowed. *Dilworth v. Com.*, 12 Gratt. (53 Va.) 689, 65 Am. Dec. 264.

[b] **Juror Disclosed Was Grand Juror on Opening Statement.**—Juror announced that he then for the first time recalled that he had been on the former jury who tried the case. Objection to his serving was at once made, but the court refused to discharge him. *Taylor v. Combs*, 20 Ky. L. Rep. 1828, 50 S. W. 64.

[c] **False Statements Disclosed During Progress of Trial.**—Counsel for defendant on learning for the first time during the progress of the trial that

juror had made false answers as to his previous expression of opinion, adopted the correct practice by bringing the matter at once to the court's attention and asking for discharge of jury and the impaneling of a new jury. *Hughes v. State* (Tex. Crim.), 60 S. W. 562.

[d] **Juror Unauthorized To Sit.** One having without examination, or challenge, unauthorizedly taken his seat in the jury box, and having been sworn before the mistake was discovered, it was reversible error to compel defendant to go to trial with the jury simply because it had been sworn. Timely objection was made before any evidence had been introduced. *State v. Sternberg*, 59 Mo. 410.

72. *Warnack v. State*, 7 Ga. App. 73, 66 S. E. 393.

73. *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

74. *People v. Bodine*, 1 Edm. Sel. Cas. (N. Y.) 36.

[a] **Error To Refuse Where Juror Expressed Opinion After Being Sworn.** It was held reversible error not to have granted a new trial where the juror after opening statement made by counsel, and during a recess before the taking of testimony, publicly gave utterance to brutal and profane language against defendant which "stamped him as being utterly unfit to pass upon the guilt or innocence of the party," and the matter was at once brought to the trial court's attention. *State v. Wheeler*, 108 Mo. 658, 18 S. W. 924.

[b] **Can Only Be Allowed for Such After Arising Cause.**—"No juror can be challenged by the defendant after he has been selected and sworn without the consent of the state, unless it be for some cause which has arisen since he was chosen and sworn." *Stato v. Lipscomb*, 134 N. C. 689, 47 S. E. 44.

(IV.) **Before Verdict.**—Whatever other rules obtain as to the time to challenge,⁷⁵ it is generally agreed that challenges for cause must be made before the verdict of the jury.⁷⁶ They cannot be made for

[c] **Except by Consent.**—After a juror has been impaneled and sworn he cannot be challenged without consent, except for a cause originating since he was sworn. *Harris v. State*, 177 Ala. 17, 59 So. 205.

75. See *supra*, VII, E, 4, b, (I) to (III).

76. **Ala.**—*Carson v. Pointer*, 11 Ala. App. 462, 66 So. 910. **Ark.**—*Cureton v. State*, 117 Ark. 655, 174 S. W. 810. **Ga.**—*Bush v. Roberts*, 4 Ga. App. 531, 62 S. E. 92. See also *Jordan v. State*, 119 Ga. 443, 46 S. E. 679; *Hill v. State*, 64 Ga. 453; *Gormley v. Laramore*, 40 Ga. 253; *Epps v. State*, 19 Ga. 102. **Mo.**—*State v. Ward*, 74 Mo. 253. **N. C.**—*State v. Lipscomb*, 134 N. C. 689, 47 S. E. 44; *State v. Lambert*, 93 N. C. 618. **S. C.**—*Billis v. State*, 2 McCord 12. **Va.**—*Poindexter v. Com.*, 33 Gratt. (74 Va.) 766. **W. Va.**—*State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757; *Zickefoose v. Kuykendall*, 12 W. Va. 23; *State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606; *State v. McDonald*, 9 W. Va. 456.

[a] **No Distinction Between Principal Challenge or to Favor.**—The better rule is that there is no distinction between challenge to the favor and principal challenge. The latter is based on a presumption of bias. If challenged the juror is excluded. But after verdict the court can see whether the bias did in fact affect the juror's decision. *Bristow v. Com.*, 15 Gratt. (56 Va.) 634. See also *Dilworth v. Com.*, 12 Gratt. (53 Va.) 689, 65 Am. Dec. 264; *Com. v. Jones*, 1 Leigh (28 Va.) 598.

[b] **Thus, after verdict it is too late to challenge on the following grounds:** (1) That juror was an alien (**Cal.**—*People v. Evans*, 124 Cal. 206, 56 Pac. 1024; *People v. Chung Lit*, 17 Cal. 320. **La.** *State v. Nolan*, 13 La. Ann. 276. **Miss.** *Fulcher v. State*, 82 Miss. 630, 35 So. 170. **N. M.**—*Territory v. Baker*, 4 N. M. 236, 13 Pac. 30; *Territory v. Anderson*, 4 N. M. 213, 13 Pac. 21. **S. C.** *State v. Quarrel*, 2 Bay 150, 1 Am. Dec. 637. **Wis.**—*Bonneville v. State*, 53 Wis. 680, 11 N. W. 427; *Brown v. La Crosse*

City Gas Light & C. Co., 21 Wis. 51, no reason shown for not sooner raising), (2) or a nonresident (**Ala.**—*Hernon v. State*, 2 Ala. App. 118, 56 So. 85. **Cal.**—*People v. McFarlane*, 138 Cal. 481, 71 Pac. 568, 72 Pac. 48, 61 L. R. A. 245. **Ga.**—*Daniel v. State*, 11 Ga. App. 799, 76 S. E. 162, "being propter defectum." **Wis.**—*Rockwell v. Elderkin*, 19 Wis. 367), (3) or has not been a resident of the state for the required length of time (*Thompson v. Paige*, 16 Cal. 77), (4) or is not a registered voter (*State v. McLean*, 21 La. Ann. 546), (5) not a freeholder (*Schuster v. La Londe*, 57 Tex. 28; *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957), (6) not upon the assessment roll (*People v. Samsels*, 66 Cal. 99, 4 Pac. 1061. See also *People v. Mortier*, 58 Cal. 262), (7) or that he has not paid his poll tax (*James v. State*, 68 Ark. 464, 60 S. W. 29), (8) or could not speak English (*Bonneville v. State*, 53 Wis. 680, 11 N. W. 427), (9) or was a member of the grand jury (*State v. McCarthy*, 44 La. Ann. 323, 10 So. 673; *State v. Jackson*, 37 La. Ann. 897), (10) or was a county officer (*Cureton v. State*, 117 Ark. 655, 174 S. W. 810), (11) or interested in the result (*Pearson v. Wightman*, 1 Mill [S. C.] 336), (12) or related to one of the parties (*Todd v. Gray*, 16 S. C. 635), (13) or that he is under age. *State v. Lipscomb*, 134 N. C. 689, 47 S. E. 44; *State v. Lambert*, 93 N. C. 618.

[c] **Juror Over Age.**—Objection that juror is over age is propter defectum and must be made before verdict. *Manning v. State*, 11 Ga. App. 766, 76 S. E. 70, which states that those Georgia decisions which are to the contrary have not been followed. But see *Staten v. State*, 141 Ga. 82, 80 S. E. 850, holding that over age is no ground of challenge. See also *United States v. Gomez*, 7 N. M. 554, 37 Pac. 1101; *United States v. Folsom*, 7 N. M. 532, 38 Pac. 70.

[d] **Claim of Damages Against Defendant.**—A juror was not so disqualified that a new trial should be granted merely because he had a claim for damages against defendant. There

the first time on appeal.⁷⁷ Steps to remedy the error where a juror has been accepted must be taken at once, without waiting to see if a favorable verdict will be obtained,⁷⁸ and this rule applies whether the discovery of disqualification be made after the juror is sworn,⁷⁹ but

was nothing to show that the claim was not honest, nor that the juror was in any way influenced thereby to disregard his oath. *Southern Ry. Co. v. Oliver*, 102 Va. 710, 47 S. E. 862.

[e] Assuming that the conviction of a felony, even if followed by a pardon, would be a disqualification, the objection comes too late after verdict. *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512.

[f] That a juror was not regularly summoned comes too late after verdict. He was in court room when his name was drawn and called, and was accepted and sworn. *State v. Anderson*, 26 S. C. 599, 2 S. E. 699.

[g] Where a venire was irregularly issued, and the jury was made up in part from persons who answered the summons, if no challenge or objection was made to any juror, no complaint can be made after verdict. *Greer v. Wilson*, 38 W. Va. 100, 18 S. E. 380.

[h] That the juror's name was not on the venire comes too late after verdict. It is at most a mere irregularity in summoning, and the verdict will not be disturbed for such. *Thrall v. Smiley*, 9 Cal. 529.

Irregularities in drawing and summoning waived by failure to challenge the array, see *supra*, VII, E, 3, a.

77. *Clark v. Drain Comr.*, 50 Mich. 618, 16 N. W. 167.

78. Ia.—*State v. Baker*, 157 Iowa 126, 135 N. W. 1097, 138 N. W. 841; *State v. Pray*, 126 Iowa 249, 99 N. W. 1065; *Pfeiffer v. City of Dubuque*, 94 N. W. 492. Minn.—*Wells-Stone M. Co. v. Bowman*, 59 Minn. 364, 61 N. W. 135. Mo.—*State v. Jackson*, 96 Mo. 200, 9 S. W. 624. Ohio.—*Lowe v. McCorkle*, 1 Ohio Dec. (Reprint) 352, 7 West. L. J. 64. Pa.—*McCorkle v. Binn*, 5 Binn. 340, 6 Am. Dec. 420; *Spong v. Leshner*, 1 Yeates 326. Tex.—*Blanton v. Mayes*, 72 Tex. 417, 10 S. W. 452. W. Va.—*State v. Strauder*, 11 W. Va. 745, 27 Am. Rep. 606.

79. *Douthitt v. State*, 144 Ind. 397, 42 N. E. 907, mental incapacity discovered.

[a] Accepted Juror Did Not Respond to Call.—That a juror accepted by both defendant and the state did not respond to the call of his name but another sat in his place cannot be raised after verdict where defendant did not object at once on discovery of the mistake, and insist on the correct juror sitting. *Granger v. State* (Tex. Crim.), 31 S. W. 671.

[b] Disqualification Suggested by State—Defendant Objected to Substitution.—Where counsel for state suggested to the court the want of qualification as a freeholder or householder, after the jury had been sworn but before any evidence had been heard by them, and moved that another be substituted, but defendant's counsel objected, he cannot raise the question after verdict. *Jarnagin v. State*, 10 Yerg. (Tenn.) 529.

[c] One Party Consenting to Withdraw, the Party Objecting Waives. Juror having disclosed that he was one of the grand jury and the prosecution having consented that he be withdrawn, but defendant declining, the objection is waived. *Reg. v. Sullivan*, 8 A. & E. 831, 8 L. J. M. C. 3, 1 P. & D. 96, 1 W. W. & H. 610, 35 E. C. L. 865, 112 Eng. Reprint 1053.

[d] Offer To Withdraw, Party Declining Waives.—Defendant clearly waives his right to object where after the juror was sworn plaintiff discovered the juror's incompetency, immediately communicated it to the court and offered to withdraw the juror, which offer the defendant declined. *Livingston v. Heerman*, 9 Mart. O. S. (La.) 656.

[e] Juror Disclosed Facts After Opening Statement.—Where after the jury had been sworn and the prosecuting attorney had made his opening statement, a juror addressing the court stated that he had expressed an opinion on the question of punishment, to which the court replied that he did not care to hear him further but would instruct the jury as to the punishment at the proper time; counsel should have examined him further and have

before evidence is received, or during the progress of the trial;⁸⁰ and even where facts are not learned until after the retirement of

challenged him at the time he made the statement, and should not have permitted the trial to proceed and interpose a challenge after several witnesses had testified. *State v. Snyder*, 182 Mo. 462, 82 S. W. 12.

80. *State v. Pray*, 126 Iowa 249, 99 N. W. 1065 (relationship to prosecuting witness discovered); *Williams v. True*, 1 Cinc. Super. Ct. (Ohio) 321.

[a] **Discovered When Trial in Progress Two Hours.**—That juror was of unsound mind was discovered by counsel when trial had been in progress less than two hours. Counsel should have brought the matter to the court's attention and have elected either to go on with eleven jurors or to have a new jury impaneled. *Pfeiffer v. City of Dubuque* (Iowa), 94 N. W. 492.

[b] **Where party was not present during the impaneling of the jury** but was in the court room during the trial, he should at once have made objection to the presence on the jury of one well known to him and believed by him to be prejudiced and hostile. *Bickel v. Krauss*, 100 Ky. 728, 39 S. W. 414.

[c] **Disqualification Disclosed by Counsel's Questions.**—Where the same counsel appeared for person being examined in an inquisition of lunacy, and he failed to object when the jury was sworn but by his questions thereafter disclosed the fact that one juror had served on a former inquisition, he should not have permitted the trial to continue. *In re Lindsley*, 46 N. J. Eq. 358, 19 Atl. 726.

[d] **District Attorney Disclosed Disqualification.**—Where during the progress of the trial, the district attorney stated to the court that he had just discovered the disqualification of a juror, it was defendant's duty to at once move to excuse the juror. His counsel could not remain silent and then take advantage of the disqualification on appeal. *McNish v. State*, 47 Fla. 69, 36 So. 176.

[e] **The court having announced** that since the last adjournment it had been informed that one of the jurors named had been convicted of a felony which disqualified him, and having asked counsel what they desired to do, to which counsel replied they had noth-

ing to say, the objection is waived. *Queenan v. Oklahoma*, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. ed. 1175, *affirming* 11 Okla. 261, 71 Pac. 218.

[f] **Juror having disclosed his incompetency when trial begun and first witness examined**, the party must either challenge or go on with the jury as constituted. *Stewart v. State*, 15 Ohio St. 155.

[g] **Counsel for defendant was informed after evidence had all been put in** that the juror was related to defendant. He did not lay the matter before the court or counsel for plaintiff. Objection was deemed waived though counsel placed little credence in the information. *Brown v. Reed*, 81 Me. 158, 16 Atl. 504.

[h] **A juror having informed a party before the case was submitted to the jury**, that he had formed and expressed an opinion, the party should have brought the matter at once to the court's attention. *Tomer v. Densmore*, 8 Neb. 384, 1 N. W. 315.

[i] **Where counsel during the progress of the trial "received a vague impression"** that a juror was over age, he should have brought the matter at once to the trial court's attention, or the disqualification is deemed waived. *United States v. Folsom*, 7 N. M. 532, 38 Pac. 70.

[j] **Identity of Juror Recognized During Progress of Trial.**—Defendant was deemed to have waived his objection to a juror based on the fact that they had been at one time confined in the same jail and defendant had conversed with the juror about his case. Defendant claimed not to have recognized the juror on his examination, but he did discover his identity during the progress of the trial. *State v. Baker*, 157 Iowa 126, 135 N. W. 1097, 138 N. W. 841.

[k] **Admissions by Juror When Testifying as Witness.**—Discovery that defendant had talked to jurors about his case was discovered by his admissions when on the stand testifying in his own behalf. The irregularity was waived by plaintiff's going on with the case. *Hussey v. Allen*, 59 Me. 269.

[l] **Party's counsel learning of communications between other party and the jury but failing to object the ir-**

the jury, parties should move at once for appropriate relief without taking chances on a favorable verdict.⁸¹

d. *Form and Sufficiency of Challenge.*—(I.) *Necessity for Formal Challenge.*⁸²—Any legal or valid objection to a juror should be stated openly.⁸³ There should be a formal challenge,⁸⁴ and not a mere general objection to the court's action,⁸⁵ or a mere statement of possible cause for challenge not directed against a particular juror,⁸⁶ or a

regularity is waived. *Fessenden v. Sager*, 53 Me. 531.

[m] *Must Call Legal Disqualification to Other Party's Attention.*—Even as to a legal disqualification which would ordinarily be ground for a new trial, though no challenge was interposed, if the party learns of the disqualification while the trial is in progress he waives his right unless he calls it to the attention of the court and the other party. *Quinn v. Halbert*, 52 Vt. 353.

[n] *Proper Practice Is To Ask for Discharge—Not for Continuance.*—Relationship was discovered during second day of trial. Counsel asked for a continuance, but proper practice is to ask for discharge of the jury. *Wells-Stone Merc. Co. v. Bowman*, 59 Minn. 364, 61 N. W. 135.

[o] *Alienage Discovered; Trial Proceeded After Juror Took Out Papers.*—Juror was an alien, of which fact both sides were ignorant until the trial had proceeded for a day, when the incompetent took out his second papers and the trial proceeded without objection. The verdict will not be set aside. *Schwantes v. State*, 127 Wis. 160, 106 N. W. 237.

81. *Cleveland, C. C. & St. L. R. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 287.

82. *Failure to challenge as waiving objection*, see *supra*, VII, E, 4, b, (III).

83. *Butler v. Kelsey*, 15 Johns. (N. Y.) 177, it was ground for setting aside an inquisition that one party called the sheriff aside, and had him excuse a juror.

84. *State v. Creasman*, 32 N. C. 395; *State v. Benton*, 19 N. C. 196.

[a] *In misdemeanor cases defendant should challenge.* *Crew v. State*, 113 Ga. 645, 38 S. E. 941; *Schnell v. State*, 92 Ga. 459, 17 S. E. 966.

[b] *Otherwise There Is No Issue To Be Tried or Reviewed.*—If a juror be not challenged for either actual or imputed bias either before or after his

voir dire examination, no issue is made to which his testimony is directed and no ruling on the admission or rejection of testimony or questions can be assigned for error. *People v. Hamilton*, 62 Cal. 377.

85. *State v. Cooper*, 74 W. Va. 472, 82 S. E. 358.

[a] *Objection to Summons Is Not Challenge to Juror Summoned.*—That a bystander was summoned by one who was not qualified so to do, is no ground for complaint where no challenge was interposed to the juror, though an objection was made to the court's order under which the summons was made. *Meeker v. Gardella*, 1 Wash. 139, 23 Pac. 837.

86. *Crew v. State*, 113 Ga. 645, 38 S. E. 941 (counsel stated, in effect, that he had heard one of the jurors, not named, had expressed a disqualifying opinion); *State v. Pell*, 140 Iowa 655, 119 N. W. 154.

[a] *Statement That Two Jurors Were Disqualified.*—When panel was presented defendant's counsel stated that two of the jurors were disqualified, stating the reason. The court thereupon said: "If you challenge the two jurors for cause, I will sustain the challenge," to which defendant said nothing but then and there excepted. The supreme court held that since defendant had not followed the proper and orderly way he was not entitled to complain. *West v. State*, 80 Miss. 710, 32 So. 298.

[b] *That there has been a motion in the nature of a challenge to the array based upon a ground which would have been valid only as a challenge to the poll addressed to each juror individually does not excuse making such a challenge.* It is not the duty of the trial court to make objections for defendant and his counsel, which they do not see fit to make for themselves. *State v. Crane*, 202 Mo. 51, 100 S. W. 422.

[c] *Where the only challenge was*

general request to excuse or discharge jurors without directing attention to any particular ground.⁸⁷ But a motion or request to the court that a particular juror may be put to answer is a challenge though not formally designated as such.⁸⁸

(II.) **Nature and Requisites Generally.**—The challenge is in the nature of a pleading.⁸⁹ It need not be in the exact statutory language,⁹⁰ but it must be so stated that issue can be joined thereon,⁹¹ and be so propounded that it may be entered of record;⁹² it should always be couched in polite and respectful language.⁹³

(III.) **Oral or Written.**—All challenges to the polls, whether principal or to the favor, may be oral,⁹⁴ and are then entered on the minutes of the court,⁹⁵ though the latter rule applies whether the challenge be written or oral.⁹⁶

(IV.) **Must Be Distinct and Specific.**—The challenge must be distinctly and specifically made⁹⁷ so that the court may see what is the legal char-

in form one to the array based upon the alleged ground that jurors had not been chosen for the week as the statute requires, but no such ground exists for challenge to the array, the challenge does not amount to an individual challenge to each juror that he had served the previous week and so was ineligible to again serve during the same term of court. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 Tex. Civ. App. 351, 116 S. W. 365.

[d] "An omnibus objection to the whole panel because they were not qualified was entirely too indefinite to entitle to a review." *Kansas City v. Smart*, 128 Mo. 242, 30 S. W. 773.

Generally as to challenges which should be to individual jurors and so are not properly raised by challenge to the array, see *supra*, VII, E, 3, a, (V).

87. *State v. Diple*, 242 Mo. 461, 147 S. W. 111.

88. *Temple v. Sumner, Smith* (N. H.) 226.

89. *Clark v. Van Vrancken*, 20 Barb. (N. Y.) 278, but it is not strictly a pleading as regulated by the code.

90. *Figg v. Donahoo*, 4 Neb. (Unof.) 661, 95 N. W. 1020, sufficient if the attention of the court be directed to the specific objection made.

As to statutory requirements on challenge for actual bias, see *infra*, VII, E, 4, d, (IV).

91. *State v. Benton*, 19 N. C. 196.

[a] To merely say it is for principal cause or for favor is not sufficient. *Powers v. Presgroves*, 38 Miss. 227.

As to demurrer, exception or denial of challenge, see *infra*, VII, E, 4, e.

92. *State v. Benton*, 19 N. C. 196.

93. *Cooley v. State*, 38 Tex. 636.

94. *O'Donnell v. Weiler*, 72 N. J. L. 142, 59 Atl. 1055; *State v. Spencer*, 21 N. J. L. 196; *Cooley v. State*, 38 Tex. 636; *Gulf, C. & S. F. Ry. Co. v. Gilvin* (Tex. Civ. App.), 55 S. W. 985.

[a] **Statutes so Provide.**—See generally the statutes.

[b] **At common law challenges to individual jurors may be ore tenus.** *State v. Clark*, 121 Mo. 500, 26 S. W. 562.

[c] **Writing is better practice in principal challenge, but is not essential.** *Shoeffler v. State*, 3 Wis. 823.

95. *People v. Renfrow*, 41 Cal. 37; *King v. Edmond*, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009, should be put upon the record.

[a] **Statutory Rule.**—See generally the statutes.

96. *Mann v. Glover*, 14 N. J. L. 195.

97. **Ia.**—*State v. Young*, 104 Iowa 730, 74 N. W. 693; *Bonney v. Cocke*, 61 Iowa 303, 16 N. W. 139. **Me.** *State v. Knight*, 43 Me. 11. **Mo.** *State v. Evans*, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; *State v. Soper*, 148 Mo. 217, 49 S. W. 1007; *State v. Albright*, 144 Mo. 638, 46 S. W. 620; *State v. Reed*, 137 Mo. 125, 38 S. W. 574; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92. **N. J.**—*O'Donnell v. Weiler*, 72 N. J. L. 142, 59 Atl. 1055; *State v. Spencer*, 21 N. J. L. 196. **N. Y.** *Stout v. People*, 4 Park. Crim. 71.

[a] **The court is entitled to know the exact ground of objection.** *State v. Dyer*, 139 Mo. 199, 40 S. W. 768.

[b] **Compared to Objection to Evidence.**—"The cause for challenge must

acter thereof; mere general challenges may be disregarded.⁹⁸ The

be as distinctly specified as the objection to the introduction to evidence." *State v. Evans*, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[c] It should state (1) whether challenge is for principal cause or for favor. (*Drake v. State*, 53 N. J. L. 23, 20 Atl. 747), (2) whether for "general disqualification," or "implied bias," or "actual bias" (*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003), (3) or whether it is for actual or implied bias. *People v. Renfrow*, 41 Cal. 37.

[d] Mere Statement That Officer Biased Is Not Enough.—Challenge specifying "that the deputy sheriff who summoned forty of the jurors is biased against the defendant" is defective as it does not show on its face whether the challenger is relying upon actual or implied bias. *State v. Gray*, 19 Nev. 212, 8 Pac. 456.

[e] Especially Where There Are Different Modes of Trial.—In a capital case the statute prescribing that challenge for "actual bias" must be by statutory triers, and for "implied bias," must be by the court; the exact ground of challenge must be stated. *State v. Hanley*, 34 Minn. 430, 26 N. W. 397.

[f] Change of Forum Does Not Change Essential Requisites.—Under the former practice act where triers were required it was essential that the challenge when made should conform to the statutory presumption. The change in forum by which the challenge is to be tried does not change the force and effect of the statute as to the essential grounds of a challenge, nor the essential form of the challenge. *State v. Salgado*, 38 Nev. 64, 145 Pac. 919, 150 Pac. 764.

98. Cal.—*People v. Owens*, 123 Cal. 452, 56 Pac. 251; *Paige v. O'Neal*, 12 Cal. 483. Ia.—*Haggard v. Petterson*, 107 Iowa 417, 78 N. W. 53; *Davis v. Anchor Mut. F. Ins. Co.*, 96 Iowa 70, 64 N. W. 687; *Bonney v. Cocke*, 61 Iowa 303, 16 N. W. 139. Neb.—*Pillion v. State*, 5 Neb. 351. Nev.—*State v. Simas*, 25 Nev. 432, 62 Pac. 242; *State v. Chapman*, 6 Nev. 320. N. D.—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003. Utah.—*People v. Thiede*, 11 Utah

241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; *People v. Hopt*, 2 Utah 247, 9 Pac. 407, affirmed, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708; *People v. Hopt*, 3 Utah 396, 4 Pac. 250. Wis. *Shoeffler v. State*, 3 Wis. 823.

[a] Examples of Challenges Held Too General.—(1) "Challenged" (*People v. Owens*, 123 Cal. 482, 56 Pac. 251); (2) "We challenge the juror" (*Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948); (3) "I challenge the juror" (*People v. Cochran*, 61 Cal. 548); (4) "I challenge the juror for cause" (*Paige v. O'Neal*, 12 Cal. 483); (5) "We challenge this juror," without stating any cause or specifying any ground of disqualification is entirely too indefinite (*State v. Bobbitt*, 215 Mo. 10, 114 S. W. 511); (6) "We challenge the juror for cause" (*State v. Fields*, 234 Mo. 615, 138 S. W. 518; *State v. Evans*, 161 Mo. 95, 61 S. W. 590, 84 Am. St. Rep. 669); (7) "Defendant challenges for cause" (*People v. Thiede*, 11 Utah 241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237. See also *Payne v. Waterloo, C. F. & N. R. Co.*, 153 Iowa 445, 133 N. W. 781; *Robinson v. Territory*, 16 Okla. 241, 85 Pac. 451); (8) "The juror is challenged for cause." *People v. Dick*, 37 Cal. 277.

[b] A "broadside" challenge to the entire panel based on the members having formed opinions as to defendant's guilt, was considered by the court in *State v. Church*, 199 Mo. 605, 98 S. W. 16. Counsel for defendant considered it a challenge to the array. The court held it was not good as such a challenge because not in writing, but disposed of the whole matter by holding that under the circumstances, as disclosed on the voir dire examination, no proper ground of objection to the individual jurors was shown.

[c] Challenge Immediately Followed by Statement on Which Based. Where the challenge was merely "for cause," but followed immediately after the statement of relationship on which it manifestly was based, the rule that the specific ground for challenge should be stated will not be strictly applied. The promptness with which the objection was overruled showed that the

challenge must state one or more of the statutory grounds,⁹⁹ and should set out the facts sufficiently to show what is objected to.¹

Under statutes naming certain grounds for challenge for implied bias, the specific ground should be stated;² a challenge simply for

trial court ruled advisedly. *Miller v. United States*, 38 App. Cas. (D. C.) 361.

99. **U. S.**—Southern Pacific Co. v. Rauh, 49 Fed. 696, 1 C. C. A. 416, construing Oregon statutes and cases. *Cal. Paige v. O'Neal*, 12 Cal. 483. *Ind. Shields v. State*, 149 Ind. 395, 49 N. E. 351. **Ia.**—*Harris v. Moore*, 134 Iowa 704, 112 N. W. 163; *State v. Wilson*, 124 Iowa 264, 99 N. W. 1060. **Me.** *State v. Knight*, 43 Me. 11. **Mo.**—*State v. Tucker*, 232 Mo. 1, 133 S. W. 27; *State v. Wooley*, 215 Mo. 620, 115 S. W. 417; *State v. Miles*, 199 Mo. 530, 98 S. W. 25; *State v. Myers*, 198 Mo. 225, 94 S. W. 242. **Neb.**—*Fillion v. State*, 5 Neb. 351, otherwise the challenge is incomplete. **Nev.**—*State v. Raymond*, 11 Nev. 98. **N. D.**—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003, or it is defective as being inexact in form. **Wash.**—*State v. Biles*, 6 Wash. 186, 33 Pac. 347.

[a] **Specific Ground Not Stated Is Waived.**—*Hammer v. Eddins*, 3 Stew (Ala.) 192; *State v. Lewis*, 31 Wash. 75, 71 Pac. 778. See generally *supra*, VII, E, 4, b.

[b] **Though Court's Statement Shows Theory of Challenge.**—Where a juror was examined as to his residence and counsel said, "We now challenge this juror for cause," whereupon the court overruled the challenge, his statement showing that he was doing so on the theory that the objection was as to the venire on which the juror was summoned, on appeal the defendant cannot claim his challenge was on the ground of the juror's ineligibility. *State v. Biles*, 6 Wash. 186, 33 Pac. 347.

[c] **Especially Where No Peremptory Challenge.**—Since the commonwealth is not allowed any peremptory challenge, its challenge must show a good and legal cause, and must be overruled if it be vague, uncertain or irrelevant. *Montague v. Com.*, 10 Gratt. (51 Va.) 767.

[d] **But it may be considered where the examination clearly discloses the ground.** *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed.

465 (*reversing* 30 App. Cas. [D. C.] 1); *Payne v. Waterloo, C. F. & N. R. Co.*, 153 Iowa 445, 133 N. W. 781 (wherein the court passed upon the question as to relation of attorney and client between juror and plaintiff's attorney, although strictly not bound to do so); *Harris v. Moore*, 134 Iowa 704, 112 N. W. 163, general challenge but examination showed it was based on lack of ability to write English.

1. *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211; *Drake v. State*, 53 N. J. L. 23, 20 Atl. 747.

[a] **Not Sufficient To Say That Juror Was Neighbor.**—Must be additional facts as that they were on terms of great intimacy, etc. *Jones v. Butterworth*, 3 N. J. L. 456.

[b] **It is simply stating a legal conclusion to say:** "Object to this juror as disqualified and not qualified to sit as a competent juror in this cause, and challenge said juror for cause." *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[c] "The defendant's counsel objects to the juror, challenges him for cause," is too indefinite. To say a juror is challenged for cause is but a legal conclusion. *State v. Mace*, 262 Mo. 143, 170 S. W. 1105.

[d] **It is not sufficient to merely challenge "for principal cause," or "for favor."** *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

2. **U. S.**—*Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708, *affirming* 4 Utah 247, 9 Pac. 407. *Idaho.* *State v. Gorden*, 5 Idaho 297, 48 Pac. 1061. **Nev.**—*State v. Salgado*, 38 Nev. 64, 145 Pac. 919, 150 Pac. 764; *State v. Raymond*, 11 Nev. 98; *Estes v. Richardson*, 6 Nev. 128. **Utah.**—*People v. Thiede*, 11 Utah 241, 39 Pac. 837, judgment *affirmed*, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; *People v. Hopt*, 3 Utah 396, 4 Pac. 250.

[a] **Such Is Statutory Rule.**—See generally the statutes.

[b] **The challenge must either specify or clearly refer to the particular subdivision of the section on which the challenger relies.** *People v. Cotta*, 49 Cal. 166. See also *People v. Welch*, 49

"implied bias" is too general.³ If the cause of challenge is not one specified as ground for implied bias the challenge can only be considered as one for actual bias;⁴ but where different modes of trial are provided for, failure to specify whether the challenge is for "actual" or "implied" bias cannot be said to be immaterial.⁵ A challenge for actual bias must state the cause alleged substantially in the language of the statute.⁶ It is not sufficient to merely challenge for "actual bias;"⁷ but the usual rule is that in a challenge for actual bias, it must be alleged that the juror is biased against the party challenging.⁸

Where the facts are all before the court, reversal will not follow simply because the challenge was not technically correct in form.⁹

(V.) **Waiver of Objections to Form of Challenge.** — One waives any right to object to the form of the challenge by joining issue¹⁰ thereon, and

Cal. 174; *People v. Renfrow*, 41 Cal. 37; *People v. Dick*, 37 Cal. 277; *People v. Hardin*, 37 Cal. 258; *People v. Reynolds*, 16 Cal. 128.

3. **Cal.**—*People v. Walsh*, 43 Cal. 447; *People v. McGungill*, 41 Cal. 429; *People v. Hardin*, 37 Cal. 258. **Nev.** *State v. Vaughan*, 22 Nev. 285, 39 Pac. 733. **Utah.**—*People v. Hopt*, 3 Utah 396, 4 Pac. 250.

[a] "I challenge the juror for implied bias" is not sufficient. *People v. Buckley*, 49 Cal. 241; *People v. Reynolds*, 16 Cal. 128.

4. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

[a] Where the examination was directed to the state of the juror's mind, and the sources of his information, the trial court was sufficiently apprised that the challenge was for actual bias. *State v. Moody*, 18 Wash. 165, 51 Pac. 356, examination was at length.

5. *State v. Hanley*, 34 Minn. 430, 26 N. W. 397.

[a] Though Matter Brought Out Was Only Applicable to One.—Under the statute the difference between "actual" and "implied" bias is not merely formal. Neither the trial court nor the reviewing court can ignore the fact that the challenge was made for "actual" bias, though the matter sought to be brought out was applicable only to a challenge for "implied" bias. *State v. Hanley*, 34 Minn. 430, 26 N. W. 397.

6. See generally the statutes, and *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948 (its purpose is to bring to the court's attention the ground relied upon); *State v. Salgado*, 38 Nev. 61,

145 Pac. 919, 150 Pac. 764. Compare *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, the court says that is the usual practice and general understanding, but passed the question because the opposite party had failed to object to the sufficiency of the challenge.

[a] Reference to the Section Must Be Specific.—"We challenge the juror under subdivision 2 of that section," is too general where there is nothing in the transcript to show what "that" section is. *People v. Owens*, 123 Cal. 482, 56 Pac. 251.

7. *People v. Hopt*, 3 Utah 396, 4 Pac. 250.

[a] Effect of Adding Words "for Positive Bias."—"We challenge the juror" is too indefinite as a challenge for actual bias, and the mere fact that one of defendant's counsel, after the challenge had been denied, overruled and ruling excepted to, added "We object to the juror on the ground of positive bias," did not cure the defect in the challenge as originally made. *People v. Renfrow*, 41 Cal. 37.

8. **Cal.**—*People v. Dick*, 37 Cal. 277. **Nev.**—*State v. Salgado*, 38 Nev. 61, 145 Pac. 919, 150 Pac. 764. **Utah.**—*People v. Thiede*, 11 Utah 241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; *People v. Hopt*, 3 Utah 396, 4 Pac. 250.

9. *State v. Gorden*, 5 Idaho 297, 48 Pac. 1061, the facts "palpably supported the challenge" and defendant was not in any wise prejudiced.

10. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181 (waived by simply denying); *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

proceeding with the trial thereof¹¹ without first making an objection.

e. *Demurrer, Exception and Denial.*—(I.) **Form and Sufficiency in General.**—The ground of challenge being fully set out,¹² the opposite party may demur if he deem the cause assigned insufficient;¹³ or under some statutes he may except to the challenge,¹⁴ or except or deny as in case of challenge to the panel.¹⁵ The orderly practice is for the opposite party either to demur or to deny.¹⁶ The party is not bound to demur; he may take issue upon the facts stated as ground for the challenge,¹⁷ by express provision of statute in some states,¹⁸ or he may counterplead new matter in evidence.¹⁹ The practice permits the court to hear debate without any formal demurrer, however.²⁰

These pleadings may be oral,²¹ and under some statutes are entered on the minutes.²²

(II.) **Effect.**—On exception or demurrer the issue raised is one of law only, the facts being taken as true,²³ by express provision of statute in some states;²⁴ but on denial there is an issue of fact to be tried.²⁵ If the opposite party admits the challenge there is no issue and the juror is excused without examination;²⁶ but some courts have held that it is the duty of the trial judge to examine a juror, if he is challenged though the other party consents to the objection.²⁷

f. *Oath on Voir Dire.*²⁸—The court has implied power to administer an oath to jurors when they are examined on voir dire touching their qualifications;²⁹ but as a matter of strict right, it has been held

11. *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

12. **Form and sufficiency of challenge**, see *supra*, VII, E, 4, d.

13. **N. J.**—*Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50. **N. Y.**—*Freeman v. People*, 4 Denio 9, 47 Am. Dec. 216. **N. C.**—*State v. Benton*, 19 N. C. 196.

14. See generally the statutes.

15. See generally the statutes.

Demurrer or exception to challenge to panel, see *supra*, VII, E, 3, e, (V).

16. **N. Y.**—*Clark v. Van Vrancken*, 20 Barb. 278; *Stout v. People*, 4 Park. Crim. 71. **N. C.**—*State v. Benton*, 19 N. C. 196. **Wis.**—*Shoeffler v. State*, 3 Wis. 823, applied to principal challenge.

17. **N. Y.**—*Freeman v. People*, 4 Denio 9, 47 Am. Dec. 216. **N. C.**—*State v. Benton*, 19 N. C. 196. **Wis.**—*Shoeffler v. State*, 3 Wis. 823, applied to principal challenge.

18. See generally the statutes.

19. *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *State v. Benton*, 19 N. C. 196.

20. *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

21. See generally the statutes.

22. See generally the statutes.

23. *State v. Benton*, 19 N. C. 196; *Shoeffler v. State*, 3 Wis. 823.

24. See generally the statutes.

25. *Shoeffler v. State*, 3 Wis. 823.

26. *State v. Creasman*, 32 N. C. 395; *State v. Benton*, 19 N. C. 196.

27. *McCarty v. State*, 26 Miss. 299.

[a] **If a juror be challenged for a cause not recognized by law and the other party consents thereto**, still the court is not bound to set the juror aside. It is the court's duty to see that a competent, fair and impartial jury is selected and the parties' rights extend only to challenging either peremptorily or for good cause sufficient in law, to be judged of by the court. *McCarty v. State*, 26 Miss. 299.

Duty of court to examine on own motion, see *infra*, VII, E, 4, i.

28. **Generally as to the right to question the juror**, see *infra*, VII, E, 4, i.

Generally as to the juror's competency as a witness, see *infra*, VII, E, 4, i.

29. *Finch v. United States*, 1 Okla. 396, 33 Pac. 638; *Bracken v. Preston*, 1 Pin. (Wis.) 365.

[a] **So Held in Prosecutions for Perjury.**—*Finch v. United States*, 1 Okla.

that the oath cannot be demanded where the statute does not so provide.³⁰ though other courts have held it to be reversible error to refuse on proper request.³¹ But statutes sometimes provide that jurors should be sworn on voir dire.³² If no request is made therefor, it cannot be objected that the juror was not sworn on his voir dire.³³ If one is not satisfied with the form of the oath he should object thereto.³⁴ The oath need not be administered to the jurors singly.³⁵

Waiver.—By failure to challenge, one waives the failure to put the juror on his oath.³⁶

g. Tribunal Before Whom Tried, etc.—(I.) Trial by Court or by Triers.—The modern practice is to try all challenges by the court without the intervention of triers,³⁷ by express provision of statute in

396, 33 Pac. 638; *Com. v. Stockley*, 10 Leigh (37 Va.) 678, applies to venire men and bystanders.

30. *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, followed in *State v. Lee*, 65 Conn. 265, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; *Bracken v. Preston*, 1 Pin. (Wis.) 365.

31. *Paducah, etc. R. Co. v. Muzzell*, 95 Tenn. 200, 31 S. W. 999, the trial judge offered to permit interrogation not under oath.

32. See generally the statutes, and *Ellis v. State*, 25 Fla. 702, 6 So. 768; *Denham v. State*, 22 Fla. 664.

33. *Conn.*—*State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89. *Fla.*—*Ellis v. State*, 25 Fla. 702, 6 So. 768, too late after jurors were excused. *Ga.*—*Hilton & Dodge Lumber Co. v. Ingram*, 135 Ga. 696, 70 S. E. 234 (too late after verdict); *Kellam v. State*, 17 Ga. App. 401, 87 S. E. 158.

34. *Denham v. State*, 22 Fla. 664.

[a] **Form Sufficient in Absence of Statutory Form.**—"You, and each of you, do solemnly swear you shall give to such questions as may be propounded touching your competency as jurors, as shall be the truth, the whole truth, and nothing but the truth, so help you God." *Denham v. State*, 22 Fla. 664.

35. *Brown v. State*, 141 Ga. 5, 80 S. E. 320, following *Roberts v. State*, 65 Ga. 430 (may be to panel of six at once); *Ruff v. Rader*, 2 Mont. 211.

[a] **Commendable Practice Though Rule Requires Putting on Prisoner Singly.**—The practice of putting the oath to twelve jurors at once is commendable as saving time and is not objectionable as disobeying the rule requiring the jurors to be put upon the prisoner singly. *Roberts v. State*, 65 Ga. 430.

[b] **Rule Requiring Examination and Challenge Respectively Does Not Forbid.**—The jurors may be called up in any number and sworn together to answer the questions notwithstanding the rule that they must be examined and challenged separately. *Wasson v. State*, 3 Tex. App. 474.

36. *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89 (court and parties assume juror's statements were true); *Trullinger v. Webb*, 3 Ind. 198.

[a] **There is nothing on which to base error** where there is no suggestion that party was prejudiced by failure to swear jurors on their voir dire; nor that the jurors did not have the requisite qualifications; nor that any exceptions were saved to the failure; nor when the knowledge first came to party or counsel. *Preston v. Hannibal, etc. R. Co.*, 132 Mo. 111, 33 S. W. 783.

37. *Conn.*—*State v. Wilson*, 38 Conn. 126; *State v. Potter*, 18 Conn. 166. *Ga.*—*Jordan v. State*, 22 Ga. 545. *Ill.*—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465; *East St. Louis Electric Ry. v. Snow*, 88 Ill. App. 660. *Kan.*—*Healer v. Inkman*, 94 Kan. 594, 146 Pac. 1172. *La.*—*State v. Porter*, 45 La. Ann. 661, 12 So. 832. *Me.*—*State v. Knight*, 43 Me. 11. *Mich.*—*Holt v. People*, 13 Mich. 224. *Miss.*—*Head v. State*, 44 Miss. 731; *Gilliam v. Brown*, 43 Miss. 611. *Mo.*—*State v. Foley*, 144 Mo. 600, 46 S. W. 733. *N. H.*—*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *Rowell v. Boston, etc. R. Co.*, 58 N. H. 514; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533. *N. J.*—*Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50. *N. Y.*—*Butler v. Glens Falls, S. H. & F. E. St. B. Co.*, 121 N. Y. 112, 24

some states.³⁸ Principal challenges have always been tried by the court,³⁹ though where the facts were in dispute the proper practice was to appoint triers.⁴⁰ At common law a challenge "to the favor" was triable by triers,⁴¹ who ordinarily were the first two jurors accepted and sworn,⁴² though sometimes the trial was by all the jurors

N. E. 187; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Thomas v. People*, 67 N. Y. 218. **N. C.** *State v. Benton*, 19 N. C. 196. **S. C.** *State v. Nance*, 25 S. C. 168; *State v. Coleman*, 20 S. C. 441; *State v. Baldwin*, 3 Brev. 309, 1 Tread. 289. **Tenn.** *Crider v. Lifsey*, 10 Heisk. 456; *Isham v. State*, 1 Sneed 111. **Utah.**—*People v. Hopt*, 3 Utah 396, 4 Pac. 250. **Va.** *Montague v. Com.*, 10 Gratt. (51 Va.) 767. **W. Va.**—*Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

[a] "In civil as well as criminal actions challenges for cause are triable by the court." *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369.

[b] **Reason for Change.**—"The common-law method of trying challenges would be cumbersome and attended with unnecessary delay in the trial of causes, without any beneficial result." *O'Fallon Coal & Min. Co. v. Laquet*, 198 Ill. 125, 64 N. E. 767.

38. See generally the statutes.

39. **Ark.**—*Milan v. State*, 24 Ark. 346; *Stewart v. State*, 13 Ark. 720. **Ga.**—*Robinson v. State*, 1 Ga. 563. **Me.** *State v. Knight*, 43 Me. 11. **N. H.** *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. **N. J.**—*State v. Spencer*, 21 N. J. L. 196; *Mann v. Glover*, 14 N. J. L. 195. **N. Y.**—*People v. Vermilyea*, 7 Cow. 108. **W. Va.**—*Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015. **Wis.**—*Shoeffler v. State*, 3 Wis. 823.

40. **N. H.**—*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Dewick*, 2 Park. Crim. 230. **Wis.**—*Shoeffler v. State*, 3 Wis. 823.

[a] "When the facts are ascertained, either by the triers or the court, or are admitted by demurrer, the sufficiency of the cause of challenge is a pure question of law, to be adjusted by the court." *State v. Benton*, 19 N. C. 196.

41. **Ark.**—*Milan v. State*, 24 Ark. 346; *Stewart v. State*, 13 Ark. 720. **Colo.**—*Solander v. People*, 2 Colo. 48. **Conn.**—*State v. Wilson*, 38 Conn. 126; *State v. Potter*, 18 Conn. 166. **Ga.**

Robinson v. State, 1 Ga. 563. **Ill.** *O'Fallon Coal & Min. Co. v. Laquet*, 198 Ill. 125, 64 N. E. 767; *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. **La.**—*State v. Porter*, 45 La. Ann. 661, 12 So. 832. **Mich.**—*Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317. **N. H.**—*State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. **N. J.** *State v. Spencer*, 21 N. J. L. 196. **N. Y.** *People v. Bodine*, 1 Denio 281. **N. C.** *State v. Benton*, 19 N. C. 196. **S. C.** *State v. Baldwin*, 3 Brev. 309, 1 Tread. 289. **Tex.**—*Cooley v. State*, 38 Tex. 636. **W. Va.**—*Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015. **Wyo.** *Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443, where the court says in effect that triers were an established feature of the common law.

Compare State v. Knight, 43 Me. 11, where it is doubted if common-law rule ever in force in Maine.

42. **U. S.**—*Queen v. Hepburn*, 2 Cranch C. C. 3, 20 Fed. Cas. No. 11,503; *Joice v. Alexander*, 1 Cranch C. C. 528, 13 Fed. Cas. No. 7,435. **Ga.**—*McGuffie v. State*, 17 Ga. 497; *Copenhagen v. State*, 14 Ga. 22; *Boon v. State*, 1 Ga. 618. **Ill.**—*East St. Louis Electric Ry. v. Snow*, 88 Ill. App. 660. **Me.** *State v. Knight*, 43 Me. 11. **N. H.** *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. **N. J.**—*McCormick v. Brookfield*, 4 N. J. L. 69. **N. Y.**—*People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *People v. Dewick*, 2 Park. Crim. 230.

[a] **The Prescribed Order Should Be Followed.**—*McGuffie v. State*, 17 Ga. 497; *Boon v. State*, 1 Ga. 618; *McCormick v. Brookfield*, 4 N. J. L. 69.

[b] **It is error (1) to appoint three triers in the first instance** (*McCormick v. Brookfield*, 4 N. J. L. 69), (2) or to omit to make the one juror who is sworn, a trier, when the second juror is challenged. *McGuffie v. State*, 17 Ga. 497.

[c] "If the prisoner challenge ten, and the state one, and the twelfth be sworn, one trier shall be chosen by each party, and added to the jurymen sworn and the challenges be referred

theretofore sworn.⁴³ Such practice is still permitted on request according to some authorities.⁴⁴ But where triers would have been proper, the right thereto is waived where the opposite side acquiesced in trial by the court,⁴⁵ or where counsel refuse to state in what manner he wishes the matter determined;⁴⁶ and the court might try the challenge by consent.⁴⁷

Where a challenge is tried by triers, a special oath should be administered to the triers according to some cases;⁴⁸ but it is not necessary to again put the juror on his voir dire oath.⁴⁹ The trial should be in open court,⁵⁰ and according to the prescribed practice therefor.⁵¹ The trial proceeds by examination of witnesses before the triers, and the truth of the matter alleged as cause of challenge must be made

to their decision." *Copenhagen v. State*, 14 Ga. 22.

43. Reason *v. Bridges*, 1 Cranch C. 477, 20 Fed. Cas. No. 11,617.

[a] It is said in *McGuffie v. State*, 17 Ga. 497, that where more than two had been sworn before any juror challenged the court might select any two of those sworn, to be triers. It was not necessary to try the challenge with all those previously sworn as triers. See also *Copenhagen v. State*, 14 Ga. 22.

44. *State v. Porter*, 45 La. Ann. 661, 12 So. 832 (wherein it is suggested that was the rule as laid down in *State v. Bunger*, 11 La. Ann. 607, but "the jury laws have been entirely remodeled since that decision was rendered"); *Shoeffler v. State*, 3 Wis. 823.

[a] A mere remark by counsel: "We think it should be put up to triers," is not a request for triers within the rule that there must be a request or demand for triers. *State v. Casey*, 34 Nev. 154, 117 Pac.

45. Ark.—*Milan v. State*, 24 Ark. 246; *Stewart v. State*, 13 Ark. 720. Mich.—See *People v. Doe*, 1 Mich. 451. N. H.—*State v. Saville*, 66 N. H. 488, 72 Atl. 831. Pa.—*Com. v. Gross*, 1 Ashm. 281.

[a] **Failing To Object and Introducing Evidence.**—Challenger having right to trial by triers acquiesces in trial by court where he fails to object and introduces evidence in support of his challenge. *State v. Gray*, 19 Nev. 212, 8 Pac. 456; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122.

46. *People v. Doe*, 1 Mich. 451.

47. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

[a] **Presumption is that was done** where there is nothing to show that the parties asked for triers. *O'Brien v. People*, 36 N. Y. 276.

[b] **Consent cannot be withdrawn** after challenge decided. *People v. Rathbun*, 21 Wend. (N. Y.) 509.

48. *Copenhagen v. State*, 14 Ga. 22; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216, both containing approved forms.

49. *Griffin v. State*, 15 Ga. 476.

50. *Epps v. State*, 19 Ga. 102, but the court refused to reverse where in accordance with a custom the parties had first been permitted to ask questions in open court and then the triers conversed with the juror privately.

[a] **The trial should be conducted** like the trial of a special issue before a jury, the triers should be placed in the jury box; have the witnesses examined before them by the parties, or their counsel; be told the law by the court; and be allowed to deliberate in the jury box, or if need be in some more private place. *Baker v. State*, 15 Ga. 498.

[b] **Instructions Should Be Made Publicly.**—It was not proper to send written instructions to them after they had retired, to propound a certain interrogatory to the juror. *Whaley v. State*, 11 Ga. 123.

51. *McCormick v. Brookfield*, 4 N. J. L. 69, failure to follow the prescribed practice as to triers has been held reversible error.

[a] **But for an error in giving an instruction** to the triers which is not technically clear, no reversal can be had unless a correct instruction was requested. *Wright v. State*, 18 Ga. 353.

out to their satisfaction.⁵² Argument is not allowed before the triers.⁵³ In deliberating, the triers should first decide whether the fact alleged exists,⁵⁴ and then whether that fact makes the juror not indifferent.⁵⁵ The same secrecy as surrounds the deliberations of the jury need not be placed on their deliberations.⁵⁶ The decision of triers on the challenge for favor cannot cure any error in the decision of the court on the challenge for principal cause.⁵⁷ Where one has challenged to the favor and his challenge is being tried by triers, he cannot as a matter of right call upon the court to rule that the juror was incompetent and subject to principal challenge.⁵⁸

(II.) **Statutory Triers.**⁵⁹ — There has been, and still is in at least one jurisdiction, a practice of trying actual bias by triers appointed for that purpose by the court.⁶⁰ In capital cases the trial must be by the statutory triers,⁶¹ but the court may try the challenge in other cases by consent,⁶² or the right may be waived by failure to object

52. *Copenhagen v. State*, 14 Ga. 22.

[a] **Any and every fact or circumstance** from which bias, prejudice, or partiality may be inferred is admissible on the issue of indifference. *People v. Bodine*, 1 Denio (N. Y.) 281.

[b] **The juror may be examined** as a witness. *Pike County v. Guffin*, etc. *Plank Road Co.*, 15 Ga. 39; *Copenhagen v. State*, 14 Ga. 22.

[c] **The court says (1) what evidence is admissible** upon the question of indifference, but its weight and sufficiency is for the triers (*Smith v. Floyd*, 18 Barb. [N. Y.] 522), (2) and they should not be instructed that a certain opinion disqualifies the juror (*Freeman v. People*, 4 Denio [N. Y.] 9, 47 Am. Dec. 216), (3) nor any certain rule be laid down for their guidance. *People v. Bodine*, 1 Denio (N. Y.) 281.

53. *Joice v. Alexander*, 1 Cranch C. C. 528, 13 Fed. Cas. No. 7,435.

54. *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

55. *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

[a] **If they disagree** as to the juror's indifference he is considered competent. *Com. v. Fitzpatrick*, 3 Clark 520, 6 Pa. L. J. 201. *Contra*, *People v. Dewick*, 2 Park. Crim. (N. Y.) 230.

56. *Baker v. State*, 15 Ga. 498, where it did not appear the triers requested such be allowed, and the court cleared a corner of the court room for their use, which from all that appeared was a sufficiently private place for deliberation.

57. *Cancemi v. People*, 16 N. Y. 501; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

58. *People v. Allen*, 43 N. Y. 28.

59. **Necessity that challenge specify the kind of challenge**, see *supra*, VII, E, 4, d.

60. Cal.—*People v. Voll*, 43 Cal. 166. Utah.—*United States v. Miles*, 2 Utah 19, judgment *affirmed*, 103 U. S. 304, 26 L. ed. 481. Wyo.—*Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

In Minnesota the practice still obtains. Three persons, not members of the panel, are appointed by the court to try actual bias. In cases not capital, the parties may consent to trial by the court. See Gen. Stats. (1913), §9237; and see *State v. Smith*, 78 Minn. 362, 81 N. W. 17.

[a] **Upholding the constitutionality of a similar statute** in Wyoming the court said that triers were an established feature of the common law, and while gradually being abolished, they are but part of the court's machinery and may properly be regulated by the legislature. *Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

61. *State v. Barrett*, 40 Minn. 65, 41 N. W. 459; *State v. Hanley*, 34 Minn. 430, 26 N. W. 397.

[a] **But the refusal may have been harmless** as where the matters thereafter inquired into by the court did not show ground for actual bias. *State v. Casey*, 34 Nev. 154, 117 Pac. 5.

62. *State v. Smith*, 78 Minn. 362, 81 N. W. 17, record held to show consent.

to trial by the court.⁶³ If the challenge be admitted there is nothing to try and the juror must be excused.⁶⁴ The triers need not be re-sworn on the submission of each challenge.⁶⁵ No definite rule can be laid down for the guidance of the triers,⁶⁶ and they may hear any evidence which would lead to the conclusion that the juror is biased;⁶⁷ but the court may rule on the competency of the evidence.⁶⁸ Their decision is absolutely final in both criminal⁶⁹ and civil cases;⁷⁰ and the same rule prevails where the court is acting as trier by consent.⁷¹ An objection to the competency of a statutory trier should be made at the time the appointment is announced.⁷²

h. Interrogation Before Challenge. — (I.) **By Party.**⁷³ — The strict rule is that the party must challenge before he can examine a juror;⁷⁴ but the custom is to permit the asking of preliminary questions, and

[a] **Remark of Counsel Not Sufficient Demand.**—Where counsel only said: "We think it should be put up to triers," that does not amount to a legal demand for triers. *State v. Casey*, 34 Nev. 154, 117 Pac. 5.

63. *People v. Renfrow*, 41 Cal. 37, mere exception to court's ruling on the challenge is not an objection.

64. *State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Lautenschlager*, 22 Minn. 514; *Morrison v. Lovejoy*, 6 Minn. 183.

65. *State v. Brown*, 12 Minn. 538.

66. *People v. Reynolds*, 16 Cal. 128, they must judge by what they can discover of the qualities, state of mind, motives and relations of the particular juror.

[a] **The court is not to judge of the bias from inferences drawn from the questions.** *People v. Reyes*, 5 Cal. 347.

67. *People v. Reyes*, 5 Cal. 347.

68. *People v. Reyes*, 5 Cal. 347.

69. **Cal.**—*People v. Reynolds*, 16 Cal. 128. **Minn.**—*State v. Evans*, 88 Minn. 262, 92 N. W. 976; *State v. Feldman*, 80 Minn. 314, 83 N. W. 182; *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127; *State v. Mims*, 26 Minn. 183, 2 N. W. 494, 683; *State v. Dumphy*, 4 Minn. 478. **Utah.**—*United States v. Miles*, 2 Utah 19, *affirmed*, 103 U. S. 304, 26 L. ed. 481.

[a] **Even should the evidence conclusively establish the actual bias of a challenged juror, the statute is plain and unambiguous and there can be no review on the theory that the question which then arises is one of law.** *State v. Evans*, 88 Minn. 262, 92 N. W. 976.

Generally that triers' decision is

final at common law, see *infra*, VII, E, 3, n. (I).

70. *Bennett v. Backus Lumber Co.*, 77 Minn. 198, 79 N. W. 682; *Hawkins v. Manston*, 57 Minn. 323, 59 N. W. 309; *Morrison v. Lovejoy*, 6 Minn. 319.

71. *State v. Evans*, 88 Minn. 262, 92 N. W. 976; *State v. Feldman*, 80 Minn. 314, 83 N. W. 182; *Bennett v. Backus Lumber Co.*, 77 Minn. 198, 79 N. W. 682; *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127; *Hawkins v. Manston*, 57 Minn. 323, 59 N. W. 309; *State v. Mims*, 26 Minn. 183, 2 N. W. 494, 683; *Morrison v. Lovejoy*, 6 Minn. 183.

72. *People v. Voll*, 43 Cal. 166, objection that he was one of the panel. If overruled exception is taken.

73. **Right of party to examine is not taken away by court's right to examine to determine excusing on own motion, see *supra*, VII, D, 8, a.**

74. **Ala.**—*Kansas City R. Co. v. Whitehead*, 109 Ala. 495, 17 So. 705; *Hornsby v. State*, 94 Ala. 55, 10 So. 522; *Lundy v. State*, 91 Ala. 100, 9 So. 189; *Bales v. State*, 63 Ala. 30. **Cal.**—*People v. Edwards*, 163 Cal. 752, 127 Pac. 58; *People v. Reynolds*, 16 Cal. 128; *People v. Backus*, 5 Cal. 275. **Mich.**—*Crippen v. People*, 8 Mich. 117. **Minn.**—*State v. Lautenschlager*, 22 Minn. 514. **Miss.**—*Powers v. Presgroves*, 38 Miss. 227; *State v. Flower*, Walk. 318. **N. C.**—*State v. Creasman*, 32 N. C. 395.

[a] **Though Peremptory Challenges Have Been Exhausted.**—The fact that at the time one desires so to interrogate he has exhausted his peremptory challenges does not change the rule. *State v. Smith*, 56 Minn. 78, 57 N. W. 325.

to challenge upon its appearing that there is cause therefor;⁷⁵ and the court may permit preliminary questioning by the party,⁷⁶ though it is purely discretionary with him whether he will allow it or not.⁷⁷ The questions asked informally before challenge cannot be assigned for error.⁷⁸

(II.) **By Court.** — It has been recognized as an orderly practice to have the preliminary questions asked by the court;⁷⁹ and the court may, in its discretion, and without the interposition of a challenge ask questions proper to test the juror's competency and bias;⁸⁰ but in the absence of statute one cannot demand that the court examine unless he has challenged.⁸¹ The statutes sometimes provide for an examination by the court prior to challenge.⁸² It is of no importance, under these statutes, whether the court acts on his own motion or by suggestion of another;⁸³ but the right to challenge for cause remains,⁸⁴ and the statute has not abrogated the pre-existing law as to the competency of jurors.⁸⁵ When the questioning is by the court counsel can-

75. *People v. Hamilton*, 62 Cal. 377; *People v. Backus*, 5 Cal. 275.

[a] **This Saves Time and Promotes Justice.**—The provisions of the codes seem to assume that the challenge for cause and the denial of the fact asserted as the foundation thereof should precede the examination of a juror, but in practice it saves time and promotes justice to allow the party to first elicit the facts by questioning the juror. *People v. Edwards*, 163 Cal. 752, 127 Pac. 58.

[b] **Although not specifically sanctioned by statute** the practice is to call twelve men to the box, swear them to answer concerning their competency and examine them. A preliminary challenge is not necessary but if the examination discloses ground for challenge it should then be made. *Ruff v. Rader*, 2 Mont. 211.

76. *Jarvis v. State*, 138 Ala. 17, 34 So. 1025; *State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Lautenschlager*, 22 Minn. 514.

77. *State v. Smith*, 56 Minn. 78, 57 N. W. 325.

[a] **The whole matter is left to the sound judgment and judicial discretion** of the judge as to how far he will permit interrogating, or himself examine, when there has been no challenge. *Powers v. Presgroves*, 38 Miss. 227.

78. *People v. Hamilton*, 62 Cal. 377, explaining *People v. Backus*, 5 Cal. 275, and *People v. Reynolds*, 16 Cal. 128; *Crippen v. People*, 8 Mich. 117.

79. *Kansas City, etc. R. Co. v.*

Whitehead, 109 Ala. 495, 19 So. 705, the other practice would result in "a mere fishing procedure wearying jurors and needlessly consuming the public time." Compare *People v. Trask*, 7 Cal. App. 103, 93 Pac. 891, where the court asked preliminary questions and refused permission to examine before challenge.

80. *Powers v. Presgroves*, 38 Miss. 227, must not be such as would degrade jurors or render them infamous.

81. *Hawes v. State*, 88 Ala. 37, 7 So. 302, though answers to the questions would have authorized a challenge.

82. See generally the statutes.

[a] **In criminal cases in Alabama** the court examines the jurors to determine whether they possess the general qualifications of jurymen, or are for any reason not competent to try the case at bar. *O'Rear v. State*, 188 Ala. 71, 66 So. 81.

83. *O'Rear v. State*, 188 Ala. 71, 66 So. 81.

84. *Herndon v. State*, 2 Ala. App. 118, 56 So. 85.

85. *Herndon v. State*, 2 Ala. App. 118, 56 So. 85.

[a] **The statute does not undertake to say who are competent for the trial** of particular cases. Insofar as it prescribes qualifications of persons who are to be placed on the lists it does not intend that a person put on the list by the commissioners shall serve as a juror when the court finds him incompetent. *O'Rear v. State*, 188 Ala. 71, 66 So. 81.

not interpose questions except by the court's direction.⁸⁶

i. *Examination*.⁸⁷ — (I.) *Nature and Right Generally*. — The examination of jurors on their voir dire is one of the usual and inherent powers of the court.⁸⁸ The prime purpose of such an examination is to ascertain whether, if selected, a juror will be fair and impartial and render a verdict according to the evidence and the law, guided by the instructions of the court;⁸⁹ and its manifest object is to determine whether or not there is ground for a challenge for cause.⁹⁰ It has a two-fold purpose: to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right to challenge peremptorily.⁹¹

Examination is a privilege and not a requirement.⁹² In some jurisdictions the accused is not entitled, as a matter of strict right, to examine each juror individually as to his qualifications;⁹³ but the more usual holding is that one who properly applies therefor is entitled to have each juror examined as of right,⁹⁴ even where the statute

86. *Powers v. Presgroves*, 38 Miss. 227.

87. *Necessity that prisoner be present at examination of jurors*, see generally the title "Trial."

88. *Finch v. United States*, 1 Okla. 396, 33 Pac. 638.

89. *Colo.*—*Henwood v. People*, 57 Colo. 544, 143 Pac. 373. *Fla.*—*Savage v. State*, 18 Fla. 909. *Mich.*—*People v. Wright*, 170 Mich. 154, 135 N. W. 912; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238, 18 N. W. 797. *Ohio.*—*State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677. *Tex.*—*Stagner v. State*, 9 Tex. App. 440.

[a] *In Furtherance of Law To Secure Impartial Jurors*.—Practice of examining jurors on voir dire before swearing them in chief is in furtherance of the law which seeks to secure an impartial jury. Upheld though not required by statute. *Stoner v. State*, 4 Mo. 221. See also 13 ENCY. OF EV. 1606, et seq.

[b] *To Discover Whether One Is a Suitable Juror in Particular Case*.—"The object of the examination is to ascertain whether the person then being examined is a suitable person to sit as a juror in that case." *Hickey v. State*, 12 Neb. 490, 11 N. W. 744.

[c] "The object and purpose of the examination of a juror is to determine whether or not he is qualified to sit in the trial." *State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

90. *Com. v. Evans*, 25 Pa. Super.

239; *State v. Morgan*, 23 Utah 212, 64 Pac. 356, "for actual or implied bias."

91. *Ind.*—*Pearcy v. Michigan Mut. Life Ins. Co.*, 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673. *Ky.*—*Apkins v. Com.*, 148 Ky. 662, 147 S. W. 376. *Mich.*—*Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238, 18 N. W. 797. *Mo.*—*State v. Mann*, 83 Mo. 589. *Neb.*—*Basye v. State*, 45 Neb. 261, 63 N. W. 811. *Utah.*—*Tarpey v. Madsen*, 26 Utah 294, 73 Pac. 411; *State v. Morgan*, 23 Utah 212, 64 Pac. 356.

[a] *For Benefit of Court and Parties*.—So the court "may determine whether they should be allowed or not to sit as jurors, and the parties may determine whether they will challenge either from cause or peremptorily." *Savage v. State*, 18 Fla. 909.

As to the right to examine for purpose of peremptory challenge, see *infra*, VII, E, 5, m, (I).

92. *State v. Clark*, 34 Wash. 485, 76 Pac. 98, 101 Am. St. Rep. 1006, prosecution is not bound to examine. The statute only declares the right so to do.

Waiver of objections by failure to examine, see *supra*, VII, E, 4, b, (IV).

93. *State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *State v. Lee*, 69 Conn. 186, 37 Atl. 75, it is a matter for the trial court's discretion and there can be no reversal unless that discretion be abused.

94. *Ga.*—*Brown v. State*, 104 Ga. 736, 30 S. E. 951; *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063. *Neb.*—*Wilson v. State*, 87 Neb. 638, 128 N. W. 38,

forbids review of the trial court's decisions as to challenges;⁹⁵ and the fact that a struck jury has been demanded does not waive the right to have the jurors examined.⁹⁶

(II.) By Court or Counsel.⁹⁷—Under some statutes, the court examines the juror on the request of the party, to know whether he is incompetent, or unindifferent.⁹⁸ Under these statutes it has been held that the court exclusively may examine,⁹⁹ but that it is better practice to permit the counsel to examine under the court's supervision.¹ Except in so far as the statutes provide for questioning by the court, however, a reasonable examination by counsel must always be allowed, so that the court may see that the jurors are possessed of requisite qualifications and so that counsel may challenge for cause.² But there is no prejudicial error where the court propounds the questions as fully as counsel desired;³ and it is sometimes optional with the court to propound questions itself or permit counsel to do so.⁴ The fact that

following *Basye v. State*, 45 Neb. 261, 63 N. W. 811. *Ohio*.—*Hull v. Albro*, 2 Disn. 147, 13 Ohio Dec. 91. *Tenn.* Paducah, etc. R. Co. v. Muzzell, 95 Tenn. 200, 31 S. W. 999. *W. Va.*—*Car-penter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078.

See also 13 ENCY. OF EV. 1008, et seq.

[a] **Though Unqualified Jurors Are on List.**—That by accident or oversight certain jurors are put on the panel, by the jury commissioners, who are not qualified to act, does not deprive defendant of his right to examine the jurors on their voir dire. *State v. Aspara*, 113 La. 940, 37 So. 883.

Time to examine and challenge generally, see *supra*, VII, E, 4, c.

Right is not taken away by examination by court to determine excusing on own motion, see *supra*, VII, D, 8, a.

95. *Apkins v. Com.*, 148 Ky. 662, 147 S. W. 376, the practice is within both the reason and letter of the law.

96. *Kansas City, M. & B. R. Co. v. Ferguson*, 143 Ala. 512, 39 So. 348, reversible error to refuse examination on request.

[a] **Proper To Examine and Excuse Such as Are Disqualified.**—Neither party because a struck jury is demanded, is subjected to the peril of having a disqualified juror try his case. It is therefore proper for the court to examine the jurors and excuse such as he finds to be disqualified. *Steed v. Knowles*, 97 Ala. 573, 12 So. 75.

As to special or struck jury, see generally *infra*, VII, G.

97. **Examination by court prior to**

or independent of challenge, see *supra*, VII, E, 4, h.

Statutory questions, see *infra*, VII, E, 4, i, (III), (G).

98. See generally the statutes, and *Pierce v. State*, 13 N. H. 536.

99. *Jones v. State*, 35 Fla. 289, 17 So. 284; *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

1. *Jones v. State*, 35 Fla. 289, 17 So. 284; *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75.

2. **III.**—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *American Bridge Works v. Pereira*, 79 Ill. App. 90. *Ky.* *South Covington, etc. R. Co. v. Weber*, 26 Ky. L. Rep. 922, 82 S. W. 986. *La.* *State v. Harris*, 51 La. Ann. 1194, 25 So. 984; *State v. West*, 46 La. Ann. 1009, 15 So. 418. *Mich.*—*Gornetzky v. Gornetzky*, 174 Mich. 492, 137 N. W. 706. *Mo.*—*State v. Mann*, 83 Mo. 589. *Pa.*—*Comfort v. Mosser*, 121 Pa. 455, 15 Atl. 612.

The right to examine may be waived, see *Com. v. Ware*, 137 Pa. 465, 20 Atl. 806; also *supra*, VII, E, 4, b.

3. *London, etc. F. Ins. Co. v. Rufer's Admr.*, 89 Ky. 525, 12 S. W. 948, counsel declared themselves satisfied and no challenge for cause was made nor did any cause for challenge appear.

4. *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266, Ann. Cas. 1913D, 552; *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Com. v. Gee*, 6 Cush. (Mass.) 174; *Guice v. State*, 60 Miss. 714.

[a] **The Court Is Not Bound To Ask Jurors Any Questions.**—It was the privilege of the accused to examine all who are tendered as to their qualifications.

the court undertakes the examination does not take away the party's right to cross-examine.⁵ Having one counsel in court during the whole time the jury were being examined, one cannot complain because associate counsel was not also present.⁶

(III.) **Extent and Conduct of Examination.**⁷—(A.) **GENERALLY.**—The nature and extent of the examination is a matter largely within the sound discretion of the trial court,⁸ and no reversal can be had unless that discretion is abused.⁹ At the same time that discretion has¹⁰ its lim-

If he fails to do so it cannot be urged as error that it was not done. *Skinner v. State*, 53 Miss. 399.

[b] The best practice in capital cases or other cases exciting great public interest, is for the presiding judge to personally conduct the entire examination, allowing full latitude to counsel in their suggestions of questions to be propounded, and giving free scope to such preliminary examination, so as to fully search the conscience of the juror. *Gammons v. State*, 85 Miss. 103, 37 So. 609. See also *Story v. State*, 68 Miss. 609, 10 So. 47.

5. *Stephens v. People*, 33 Mich. 739, it was just as much the privilege of the party to meet by further inquiries, what has been brought out by the court, as it would be to meet matter drawn out by opposing counsel.

Examination by court to determine whether he will excuse on own motion as not taking away party's right to examine, see *supra*, VII, D, 8.

6. *Fischer v. Brooklyn Heights R. Co.*, 84 N. Y. Supp. 254, neither counsel asked leave to challenge, nor that any juror be excused.

7. See generally 13 ENCY. OF EV. 1011, et seq.

8. **U. S.**—*Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033 (rule in both civil and criminal cases); *Richards v. United States*, 175 Fed. 911, 99 C. C. A. 401, following *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033. **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. Aiken*, 100 Ark. 437, 140 S. W. 698. **D. C.** *Howgate v. United States*, 7 App. Cas. 217. **Ill.**—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964. **Ind.**—*Stoots v. State*, 103 Ind. 415, 9 N. E. 380; *Epps v. State*, 102 Ind. 539, 1 N. E. 491. **Ky.**—*South Covington & C. St. Ry. Co. v. Weber*, 26 Ky. L. Rep. 929, 82 S. W. 986; *London, etc. F. Ins. Co. v. Rufer's Admr.*, 89 Ky. 525, 12 S. W. 948. **La.** *State v. Cornelius*, 118 La. 146, 42 So.

754; *State v. Harris*, 51 La. Ann. 1194, 25 So. 984. **Mich.**—*Gornetzky v. Gornetzky*, 174 Mich. 492, 137 N. W. 706. **Neb.**—*Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295. **N. M.**—*Territory v. Lynch*, 18 N. M. 15, 133 Pac. 405. **Pa.** *Clay v. Western Maryland R. Co.*, 221 Pa. 439, 70 Atl. 807. **S. C.**—*State v. Hayes*, 69 S. C. 295, 48 S. E. 251; *State v. Coleman*, 8 S. C. 237. **S. D.**—*State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432. **Tex.**—*Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588. **Vt.**—*State v. Turley*, 87 Vt. 163, 88 Atl. 562; *Fowlie's Admx. v. McDonald, Cutler & Co.*, 85 Vt. 438, 82 Atl. 677. **Va.**—*Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078.

See 13 ENCY. OF EV. 1012.

[a] The trial judge "is necessarily the proper person to determine the latitude to be allowed the cross-examination of the juror on his voir dire." *State v. Cancienne*, 50 La. Ann. 1324, 24 So. 321.

[b] Though questions may have been proper in themselves no prejudicial error is committed in refusing them, where the record shows that ample latitude was allowed to illustrate the condition of mind of the juror as to bias and prejudice. *People v. Hill*, 20 Cal. App. 407, 129 Pac. 475.

9. **D. C.**—*Howgate v. United States*, 7 App. Cas. 217. **N. M.**—*Territory v. Lynch*, 18 N. M. 15, 133 Pac. 405. **Vt.** *State v. Turley*, 87 Vt. 163, 88 Atl. 562.

See 13 ENCY. OF EV. 1013.

[a] No abuse of discretion appears where "every matter bearing on the juror's qualification" was brought out. *St. Louis, I. M. & S. Ry. Co. v. Aiken*, 100 Ark. 437, 140 S. W. 698.

10. *Territory v. Lynch*, 18 N. M. 15, 133 Pac. 405.

[a] To restrict the examination arbitrarily to the answer of the one question by the court, whether the juror "could or could not try the case and

its. Except in so far as the statute may otherwise prescribe,¹¹ the examination need not be according to any particular set custom or manner so long as it does not deprive the parties of any substantial right;¹² but each case and each juror must be governed by the peculiarities surrounding that case and that particular juror.¹³ Considerable latitude must be permitted counsel.¹⁴ The general rule is that the juror may be asked any question needful to show his disqualification.¹⁵ The examination should not be needlessly drawn out, however;¹⁶ nor need questions merely be repeated in some other form;¹⁷ nor should jurors

render a verdict under the law as declared by the court and upon the evidence adduced upon the trial without regard to any previously formed opinions," is reversible error, as it makes the juror the judge of his own competency. *People v. Woods*, 29 Cal. 635.

[b] Where the counsel ask a perfectly proper question stripped of all immaterial matters, it was reversible error to refuse to permit it unless put in a form, suggested by the court, which would have permitted the juror to give an evasive or unsatisfactory answer. *State v. Bresland*, 59 Minn. 281, 61 N. W. 450.

Examination limited to pertinent matter, see *infra*, VII, E, 4, i, (III), (B).

11. See *infra*, VII, E, 4, i, (III), (G).

12. *Ala.*—*Citizens' Light, H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199. *Ind.*—*Epps v. State*, 102 Ind. 539, 1 N. E. 491. *Pa.*—*Com. v. Nye*, 240 Pa. 259, 87 Atl. 585, construing Act March 6, 1901 (P. L. 16), as superseding any custom inconsistent therewith; *following Com. v. Conroy*, 207 Pa. 212, 56 Atl. 427. *S. C.*—*State v. Nance*, 25 S. C. 168, but judge must satisfy himself on the points indicated by the statute. *S. D.*—*State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432. *Vt.*—*State v. Turley*, 87 Vt. 163, 88 Atl. 562.

[a] Any method not violative of the statutes and which is calculated thoroughly to test the juror's qualification is a proper examination. *Hardin v. State*, 4 Tex. App. 355.

13. *Stagner v. State*, 9 Tex. App. 440.

[a] "No rule can be laid down that would be a safe guide in all cases." *Van Slike v. Potter*, 53 Neb. 28, 73 N. W. 295.

14. *Colo.*—*Henwood v. People*, 57 Colo. 544, 143 Pac. 373. *Ind.*—*Stoots*

v. State, 108 Ind. 415, 9 N. E. 380; *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312. *Ia.*—*State v. Dooley*, 89 Iowa 584, 57 N. W. 414. *Kan.*—*Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635. *Mich.*—*People v. Wright*, 170 Mich. 154, 135 N. W. 912. *Mo.*—*State v. King*, 174 Mo. 647, 74 S. W. 627; *State v. Mann*, 83 Mo. 589. *Neb.*—*Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344. *S. D.*—*State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432. *Vt.*—*State v. Turley*, 87 Vt. 163, 88 Atl. 562.

[a] A liberal examination is to be allowed to see whether any of the statutory grounds exist for excluding the juror. *State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677.

[b] Greatest latitude is allowed to test the indifference of the juror. *State v. Garth*, 164 Mo. 553, 65 S. W. 275.

15. *State v. Harris*, 51 La. Ann. 1194, 25 So. 984; *People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911.

16. *Ill.*—*Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778; *Pennsylvania Co. v. Rudel*, 100 Ill. 603. *La.*—*State v. Cornelius*, 118 La. 146, 42 So. 754. *Mo.*—*State v. Garth*, 164 Mo. 553, 65 S. W. 275; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330.

[a] Though Particular Questions Might Well Have Been Permitted. Where it was evident that the counsel had asked so many questions the trial judge had become impatient, and no question was excluded that bore upon the juror's bias or prejudice, there was no ground for reversal even where the supreme court says "it would perhaps have been well to allow these questions." *Gornetzky v. Gornetzky*, 174 Mich. 492, 137 N. W. 706.

17. *La.*—*State v. Bennett*, 14 La. Ann. 651. *Utah.*—*State v. Hillstrom*, 46 Utah 341, 150 Pac. 935. *W. Va.*

be subjected to a rigid cross-examination,¹⁸ except in so far as this may be deemed necessary in the case of a recalcitrant juror.¹⁹ But it is proper to ask a juror, by way of cross-examination, whether he has understood a question propounded to him by the other side.²⁰ It is discretionary with the court to permit further examination after the

Carpenter v. Hyman, 67 W. Va. 4, 66 S. E. 1078.

[a] **Questions merely variant in form** but bringing out only what has already been answered, are properly refused. *State v. Hinton*, 49 La. Ann. 1354, 22 So. 617.

[b] **Where the examination was thorough enough to elicit all the information that either party needed to enable counsel to act advisedly**, mere refusal to ask additional questions along lines already covered is not prejudicial error. *South Covington, etc. St. R. Co. v. Weber*, 26 Ky. L. Rep. 922, 82 S. W. 986.

[c] **Where Whole Matter so Far as Pertinent Is Covered.**—The mere failure of the court to compel a juror to answer specifically a question put by counsel is harmless where the whole matter so far as it was legal and pertinent was covered by other questions put by the court and counsel. *State v. Royse*, 24 Wash. 440, 64 Pac. 742.

[d] **Sufficient if Answered on Question by Other Side.**—It was proper to refuse to permit repetition of questions by defendant, where juror had already answered similar questions by state. *State v. Harris*, 51 La. Ann. 1194, 25 So. 984.

[e] **Chief Counsel Not Permitted To Repeat Associate's Questions.**—The trial court was clearly acting within his discretion when he refused to permit chief counsel to go over matters already covered by associate counsel. *State v. Cancienne*, 50 La. Ann. 1324, 24 So. 321.

[f] **Having Stated Not Prejudiced May Refuse Question on Reasonable Doubt.**—After the juror has stated, several times, that his knowledge that defendant was the keeper of a brothel would not prejudice him, there was no error in refusing to permit the question whether the juror would give defendant the benefit of a reasonable doubt if it should be proved she was engaged in that business. Prosecution was for larceny. *State v. Frelinghuysen*, 43 Minn. 265, 45 N. W. 432.

[g] **More Specific Question Refused**

Where General Question Covered. Though the code made it a ground for challenge for cause that juror had been indicted for a similar offense within twelve months, it was not error, in a homicide case, for the court to refuse to permit the direct question, "Have you been indicted for murder in the last twelve months?" where the juror had just answered that he had never been indicted for murder. *Gregory v. State*, 148 Ala. 566, 42 So. 829.

[h] **Involved Question Mere Repetition Properly Overruled.**—It was not error to overrule a long involved question consisting of two parts which were repetitions, in another form, of a question which had already been answered. *Faulkner v. State*, 53 Tex. Crim. 258, 109 S. W. 199.

18. *State v. Cornelius*, 118 La. 146, 42 So. 754.

[a] **Juror Not Analogous to Witness.**—The examination should be conducted with fairness to the juror, and he should not be subject to rigid cross-examination as a witness in a case, since the attitude of a witness and a juror are entirely dissimilar. *Stagner v. State*, 9 Tex. App. 440.

Cross-examination of juror on his voir dire, see generally 13 ENCY. OF EV. 1007.

19. *State v. Cornelius*, 118 La. 146, 42 So. 754.

[a] **Juror's Unwillingness To Answer May Show Unfitness.**—"Whilst it may become necessary to deal with seeming harshness with a refractory witness, it can never be necessary to so deal with a juror . . . unless . . . he should manifest an unwillingness to disclose what his real feelings or opinions are; and this the judge should guard with great particularity. One who is too refractory or silly to answer a respectful question in a respectful manner is generally unfit" as a juror. *Stagner v. State*, 9 Tex. App. 440.

20. *State v. Garner*, 135 La. 746, 66 So. 181.

other party has cross-examined.²¹ The latitude allowed in the examination of jurors cannot be extended so as to allow parties to ask questions having a tendency to produce disagreements of the jury.²² The juror cannot be asked whether he wishes to sit on the jury,²³ or what his idea is of the duties of jurors.²⁴ Questions which tend to confuse or mislead the juror should be excluded,²⁵ as should questions about matters which the jurors could not be supposed to have knowledge.²⁶

In framing questions, the court must avoid disobeying the rule of the particular jurisdiction as to comment upon the evidence,²⁷ and must not infer that counsel have been guilty of improper conduct in

[a] **Permission to so Question Improperly Refused.**—Jurors having been asked by the prosecution whether they would bring in a verdict of guilty "if the state proves its case beyond a reasonable doubt," it was an improper restriction of the right to cross-examine to refuse to permit defendant to ask whether they understood the question. *State v. Garner*, 135 La. 746, 66 So. 181.

21. *State v. Shelledy*, 8 Iowa 477.

[a] **Discretion Not Abused Where No New Subject Shown.**—Court's discretion to refuse further examination after juror has been cross-examined by the other side, is not abused, where counsel did not indicate any desire to question on any new subject. *State v. Heft*, 155 Iowa 21, 134 N. W. 950.

[b] **Question Should Be Allowed Where Court's Questions Have Modified Former Answers.**—No good reason can be given for refusing to permit counsel to ask one more question, after the court had propounded a number of questions which had the effect of modifying former answers to counsel's direct questions. The state had interposed no objection to the question being asked. *Wilson v. State*, 87 Neb. 638, 128 N. W. 38.

Re-examination after acceptance or rejection, see *infra*, VII, E, 4, e.

Whether one party must accept or reject before passing to other party for examination, see *supra*, VII, E, 2.

22. *McGuire v. Guthmann Transfer Co.*, 234 Ill. 125, 84 N. E. 723 (*affirming* 138 Ill. App. 162); *State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677.

23. *Abby v. Wood*, 43 Wash. 379, 86 Pac. 558.

24. *Pennsylvania Co. v. Rudel*, 100 Ill. 603, it was claimed this question was a proper test of his soundness of

judgment and extent of information, but the court says it is not admissible for any purpose and would needlessly prolong the case.

25. *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312; *State v. Harris*, 51 La. Ann. 1194, 25 So. 984.

[a] **Contradictory Question.**—A question "Assuming you have been accepted as a juror, and that you have heard all the evidence, and from the evidence you believe the defendant to be guilty, but you have a reasonable doubt as to his guilt, with your mind in that condition, would you give the defendant the benefit of the doubt and acquit him?" is contradictory and inconsistent for if the juror believed defendant guilty he could not have any reasonable doubt. *Coy v. State* (Tex. Crim.), 180 S. W. 264.

[b] **Indefinite Question Sufficiently Answered.**—Asking the juror "Would you regard such a defense as that with any degree of disfavor?" is indefinite and misleading, and is sufficiently answered when the juror replies: "I would abide by the law." *State v. Royse*, 24 Wash. 440, 64 Pac. 742.

26. *Com. v. Warner*, 173 Mass. 541, 54 N. E. 353.

27. *Hubbard v. State*, 37 Fla. 156, 20 So. 235.

[a] **Practice To Be Avoided Though Not Necessarily Reversible Error.**—The supreme court refuses to say it is alone ground for a new trial but declares "we deem it judicious to avoid submitting to the jurors on their voir dire any hypothetical question which might lead to the impression that it was one based upon the facts to be presented in the case." *Kirk v. Territory*, 10 Okla. 46, 60 Pac. 797.

[b] In questioning as to attitude on circumstantial evidence court should

asking jurors whether counsel have talked with them about the case.²⁸

The particular order in which the jurors shall be examined is unimportant.²⁹ While it has been held discretionary with the court as to how many jurors he will permit in the box for examination at the same time,³⁰ the better practice is to permit the examination of the jurors singly;³¹ and in some jurisdictions, while questions may be propounded by the trial judge to each juror separately, or to the entire panel, in civil cases,³² that is not the correct practice in criminal cases.³³

The use of leading and suggestive questions is permissible,³⁴ and a ques-

not state that he understood prosecution might be unable to prove by direct testimony who mixed the poison which caused deceased's death, as that assumed deceased was poisoned. *State v. David*, 131 Mo. 380, 33 S. W. 28.

[c] Mere use of illustrations by the court in examining a juror who was excused because of his prejudice against circumstantial evidence was held not prejudicial. *Brown v. State*, 76 Tex. Crim. 316, 174 S. W. 360.

28. *Hubbard v. State*, 37 Fla. 156, 20 So. 235, the inquiry should be avoided but, if made, must be in general terms.

29. *State v. Diple*, 242 Mo. 461, 147 S. W. 111, no possible prejudice can result from permitting the voir dire examination of certain talesmen before two others whose names appear earlier on the list.

Order in which challenges must be interposed, see *supra*, VII, E, 2.

30. *State v. Munch*, 57 Mo. App. 297.

[a] The general question having been asked of the whole panel as to whether they had formed or expressed an opinion concerning the merits of the case, and some jurors having been excused on their response thereto, counsel cannot object because he has not been allowed to put that question to each juror personally. *State v. Munch*, 57 Mo. App. 297.

Necessity that full panel be present before challenge, see *supra*, VII, E, 2, c.

31. *Driskell v. Parish*, 7 Fed. Cas. No. 4,087, questions as to conscientious scruples of jurors should be asked of each juror separately and not of the whole panel collectively.

[a] Reversal Refused for This Error Alone.—While not willing to reverse for this error alone, the court held it was improper to compel counsel to address questions to the jurors as a

whole. While the court can prevent useless frittering away of time by asking useless questions the defendant should be allowed to examine each individual juror by addressing proper questions to him individually. *Barnes v. State*, 74 Tex. Crim. 501, 168 S. W. 558.

[b] It may be proper to exclude all the other veniremen while the examination of one is being conducted. The court says that while it would not in the case at bar reverse for failure to grant defendant's request for such exclusion, yet the request should have been granted, and reversal would follow if it should appear that by reason of the refusal defendant was obliged to forego asking proper questions which might prejudice the jury, or in asking them might create a prejudice. *Streight v. State*, 62 Tex. Crim. 453, 138 S. W. 742.

32. *Lundy v. Livingston*, 11 Ga. App. 804, 76 S. E. 594.

[a] This Is the Most Convenient Practice.—*Hilton & Dodge Lumber Co. v. Ingram*, 135 Ga. 696, 70 S. E. 234.

33. *Hilton & Dodge Lumber Co. v. Ingram*, 135 Ga. 696, 70 S. E. 234; *Wilkerson v. State*, 74 Ga. 398; *Williams v. State*, 60 Ga. 367, 27 Am. Rep. 412.

[a] Reason for Distinction.—The criminal practice is based on the provisions of the code requiring the presentation of each juror to the prisoner as he is called. *Hilton & Dodge Lumber Co. v. Ingram*, 135 Ga. 696, 70 S. E. 234.

34. *People v. Ah Lee Doon*, 97 Cal. 171, 31 Pac. 933, discretionary with court and not error unless discretion abused. See 13 ENCY. OF EV. 1012.

[a] The court being the trier, there is no danger in permitting such examination. *Martin v. State*, 16 Ohio 364.

[b] The court has the right to ask

tion may be put in the form of a "summing up" question.³⁵ On overruling a question as not being proper, the court need not instruct the counsel how to frame his question to avoid the objection.³⁶

Analogy Between Juror and Witness.—Though a juror, on his voir dire examination, has been said to be no less than a witness,³⁷ the attitude of a juror and a witness is entirely dissimilar;³⁸ at the same time he is entitled to many privileges of witnesses.³⁹

(B.) LIMITED TO PERTINENT MATTERS.⁴⁰—One of the limitations on the right to examine a juror on his voir dire is that the examination shall be confined to pertinent matters, inquiry into which will tend to enlighten court and counsel.⁴¹ The questions, therefore, must be relevant and material.⁴² Such as are clearly impertinent are properly dis-

the juror leading questions in passing upon his qualifications. *State v. Boyce*, 24 Wash. 514, 64 Pac. 719.

[c] "It is sometimes as objectionable as upon the trial of a formal issue." In the case at bar counsel for both sides and the court asked such questions with the result that the juror "adopted nearly every question" and the true state of his mind was left in doubt. *State v. Smith*, 74 Kan. 383, 85 Pac. 1020, 89 Pac. 21.

35. *People v. Radley*, 127 Mich. 627, 86 N. W. 1029.

[a] But a Question Is Properly Excluded Which Does Not Fairly Sum Up. The juror had answered in effect that he "was not in sympathy with the liquor business" and that he did not "like bad men that will throw themselves away, and get drunk, and become disorderly and fight." The excluded question was, "You do have then, some prejudice against a man who drinks?" *People v. Radley*, 127 Mich. 627, 86 N. W. 1029.

36. *San Antonio, etc. R. Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 607.

37. *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312.

38. *Stagner v. State*, 9 Tex. App. 440.

39. *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451; *State v. Cornelius*, 118 La. 146, 42 So. 754.

[a] Exemptions Are Those of Witness and No More.—When put on his voir dire, the juror becomes merely a witness, and is exempt from answering such questions as witnesses are exempt from answering, and from no others. *Pike County v. Griffin, etc. Plank Road Co.*, 15 Ga. 39.

40. See generally 13 ENCY. OF EV. 1011, et seq.

41. Fla.—*Savage v. State*, 18 Fla. 909. Ill.—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964. Ind.—*Stoots v. State*, 108 Ind. 415, 9 N. E. 380; *Epps v. State*, 102 Ind. 539, 1 N. E. 491; *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312. Ky.—*South Covington, etc. R. Co. v. Weber*, 26 Ky. L. Rep. 922, 82 S. W. 986. S. C. *State v. Coleman*, 8 S. C. 237.

[a] Should Be To Disclose Juror's Relation and Attitude of Mind.—Though a rigid examination is permitted it should be such as is calculated to disclose the juror's relation to the parties, and the actual disposition of his mind toward the parties or the subject-matter of the action. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

[b] Pertinent To Ask Jurors as to Bias From Lapse of Time.—Where a crime was committed in 1879 and the indictment was not found until 1895 it was a pertinent inquiry to ask jurors whether the lapse of time would prevent their rendering a verdict under the evidence and instructions of the court. *Howgate v. United States*, 7 App. Cas. (D. C.) 217.

42. *Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588.

[a] Must Be Confined to Cause of Challenge Made.—The examination should be confined to the questions raised by the particular cause of challenge under investigation at that time. *Collins v. State* (Tex. Crim.), 178 S. W. 345; *Stagner v. State*, 9 Tex. App. 440.

[b] Should Be as to Grounds Then Existing.—The examination should be confined to an investigation of grounds which exist at the time of the examination; such as citizenship and other legal requirements, relationship to the

lowed.⁴³ as are those which are purely speculative.⁴⁴ Nor is it necessary to ask any question which would add nothing material to the questions which have been put.⁴⁵ It is improper to ask a juror questions which would compel him to disclose matters that the law forbids his being questioned about.⁴⁶ It is also prejudicial error to so

parties, opinions and prejudices and other facts which show the actual disposition of the juror's mind toward the parties or the subject-matter of the action. *State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677.

[c] Question as to how juror decided in another case is wholly incompetent, irrelevant and immaterial to the issue being tried. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457; *People v. Trask*, 7 Cal. App. 103, 93 Pac. 891.

[d] It is not proper to ask a juror how many murder cases he has sat on, as the question does not tend to show actual bias, and is not permissible for the purpose of determining peremptories. *People v. Brittan*, 118 Cal. 409, 59 Pac. 664.

[e] Question Held Not Within Issues.—It was improper to ask a juror who stated he had no bias or prejudice against the prisoner, "Have you any aversion to the defense that a man is not connected with the crime either by illegal act or omission, and that he is not a principal, accomplice, or accessory?" The plea of not guilty put the burden on the state and a juror without prejudice against the prisoner could not be prejudiced against his proving he was not connected with the crime. *Collins v. State* (Tex. Crim.), 178 S. W. 345.

43. *Fla.*—*Mathis v. State*, 45 Fla. 46, 24 So. 287. *Ind.*—*Elliott v. State*, 73 Ind. 10; *Pemberton v. State*, 11 Ind. App. 297, 38 N. E. 1096. *Pa.*—*Clay v. Western Maryland R. Co.*, 221 Pa. 439, 70 Atl. 807.

[a] It wastes time and interjects prejudice into the case to examine upon matters not even claimed to be relevant and which cannot be seen or presumed by the court to be so. *Dixon v. Russell*, 156 Wis. 161, 145 N. W. 761.

[b] A juror having admitted making the remark that "it would ruin or injure any lawyer politically with certain persons in the county to appear for the prisoner," it was proper for the

court to refuse to permit the juror to be questioned as to who those persons were, since this was not material on the question of the juror's fairness. *State v. Mills*, 91 N. C. 581.

[c] Service in Other Case Disclosed, Court's Action Therein Immaterial. The court having permitted counsel to proceed sufficiently to learn whether or not the juror had served in a certain other case in which counsel claimed the court had criticised the jury, properly refused to permit the inquiry to be carried any further. The court's action in the other case was not a proper matter of inquiry and his refusal to permit it to become so, shows no disposition to hamper the free examination of the jurors. *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

[d] Plaintiff's Ability To Pay Not Relevant to the Issue.—The jury's duty in condemnation proceedings is simply to consider and determine the value of the land, and the ability of plaintiff to pay that value is wholly irrelevant to the issue. So a question was properly excluded which sought to find out how the juror, in the absence of evidence on the subject, would determine how much the plaintiff could afford to pay. *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

44. *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *Lundy v. State*, 91 Ala. 100, 9 So. 189.

45. *Com. v. Surles*, 165 Mass. 59, 42 N. E. 502.

46. *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871.

[a] It is proper to exclude a question as to how the juror decided in certain other cases in which he had been a juror. Such inquiry is not only as to a matter wholly irrelevant, but it is against public policy in so far as it may seek to show some ulterior motive in reaching a verdict in such other cases. *People v. Conte*, 17 Cal. App. 771, 122 Pac. 450, 457.

[b] A question which tends to introduce politics into the jury box is

question the jury as to bring into the case by indirection matters which could not be commented on directly.⁴⁷ The juror need not be questioned as to matters which the statute provides shall be proved only by other testimony.⁴⁸ The court cannot infer that a question is asked for an ulterior purpose which is on its face a proper question.⁴⁹ The court may, in its discretion, compel a defendant to consult with his attorney to avoid the asking of irrelevant and immaterial questions.⁵⁰

(C.) MATTERS GOING TO DISCREDIT JUROR. — At common law the juror could not be asked about matters going to his dishonor or discredit;⁵¹ and the rule is still recognized in some jurisdictions.⁵² Even where the question, if answered affirmatively, would clearly show the juror incompetent the better practice is to bring the matter out by extrinsic

properly disallowed. *State v. Mills*, 91 N. C. 581.

47. *Colo.*—Cripple Creek Min. Co. v. Brabant, 37 *Colo.* 423, 87 *Pac.* 794; *Vindicator C. G. M. Co. v. Firstbrook*, 36 *Colo.* 498, 86 *Pac.* 313. *Conn.* *Girard v. Grosvenordale Co.*, 82 *Conn.* 271, 73 *Atl.* 747. *Ill.*—*Mithen v. Jeffery*, 259 *Ill.* 372, 102 N. E. 778; *Crowley v. Stresenreuter*, 174 *Ill. App.* 538; *Eckhart, etc. Milling Co. v. Schaefer*, 101 *Ill. App.* 500. *N. Y.*—*Odell v. Genesee Const. Co.*, 145 *App. Div.* 125, 129 N. Y. Supp. 122.

[a] **Prosecution Should Be Rebuked for Asking About Acquaintance With Bribers.**—The judge should not only have refused to permit the questions, but should have rebuked prosecutor for asking jurors whether they were acquainted with certain noted bribe givers and takers, this being done "to intimate to the jurors that defendant was a bird of the same feather, and thus in advance prejudice the panel against him." *State v. Meysenburg*, 171 *Mo.* 1, 71 S. W. 229.

48. *Bridges v. State*, 110 *Ala.* 15, 20 S. W. 348.

49. *Blair v. M. McCormack Const. Co.*, 123 *App. Div.* 30, 107 N. Y. Supp. 750; *Grant v. National R. Spring Co.*, 100 *App. Div.* 234, 91 N. Y. Supp. 805.

50. *Shaw v. State*, 32 *Tex. Crim.* 155, 22 S. W. 588.

51. *U. S.*—*Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451. *Ind.*—*Maize v. Sewell*, 4 *Blackf.* 447; *Jones v. State*, 2 *Blackf.* 475; *Hudson v. State*, 1 *Blackf.* 317. *N. J.*—*State v. Spencer*, 21 N. J. L. 196. *N. Y.*—*Mechanics', etc. Bank v. Smith*, 19 *Johns.* 115; *People v. Fuller*, 2 *Park. Crim.* 16. *N. C.*—*State v. McAfee*, 64 N. C. 339;

Baker v. Harris, 60 N. C. 271; *State v. Benton*, 19 N. C. 196. *S. C.*—*State v. Baldwin*, 3 *Brev.* 309, 1 *Treadw.* 289. *Eng.*—*The King v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 106 *Eng. Reprint* 1009.

[a] **Whether Juror Considered Conviction Necessary to Own Protection.** It was proper to refuse to permit a question as to whether the juror believed defendants' conviction and punishment was "necessary to secure yourself, your family, or the country from the retaliatory vengeance and depredation of the Indians." *Hudson v. State*, 1 *Blackf. (Ind.)* 317.

52. *U. S.*—*Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451. *Ga.*—*Ryder v. State*, 100 *Ga.* 528, 28 S. E. 246, 62 *Am. St. Rep.* 334, 38 L. R. A. 721. See also *Simmons v. State*, 73 *Ga.* 609, 54 *Am. Rep.* 885; *Copenhagen v. State*, 14 *Ga.* 22. *Mo.*—*State v. Mann*, 83 *Mo.* 589. *N. C.*—*State v. McAfee*, 64 N. C. 339; *Baker v. Harris*, 60 N. C. 271; *State v. Benton*, 19 N. C. 196.

See 13 *Ency. of Ev.* 1016.

[a] **Cannot Be Asked as to Prejudice of Public Against Verdict of Acquittal.**—Juror cannot be asked whether the state of the public mind is such that a verdict of acquittal would create a prejudice and social ostracism against him among his friends and acquaintances. The answer might tend to degrade him or produce a prejudice or ostracism against himself or his family. *Savage v. State*, 18 *Fla.* 909.

[b] It is improper to ask juror if prejudiced against one who is accused of crime or whether he has any feeling against one so charged. "No man, if he understands such a question, will answer that he has a prejudice, be-

evidence.⁵³ However, it has been held to be proper to ask the question, the juror having the privilege to refuse to answer,⁵⁴ and the rule has been modified by the statutes which provide that no one shall be relieved from testifying providing it will not expose him to criminal prosecution, penalty or forfeiture.⁵⁵

(D.) MATTERS GOING TO JUROR'S STATE OF MIND AS TO BIAS.⁵⁶ — The modern rule is that it is proper to question the juror upon the state of his mind as to bias,⁵⁷ though the strict common-law rule seems to have been otherwise.⁵⁸

cause a prejudice is something that is not founded on information or reason." The question, however, had been asked, and the juror was held competent. *State v. Croney*, 31 Wash. 122, 71 Pac. 783.

53. *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451, as to crime.

[a] Under a statute providing that jurors "shall not be asked a question, the answer to which may show that he has been convicted of an offense which disqualifies him, or that he stands charged by indictment or other legal accusation with theft or felony," if it is desired to raise any question as to these matters it must be done by evidence other than that of the juror. *Sewell v. State*, 15 Tex. App. 56.

54. *People v. Donaldson*, 2 Edm. Sel. Cas. (N. Y.) 78.

[a] Applied to Question as to Secret Oath.—It was proper to permit the prosecutor to ask jurors whether they had taken an oath to favor counterfeiters, but says it is "one which the persons interrogated might well decline to answer." *Fletcher v. State*, 6 Humph. (Tenn.) 249.

55. See generally the statutes, and *State v. Fox*, 25 N. J. L. 566.

56. As to what particular questions can be asked to establish either that he has any bias, prejudice or opinion, or the extent thereof, see *infra*, VII, F.

57. *People v. Knickerbocker*, 1 Park. Crim. (N. Y.) 302. See *Lohman v. People*, 1 N. Y. 379 (where it is said in effect that the issue being as to whether the juror stands indifferent, his opinion derived from his own consciousness, was relevant, competent and primary evidence); also *People v. Cristie*, 2 Park. Crim. (N. Y.) 579, where it is said to be "the only source from which the fact of the formed opinion can be obtained."

[a] When a challenge is to the favor a juror may be interrogated to show

the real state of his mind toward the parties and in reference to the issue to be tried. *Shoeffler v. State*, 3 Wis. 823.

[b] Bias Is Best Judged by Conscience of Juror.—Whether the bias of the juror is such as will readily yield to proof can be more satisfactorily and reliably ascertained by an appeal to the conscience of the juror. *Williams v. Godfrey*, 1 Heisk. (Tenn.) 299.

58. *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

[a] As Being Application of "Ill-Will" or "Malice" Rule.—The English rule did not permit the juror to be asked whether he had expressed an opinion. But our courts permit it. The reason for the English rule is based on the *malice* rule as to opinion. *State v. Flower*, Walk. (Miss.) 318.

[b] But after an exhaustive consideration of the English cases the court in *State v. Benton*, 19 N. C. 196, concludes that the juror may be compelled to answer any question unless it "cannot be answered without exposing him to the peril of disgrace and punishment." The rule requiring *ill-will* grows out of a misapprehension of the use of that expression in the old cases, and had reference either to those cases in which the juror had found a verdict or bill of indictment against the prisoner. It follows that the mere opinion of the juror can be inquired into.

[c] Under the rule that *ill-will* toward the prisoner must be shown, or a mere expression of opinion will not disqualify, the juror cannot be questioned as it tends to his dishonor. *King v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

[d] Where the challenge is for principal cause, as where the opinion is based on having been a member of a jury which has passed on practically the same state of facts, it has been

(E.) QUESTIONS OF LAW.—(1.) *Generally.*—If a juror is asked questions which involve propositions of law he should be told what the law is.⁵⁹ Where counsel states an erroneous rule of law during his examination, the court properly interrupts and gives the correct rule.⁶⁰ and it has been held that counsel has no right to explain legal terms which the court will explain in its charge.⁶¹ A juror cannot be asked how he will decide a question of law,⁶² nor can he be questioned as to his understanding of or familiarity with legal terms and expressions.⁶³ He may be asked the broad question whether he will

suggested that the old rule should apply since his answer must disparage the juror. *Baker v. Harris*, 60 N. C. 271.

Generally as to right to question jurors in a manner exposing to disgrace or punishment, see *supra*, VII, E, 4, i, (III), (C).

59. *Montgomery v. Wabash, St. L. & P. Ry. Co.*, 90 Mo. 446, 2 S. W. 409; *Keegan v. Kavanaugh*, 62 Mo. 230.

60. *State v. Heft*, 155 Iowa 21, 134 N. W. 950; *State v. Royse*, 24 Wash. 440, 64 Pac. 742.

61. *Collins v. State* (Tex. Crim.), 178 S. W. 345, juror did not know what "alibi" meant when counsel asked if he was prejudiced against that defense.

62. *Fla.*—*Brown v. State*, 40 Fla. 459, 25 So. 63; *Roberson v. State*, 40 Fla. 509, 24 So. 474. *Ill.*—*Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406. *N. Y.*—*People v. Conklin*, 175 N. Y. 333, 67 N. E. 624. *Wash.* *State v. Royse*, 24 Wash. 440, 64 Pac. 742; *State v. Everitt*, 14 Wash. 574, 45 Pac. 150; *State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

[a] **How Will Decide in Absence of Evidence.**—To ask juror how he will decide if the indictment is read and no evidence put in is objectionable as asking him to decide a question of law. *State v. Turley*, 87 Vt. 163, 88 Atl. 562.

[b] **Distinction Based on Jurors Being Judges of Law.**—If jurors are judges of law, questions as to their opinion on the constitutionality of the law are improper, for they might refuse to convict on the ground of unconstitutionality, and their fixed opinions would not disqualify them. But if they are not judges of the law no valid exception can be taken to the questions. *Pierce v. State*, 13 N. H. 556.

63. *La.*—*State v. Ford*, 42 La. Ann. 255, 7 So. 696. *Miss.*—*Fugate v. State*, 85 Miss. 86, 37 So. 557. *Neb.*—*Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108. *Vt.*—*State v. Turley*, 87 Vt. 163, 88 Atl. 562. *Wis.*—*Ryan v. State*, 115 Wis. 488, 92 N. W. 271.

See also 13 ENCY. OF EV. 1016.

[a] **Is Not Calculated To Disclose Mental Fitness.**—The law does not contemplate that the juror shall be learned in the law. Neither is such questioning calculated to disclose the mental fitness or unfitness of the juror to act as such. *San Antonio, etc. R. Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 607.

[b] **Especially Where Laymen Ordinarily Would Be Ignorant.**—Applied where the questions were such "as to which a fair and competent juror might well be ignorant, and which, without explanation, even an educated layman might not clearly comprehend. *O'Rourke v. Yonkers R. Co.*, 32 App. Div. 8, 52 N. Y. Supp. 706.

[c] **Rule on Which Instruction Was Subsequently Asked.**—A question which involves a rule of law concerning which men in general are not supposed to be accurately informed, and which the defendant subsequently asked the court to instruct the jury upon, is properly overruled. *Richards v. United States*, 175 Fed. 911, 99 C. C. A. 401.

[d] **Questions Held Improper Under This Rule.**—"What do you understand by the words, a person of sound memory and discretion?" "Would you deem him legally responsible for his deed?" *Com. v. Calhoun*, 238 Pa. 474, 86 Atl. 472.

[e] **Questions on Circumstantial Evidence.**—"Do you understand the meaning of a circumstantial evidence case?" Then reciting certain facts and adding, "Would you call that a case of circumstantial evidence?" *Roberson v. State*, 40 Fla. 509, 24 So. 474.

take the law from the court,⁶⁴ but that is as far as he can be interrogated along this line;⁶⁵ and it is clearly going beyond the proper limits of the voir dire examination to ask the juror whether he would of his own accord observe the law of the case whether such law were given in the court's charge or not.⁶⁶

(2.) *As to Burden of Proof, Presumptions, etc.*—The jurors should not be questioned about their knowledge of "burden of proof,"⁶⁷ or "preponderance of the testimony,"⁶⁸ or "reasonable doubt,"⁶⁹ or "presumption of innocence,"⁷⁰ and though it has been held that counsel should be allowed to ask the juror whether he will presume the defendant innocent and give him the benefit of reasonable doubt,⁷¹ it

[f] **Questioned About Self-Defense.** Jurors are not supposed to know the law and are not incompetent because of their lack of knowledge of law of self-defense. *State v. Willie*, 130 La. 454, 58 So. 147; *State v. Perieux*, 107 La. 601, 31 So. 1016.

64. Cal.—*People v. Creeks*, 170 Cal. 368, 149 Pac. 821. Colo.—*Jones v. People*, 23 Colo. 276, 47 Pac. 275. La. *State v. Harris*, 51 La. Ann. 1194, 25 So. 984; *State v. Ford*, 42 La. Ann. 255, 7 So. 696. Pa.—*Com. v. Calhoun*, 238 Pa. 474, 86 Atl. 472, *citing Hall v. Com.*, 22 W. N. C. 25. Wash.—*State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

[a] **Care must be taken not to state a wrong rule of law in asking the jurors whether they will obey that rule if laid down to them by the court.** See *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346, the court did not reverse for this error alone.

65. *State v. Ford*, 42 La. Ann. 255, 7 So. 696; *Com. v. Calhoun*, 238 Pa. 474, 86 Atl. 472, *citing Hall v. Com.*, 22 W. N. C. 25.

[a] **Cannot Be Questioned About Court's Criticism of Former Jury.**—A juror having answered that he understood he was to take the law from the court, but to decide the question of fact on his own judgment upon the evidence, it was proper to prevent a line of questioning which sought to bring out the effect upon the juror of previous criticism by the judge of the action of a jury which had decided a case contrary to the judge's belief. *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

66. *Brown v. State*, 40 Fla. 459, 25 So. 63.

[a] **Questioning as to His Own**

Conscientious Belief.—It is not proper to ask "if the court stated the law to be a certain way, did his conscience tell him that it is proper law, and would he enforce it." *Collins v. State (Tex. Crim.)*, 178 S. W. 345.

[b] **Question About Following "Higher Law."**—"If you are taken on the jury to try this case, will you be influenced, even in the slightest degree, by an appeal to any higher law than the law of the land or the law as will be charged you by the court?" This is in the nature of a suggestion that the juror will not be governed by his oath. *Fuller v. State*, 50 Tex. Crim. 14, 95 S. W. 541.

Right to bring out his prejudices against certain laws, see *infra*, VII, F, 13, d and i.

67. *State v. Willie*, 130 La. 454, 58 So. 147; *State v. Perieux*, 107 La. 601, 31 So. 1016.

68. *State v. Ford*, 42 La. Ann. 255, 7 So. 696, this is a question of law for the court.

69. La.—*State v. Ford*, 42 La. Ann. 255, 7 So. 696, this is a question of law for the court. Miss.—*Fugate v. State*, 85 Miss. 86, 37 So. 557. Vt. *State v. Turley*, 87 Vt. 163, 88 Atl. 562.

70. *State v. Turley*, 87 Vt. 163, 88 Atl. 562.

[a] **Anticipates Court's Instructions Thereon.**—To ask a juror whether he "knew that the defendant in a criminal case is entitled to the benefit of the presumption of innocence" is properly excluded as calling upon the juror to anticipate instructions to be given by the court. *Ryan v. State*, 115 Wis. 488, 92 N. W. 271.

71. *Caton v. State*, 66 Tex. Crim. 473, 147 S. W. 590. See *Ryan v. State*, 115 Wis. 488, 92 N. W. 271.

has also been held not error to exclude the question.⁷²

(F.) **HYPOTHETICAL QUESTIONS, ETC.**—Though the general rule is that the examination should be based on existing facts and hypothetical questions should not be propounded,⁷³ hypothetical questions, based upon the theory of the defense are permitted, to some extent.⁷⁴ It is not proper to ask a juror how he would decide in a supposed state of the evidence,⁷⁵ or as to what effect he would assign to the estab-

72. *Ryan v. State*, 115 Wis. 488, 82 N. W. 271.

[a] **Not Pertinent to Inquiry as to Opinion.**—It was not the trial court's duty to permit the question whether the defendant "is presumed by you to be an innocent man," the object of the inquiry being as to whether the juror had formed or expressed an opinion as to the guilt or innocence of the accused. *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

[b] **Does Not Tend To Show Bias and Is Question of Law.**—Questioning as to whether juror would find not guilty if after hearing the evidence and instructions "there yet remains in your mind a reasonable doubt" is objectionable as not tending to show bias or prejudice or lack of qualifications, but a state of mind which would be dependent upon the court's instructions. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

[c] **Properly Disallowed as Calling for Verdict on Hypothetical Case.** Questions whether jurors would give accused the benefit of a reasonable doubt as quickly as they would if he were "a highly respectable gentleman," or if they would be prejudiced against him if it appeared he was living with a woman not his wife, while they might properly be allowed are not erroneously disallowed under the rule that he cannot be asked how he would decide on a supposed state of facts. *Hughes v. State*, 109 Wis. 397, 85 N. W. 333.

[d] **Sufficient Where Juror Says Will Take Law From Court.**—It was sought to ask the juror whether he would give the defendant the benefit of every reasonable doubt. He said in effect, that he would if the court said so. This is as far as it was proper to interrogate him. *Brown v. State*, 40 Fla. 459, 25 So. 63.

73. *State v. Bokien*, 14 Wash. 403, 44 Pac. 889.

74. *Henwood v. People*, 57 Colo. 544, 143 Pac. 373 (limited extent only);

Jones v. People, 23 Colo. 276, 47 Pac. 275; *People v. O'Neill*, 10 N. Y. St. 1.

[a] **No Error Where Done by Both Sides.**—No error occurs of which defendant can complain when his counsel asks a hypothetical question based on his theory of the case, and the district attorney asks a similar question, based on the theory of the prosecution, by way of cross-examination. *People v. Copsey*, 71 Cal. 548, 12 Pac. 721.

[b] Defendant's counsel having put similar questions, could not complain of those put by the prosecuting attorney. *Henwood v. People*, 57 Colo. 544, 143 Pac. 373.

75. Ill.—*Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Fish v. Glass*, 54 Ill. App. 655. Ind.—*Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236. N. D.—*State v. Banik*, 21 N. D. 417, 131 N. W. 262. Ohio.—*State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677. Pa.—*Com. v. Van Horn*, 188 Pa. 143, 41 Atl. 469, *affirming* 4 Lack. Leg. N. 63. Wis.—*Ryan v. State*, 115 Wis. 488, 92 N. W. 271; *Hughes v. State*, 109 Wis. 397, 85 N. W. 333.

[a] **Otherwise It Would Be Impossible To Get Juries.**—"If counsel are allowed to go into hypothetical assumptions of how the evidence will turn out on the trial, and how in certain contingencies jurors would act, it will be impossible to get juries." *Keegan v. Kavanaugh*, 62 Mo. 230.

[b] **Particularly Where Facts Not Shown To Exist.**—Particularly under this rule is it not permissible to ask a question based upon a hypothetical state of facts not shown to exist. *Merkel v. State*, 75 Tex. Crim. 551, 171 S. W. 738.

[c] **Cannot Ask What Would do if no Evidence Given.**—It is improper to ask a juror what his verdict would be in case the indictment was read but no evidence given. This is objectionable under the rule. *State v. Turley*, 87 Vt. 163, 88 Atl. 562.

lishment of a particular fact,⁷⁶ or what weight he would give to the testimony of certain witnesses,⁷⁷ to a particular part of the evidence.⁷⁸ A juror may be asked if he will consider all the testimony and evidence fairly and impartially, giving each part thereof such weight as in his best judgment it deserves;⁷⁹ and he may be questioned as to effect of evidence influencing him in arriving at a verdict, for the purpose of showing his bias, or impartiality.⁸⁰ A juror may be asked

76. *Com. v. Van Horn*, 188 Pa. 143, 41 Atl. 469, it is not proper to ask a juror what effect he would assign to an immoral relation existing between defendant and the woman he was accused of murdering.

[a] **Question as to Whether Specific Act was Negligent.**—It is doubtful whether the answer of the juror that he did not consider a specific act to be negligent would be ground for challenge for cause. *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227.

77. *Fugate v. State*, 85 Miss. 86, 37 So. 557 (whether he would believe a certain witness under oath); *People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911.

[a] **Weight To Be Given Witnesses Not To Be Tested by Juror's Views.** The object of the examination being to ascertain whether the juror had expressed an opinion as to the guilt or innocence of accused, and whether he was biased or prejudiced for or against him, questions which merely go to the juror's "views in mental and moral philosophy, and the weight to be given to the testimony of witnesses by that criterion" are properly overruled. *Gandy v. State*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

[b] **Improper Question as to Weight of Defendant's Testimony.**—"If the defendant should himself testify on some material point, and his testimony was reasonable, not contradicted, and not impeached, would you give it weight?" is properly disallowed. *People v. Warner*, 147 Cal. 546, 82 Pac. 196.

[c] **Defendant's Testimony in Light of Previous Conviction.**—The court properly overruled a question as to whether the juror would be affected by the fact that the defendant had at one time been convicted of manslaughter and that his case had been appealed. The fact that any witness has been convicted of a crime involving moral turpitude is properly one to be consid-

ered by the jurors. *Manning v. State*, 7 Okla. Crim. 367, 123 Pac. 1029.

[d] **Credence To Be Given Witnesses in Sheriff's Employ.**—Neither side should be permitted to test jurors by asking whether they would or would not give credence to the testimony of witnesses who were in the sheriff's employ. *Ellis v. State*, 69 Tex. Crim. 468, 154 S. W. 1010.

[e] **As to Belief in Testimony of Woman Not Virtuous.**—It is not proper to ask veniremen would you "believe the testimony of a woman not virtuous, as readily as you would one who is virtuous?" The jury are required to find defendant guilty beyond a reasonable doubt, regardless of the character of the witness. *Hamilton v. State*, 74 Tex. Crim. 219, 168 S. W. 536.

78. *People v. Warner*, 147 Cal. 546, 82 Pac. 196.

79. *People v. Warner*, 147 Cal. 546, 82 Pac. 196, this is only asking him to do his duty.

80. *Galena & Southern Wis. R. Co. v. Haslam*, 73 Ill. 494; *Chicago & Alton R. R. Co. v. Adler*, 56 Ill. 344; *Meaux v. Whitehall*, 8 Ill. App. 173; *In re Goldthorp's Estate*, 115 Iowa 430, 88 N. W. 944.

[a] **Influence on Determining Guilt and on Evidence Distinguished.**—It was reversible error to refuse to permit counsel to interrogate the juror as to the weight he would give to a former conviction in determining the guilt or innocence of the accused. But it was proper to refuse to permit the juror to be asked whether that fact "would influence him at all in the consideration of the evidence," where one of the issues to be tried was a former conviction as affecting the grade of offense. *People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911.

[b] **Influence by Proof of Immoral Relations.**—It was proper to inquire whether juror would be influenced by proof that the deceased and defendant's

how he would decide if the evidence were equally balanced according to some cases;⁸¹ but other cases held that the question is improper.⁸² The juror cannot be asked questions which tend to commit him to give a large verdict.⁸³ It is not proper to ask juror whether in case of conviction, he has made up his mind what punishment ought to be inflicted on the prisoner;⁸⁴ but he may be asked whether he has formed such a deliberate opinion as to the nature of the punishment to be inflicted, that it could not be affected by the evidence.⁸⁵

(G.) STATUTORY QUESTIONS.—(1.) *Generally*.⁸⁶—Under some statutes, certain specified questions are asked of jurors by the trial judge.⁸⁷ If the court does not ask the questions, the party should request that it be done;⁸⁸ and reversal will lie for failure to grant the request.⁸⁹ But if there is no request the court may decide an objection as a question of law upon an agreed state of facts⁹⁰ without any further

wife had been unduly intimate. *Jones v. People*, 23 Colo. 276, 47 Pac. 275.

[c] **May Permit Question as to Believing Accomplices.**—It is discretionary with the court to permit question as to disregarding the testimony of an accomplice. While such testimony is to be weighed for what it is worth, it is a well known fact that some men will not believe an accomplice in any case, and where the prosecution's case depended on such a witness the question was properly allowed. *State v. Flint*, 60 Vt. 304, 14 Atl. 178.

81. *Galena & Southern Wisconsin R. Co. v. Haslam*, 73 Ill. 494; *Chicago & Alton R. R. Co. v. Adler*, 56 Ill. 344; *Meaux v. Whitehall*, 8 Ill. App. 173.

82. *Keegan v. Kavanaugh*, 62 Mo. 230.

[a] **Improper as Involving a Question of Law.**—To ask the juror which side he would find on if the evidence as to drunkenness should be equally balanced, is improper as requiring the juror to determine a question of law. *State v. Royse*, 24 Wash. 440, 64 Pac. 742.

83. *Rice v. Ragan*, 61 Tex. Civ. App. 429, 129 S. W. 1148.

[a] **May Ask as to Willingness to Give Fair Compensation.**—It was proper to ask jurors if for any reason they would be unwilling to render a verdict for full and fair compensation if they found in plaintiff's favor, and if they found for him would there be any disposition to give him less than full compensation under the evidence. These questions do not tend to commit the jury to a large verdict. *Rice v. Ragen*, 61 Tex. Civ. App. 429, 129 S. W. 1148.

84. *State v. Ward*, 14 La. Ann. 673, no bias, expression of opinion or scruples against punishment appearing. Questions as to bias against particular punishment, see *infra*, VII, F, 13, i.

85. *State v. Bennett*, 14 La. Ann. 651.

86. **Examination by court on motion or request**, see *supra*, VII, E, 4, i, (II).

87. See generally the statutes, and *Stagner v. State*, 9 Tex. App. 440. See also 13 ENCY. OF EV. 1014 et seq.

[a] **The Statutory Method Is Constitutional.**—It does not deprive parties of impartial juries. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *Boon v. State*, 1 Ga. 618.

[b] **Proper in forcible entry and detainer** before justice of peace to proceed by this method. *Holton v. Hendley*, 75 Ga. 847.

[c] **Effect of Change in Questions.** Where a change in the questions was made while not technically an *ex post facto* law, yet it should not be sanctioned since the defendant was entitled to have his triers selected according to the rules of evidence which existed when the crime was committed. *Reynolds v. State*, 1 Ga. 222.

88. *Lester v. State*, 2 Tex. App. 432.

89. **S. C.**—*Robinson v. Howell*, 66 S. C. 326, 44 S. E. 931, the statute is mandatory. **Tex.**—*Lester v. State*, 2 Tex. App. 432, proper objection and exception having been taken. **W. Va.** *Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078.

90. *Tucker v. Buffalo Cotton Mills*, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957.

examination, or he may decide it upon his own observation.⁹¹ That examination is by counsel instead of by the court is not ground for reversal, where done in court's presence and not objected to.⁹² A juror who answers all the questions so as to qualify, is *prima facie* competent.⁹³ When the juror's answers have *prima facie* qualified him the court properly refuses to permit counsel to ask further questions;⁹⁴ nor need the judge ask any further questions.⁹⁵ But if it appear that the jurors have not understood the questions, the court may in its discretion explain them, or ask, or permit to be asked, further questions.⁹⁶ If the parties wish to test the jurors further for bias they must be put upon the court as a trier and some answer shown to be untrue.⁹⁷ The statutory questions may be asked in misdemeanor cases

91. *State v. Nance*, 25 S. C. 168, as where the prisoner is colored and the juror white he need not ask about relationship in the absence of request.

92. *McGuire v. State*, 3 Ohio Cir. Ct. 551, 2 Ohio Cir. Dec. 318, statute specified that particular question be asked by the court.

93. *Dumas v. State*, 63 Ga. 600.

[a] **Competent Where so Appears From All Answers Together.**—A juror was competent who at first said he "could not say that it was" when asked if his mind was impartial, but who on being told he must answer yes or no, answered "yes." *Cato v. State*, 72 Ga. 747.

[b] **Competent Though Some Answers Show Uncertainty.**—A juror was competent though in one answer to the question, "Do you think you are strictly impartial?" he said "Well, I don't know that I am;" but on further examination said he did not hear very well and might have misunderstood the question, as he did not think he so answered. His other answers were such as showed him *prima facie* competent. *Norton v. State*, 137 Ga. 842, 74 S. E. 759. Competent where he said "I think that I am, as I understand it." The court then said "Do you understand the question?" and juror said "yes." *Thomas v. State*, 27 Ga. 287.

94. *Duncan v. State*, 141 Ga. 4, 80 S. E. 317; *Brown v. State*, 141 Ga. 5, 80 S. E. 320; *Lindsay v. State*, 138 Ga. 618, 76 S. E. 369; *Simmons v. State*, 73 Ga. 609, 54 Am. Rep. 885; *Monday v. State*, 22 Ga. 672, 79 Am. Dec. 314.

[a] **No Further Questions Can Be Asked by Counsel as of Right.**—*Alford v. State*, 137 Ga. 458, 78 S. E. 375; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38

246, 62 Am. St. Rep. 334, 38 L. R. A. 721; *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814; *Carter v. State*, 56 Ga. 463; *Pines v. State*, 21 Ga. 227.

[b] **The court is under no obligation to permit defendant to further examine the juror after he has been found competent by his answers to the statutory questions.** *Carr v. State*, 104 Ala. 4, 16 So. 150.

95. *Duncan v. State*, 141 Ga. 4, 80 S. E. 317.

96. *Alford v. State*, 137 Ga. 458, 73 S. E. 375; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; *Simmons v. State*, 73 Ga. 609, 54 Am. Rep. 885; *Mitchell v. State*, 22 Ga. 211, 68 Am. Dec. 493; *King v. State*, 21 Ga. 220.

[a] **Rule Elucidated.**—(1) It was not error to refuse to ask or allow counsel to ask what the jurors understood by the words "bias" and "prejudice;" what they meant when they said they were perfectly impartial between state and accused; and whether they did not entertain settled and fixed opinions regarding the guilt of defendant. *Woolfolk v. State*, 85 Ga. 69, 11 S. E. 814. (2) But it was within the court's right, and perhaps his duty, to explain these terms if the jurors apparently did not understand them. *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782. (3) But the statutory questions, or the consequences of a negative or affirmative answer thereto, must not be neglected when the question is fully understood and fairly answered. *Henry v. State*, 33 Ga. 441.

97. *Alford v. State*, 137 Ga. 458, 73 S. E. 375; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721; *Simmons v. State*, 73 Ga. 609, 54 Am. Rep. 885; *Dumas v. State*,

though the statute only applies specifically to felonies.⁹⁸ However, the practice is to put the jurors on their voir dire on request in both civil and misdemeanor cases,⁹⁹ and to propound such questions as will test their competency to pass upon the issues in the case.¹

(2.) *Questions Propounded.*²—The character and number of the questions is left largely to the discretion of the court.³ Questions not warranted by the statute should not be propounded.⁴ The examination need not necessarily be confined strictly to the questions formulated in the statutes, however, but is to be varied and elaborated as the circumstances surrounding the juror seem to require;⁵ and the juror may be asked whether he is conscious of any circumstances which would influence him in giving a verdict other than upon a fair consideration of the evidence.⁶ He may be asked questions calculated to discover whether he has been subjected, knowingly or unwittingly, to influences which would unfit him for service.⁷ If counsel desire more specific questions than those asked by the court they must request them;⁸ but it is not error to refuse to put a question in the exact form asked by counsel.⁹ The court may ask such ad-

63 Ga. 600; *Carter v. State*, 56 Ga. 463; *Nesbit v. State*, 43 Ga. 238; *Taylor v. State*, 13 Ga. App. 715, 79 S. E. 924.

98. *Brown v. State*, 104 Ga. 736, 30 S. E. 951; *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497; *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063.

99. *Sullivan v. Padrosa*, 122 Ga. 338, 50 S. E. 142; *Thompson v. State*, 109 Ga. 272, 34 S. E. 579.

1. *Sullivan v. Padrosa*, 122 Ga. 338, 50 S. E. 142; *Brown v. State*, 104 Ga. 736, 30 S. E. 951; *Wells v. State*, 102 Ga. 658, 29 S. E. 442; *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497.

2. See generally 13 ENCY. OF EV. 1014 et seq.

3. *Sullivan v. Padrosa*, 122 Ga. 338, 50 S. E. 142; *Brown v. State*, 104 Ga. 736, 30 S. E. 951. See also *supra*, VII, E, 4, i, (III), (A).

4. *Rothschild v. State*, 12 Ga. App. 728, 78 S. E. 201.

5. *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75; *Lindsey v. State*, 111 Ga. 833, 36 S. E. 62 (substance is sufficient though immaterial changes therein); *King v. State*, 21 Ga. 220, they may be so varied in form as to enable the jurors properly to understand them.

[a] It need not be confined to "the stereotyped forms." *State v. Brown*, 35 La. Ann. 340.

[b] *Reason for Rule.*—The statutory questions are to be asked on motion. This obviously leaves it to the

court's discretion to ask other questions. "It is not one of those cases where *expressio unius est exclusio alterius*." *Pierce v. State*, 13 N. H. 536.

[c] *Question Held Proper.*—There was no abuse of discretion, where the ground of attack was based only upon the fact the jurors had previously heard certain affidavits and evidence on a motion to continue, which it was claimed would tend to cause them to prejudge the case, to refuse to put the statutory questions and to propound this question: "Have you, from having seen the crime committed, or from having heard any testimony delivered on oath, formed and expressed any opinion in regard to the guilt or innocence of the prisoner at the bar?" *Nobles v. State*, 127 Ga. 212, 56 S. E. 125.

6. *Savage v. State*, 18 Fla. 909.

7. *State v. Brown*, 35 La. Ann. 340.

[a] *As to Conversations With Persons Not Interested.*—There was no objection to asking him whether he had conversed about the case with a certain named person who was not in any way connected therewith. Assuming this inferentially charged a corrupt combination to influence jurors, the question was not objectionable. *State v. Brown*, 35 La. Ann. 340.

8. *State v. Nance*, 25 S. C. 168.

9. *O'Boyle v. Com.*, 100 Va. 785, 40 S. E. 121, sufficient if the court asks

ditional questions as he deems necessary,¹⁰ but whether he will examine any further than the statutory questions is a matter for his discretion,¹¹ and no reversal can be had unless that discretion is abused;¹² nor is the court bound to go beyond the statutory questions unless something appears making it proper to do so.¹³ Unless a request is made for an examination, the court need not propound specific questions some of which are improper;¹⁴ but if the party offers testimony to show that the juror has a preconceived opinion the court should hear it.¹⁵

(IV.) **Waiver.** — By failing to challenge one waives not only any objection to the juror's competency,¹⁶ but also any objection to the rulings of the court on the questions propounded at the examinations,¹⁷ or any failure by the court to propound required statutory questions.¹⁸ These rules apply to jurors summoned on special venire, as well as to those regularly drawn,¹⁹ and are not changed by the fact that the venire did not recite the juror's qualifications.²⁰ One waives his right to examine by declining to examine when the opportunity is given him,²¹ and he waives his statutory right to have a certain number of jurors in the box by examining when the box was improperly filled.²²

a question which is substantially identical.

10. *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, 44 Am. Rep. 573.

11. *State v. Bethune*, 93 S. C. 195, 75 S. E. 281; *State v. Bethune*, 86 S. C. 143, 67 S. E. 466.

12. *State v. Bethune*, 93 S. C. 195, 75 S. E. 281; *State v. Bethune*, 86 S. C. 143, 67 S. E. 466.

13. *Com. v. Spencer*, 212 Mass. 433, 99 N. E. 266, Ann. Cas. 1913D, 552; *Com. v. Poisson*, 157 Mass. 510, 32 N. E. 906; *Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884; *Com. v. Gee*, 6 Cush. (Mass.) 174.

14. *Sullivan v. Padrosa*, 122 Ga. 338, 50 S. E. 142.

15. *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497.

16. See *supra*, VII, E, 4, b, (I).

17. *Ga.*—*Rothschild v. State*, 12 Ga. App. 728, 78 S. E. 201. *Mo.*—*State v. David*, 131 Mo. 380, 33 S. W. 28. *N. Y.* *O'Rourke v. Yonkers R. Co.*, 32 App. Div. 8, 52 N. Y. Supp. 706.

[a] **Refusal of Proper Question Cured by General Question Asked.** Counsel having been refused permission to ask a proper question waives his right where the court puts the question to the jury as a whole ordering any juror to step down if he had the disqualifying prejudice called for in the question. If counsel desired anything more he should have made his

wants known to the court. *Loeffler v. Keokuk Northern Line Packet Co.*, 7 Mo. App. 185.

[b] **Defendant who neither objects nor excepts to any question asked by the court, nor requests the court to ask other questions, nor offers any evidence, nor requests the court to take any evidence as to any particular disqualification, waives all objections to the jury.** *James v. State*, 53 Ala. 380.

[c] **Mere failure to permit certain questions to be asked, or to question the juror further on court's own motion, cannot be reviewed where the juror was admitted and sworn without objection by appellant.** *Epps v. State*, 102 Ind. 539, 11 N. E. 491.

18. *Lindsey v. State*, 111 Ga. 833, 36 S. E. 62.

[a] **Party must request that statutory questions be asked or he cannot thereafter complain of their omission.** *Tweedy v. Briggs*, 31 Tex. 74.

[b] **Statutory question as to previous service as a talesman within twelve months is waived where no objection was made at the time.** *Young v. State*, 23 Ohio St. 577.

19. *Kenrick v. Reppard*, 23 Ohio St. 333.

20. *Bartow v. Murry*, 2 N. J. L. 97.

21. *Penn v. State*, 62 Miss. 450.

22. *Oakwood Stock Farm Co. v. Rahn*, 106 Ill. App. 269.

Also one waives his exception to refusal to permit a question by withdrawing the exception after the court permitted the question to be put.²³

j. *Evidence*.²⁴ — (I.) **Competency and Admissibility.** — In proving a challenge, the law of evidence is the same as in other cases.²⁵ The challenged juror is clearly a competent witness,²⁶ by express provision of statute in some states.²⁷ Other evidence than the juror's testimony may be received, however,²⁸ by express provision of statute;²⁹ and it is the duty of the court to hear competent evidence in support of a valid objection.³⁰ Under some statutes it may be necessary for the

23. *People v. Childs*, 87 App. Div. 474, 84 N. Y. Supp. 853.

24. **Proper questions to jurors**, see *infra*, VII, E, 4, i, (111).

25. See generally the statutes, and *People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911; *State v. Morgan*, 23 Utah 212, 64 Pac. 356.

[a] **Proof may be by records, papers, or witnesses**, either to support the challenge, or to disprove it. *State v. Spencer*, 21 N. J. L. 196.

26. *Ga.*—*Brown v. State*, 104 Ga. 736, 30 S. E. 951; *Pike County v. Griffin*, etc. *Plank Road Co.*, 15 Ga. 39; *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063. *Mich.*—*People v. Evans*, 72 Mich. 367, 40 N. W. 473. *Mo.*—*State v. Foley*, 144 Mo. 600, 46 S. W. 733. *N. J.*—*State v. Fox*, 25 N. J. L. 566; *State v. Spencer*, 21 N. J. L. 196; *Bickham v. Pissant*, 1 N. J. L. 220. *N. Y.* *Pringle v. Huse*, 1 Cow. 432; *Ogden v. Parks*, 16 Johns. 180; *People v. Fuller*, 2 Park. Crim. 16; *People v. Donaldson*, 2 Edm. Sel. Cas. 78; *People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911. *Tenn.*—*Paducah*, etc. *R. Co. v. Muzzell*, 95 Tenn. 200, 31 S. W. 999.

[a] **The juror is the best witness on a challenge for actual bias** for no one knows the state of his mind better than himself. *People v. Reyes*, 5 Cal. 247.

[b] **In misdemeanor trial**, where the jurors are challenged on ground that they do not stand indifferent, they should be put on voir dire, and evidence taken to show whether facts exist which affect their impartiality. *Lewis v. State*, 118 Ga. 803, 45 S. E. 602; *Wells v. State*, 102 Ga. 658, 29 S. E. 442.

[c] **May Be Called by Either Party.** The juror may be called as a witness either by the party attacking his competency or the party seeking to estab-

lish it. *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 62 Am. St. Rep. 334, 38 L. R. A. 721.

Examination of prospective jurors to test existence of alleged cause for change of venue, see 13 ENCY. OF EV. 949n.

Necessity of swearing juror on voir dire, see *supra*, VII, E, 4, f.

27. See generally the statutes.

28. *Kan.*—*State v. Lowe*, 56 Kan. 594, 44 Pac. 20. *Mass.*—*Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884. *Mich.*—*People v. Evans*, 72 Mich. 367, 40 N. W. 473. *Minn.*—*State v. Barrett*, 40 Minn. 65, 41 N. W. 459; *State v. Mims*, 26 Minn. 183, 2 N. W. 494, 683. *Mo.*—*State v. Foley*, 144 Mo. 600, 46 S. W. 733. *N. J.*—*Bickham v. Pissant*, 1 N. J. L. 220. *N. Y.*—*People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911.

[a] **In a civil case upon the court's being asked to excuse jurors because disqualified he may hear evidence if the facts are put in issue.** *Atlantic Coast Line R. Co. v. Bunn*, 2 Ga. App. 305, 58 S. E. 538.

[b] **Formerly Permitted Only as to Matters Not Within Juror's Knowledge.** While as a general rule witnesses cannot be introduced, it is proper to do so where a distinct cause of challenge exists which could not be known to the juror. *Com. v. Wade*, 17 Pick. (Mass.) 395.

29. See generally the statutes.

30. *Barber v. State*, 13 Fla. 675.

[a] **Any Fact Tending To Prove May Be Given.**—"Any fact or circumstance may be given in evidence tending to establish bias, partiality or prejudice, on either side." *State v. McAfee*, 64 N. C. 339.

How far it is reversible error to refuse to hear testimony, see *infra*, VII, E, 4, m, (II).

challenger to introduce evidence before the questions become pertinent.³¹ The trial judge may use his personal knowledge of the juror's character in determining his bias,³² or may rely on other information which he has.³³ Evidence is properly rejected which is not offered in time,³⁴ and after an offer has been rejected, with permission to renew, must be formally re-offered.³⁵

Where the court is the trier of principal challenges and challenges to the favor, what the proposed juror said on his examination on the principal challenge may be considered on his examination on the challenge to the favor;³⁶ but where a challenge to the favor was tried by triers, they could not consider the evidence taken by the court on the challenge for principal cause.³⁷ Where the statute prescribes a different mode of trial for various challenges, the evidence must be relevant to the particular challenge made.³⁸

(II.) Production of Evidence. — The statutes sometimes specifically provide that attendance of witnesses may be coerced;³⁹ and within certain limitations the production of written documents may be compelled⁴⁰ as

31. *Com. v. Phelps*, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566; *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. 961, 24 L. R. A. 235.

[a] Under Massachusetts statutes making it discretionary with court as to questions beyond those prescribed and giving the party the right to introduce other evidence than that of the juror, in the absence of such evidence it was not error to refuse questions as to the juror's membership in law enforcement leagues. *Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884.

32. *Pearson v. Rocky Mountain Fuel Co.*, 219 Fed. 496, 135 C. C. A. 208, as to business relations.

33. *Pearson v. Rocky Mountain Fuel Co.*, 219 Fed. 496, 135 C. C. A. 208.

34. *State v. Dyer*, 139 Mo. 199, 40 S. W. 768, after the entire panel has been fully examined, some accepted and some rejected, counsel is not entitled to introduce newspapers to show what had been read by the jurors. The newspapers should have been offered in the course of the examination and identified by the jurors as the ones read by them.

35. *State v. Weaver*, 58 S. C. 106, 36 S. E. 499, after offer to introduce a registration book which the court refused to admit but said might be offered "later on," counsel must make the subsequent offer and have a distinct ruling as to its admissibility.

36. *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1, the one examina-

tion followed immediately upon the conclusion of the former.

Tribunal before whom tried, see *supra*, VII, E, 4, g.

37. *Cancemi v. People*, 16 N. Y. 501.

[a] It Seems the Same Rule Would Apply Where the Court Tries Both. See *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1.

38. *State v. Hanley*, 34 Minn. 430, 26 N. W. 397.

[a] Challenge for Actual and Implied Bias.—Where the statute prescribes a different mode of trial of challenges for implied and actual bias, the examination upon the trial for the one challenge must not include matters which would be relevant only to challenges for the other. *State v. Hanley*, 34 Minn. 430, 26 N. W. 397.

39. See generally the statutes.

40. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

[a] Defendant Cannot Go on "Fishing Expedition."—Defendant is not entitled to compel the district attorney to produce his memoranda, papers, or documents relating to the juror's competency, at least until some witness testifies to having made some report or statement in writing respecting the matter, when the court might, if it appeared necessary, compel the production of the paper in aid of getting the entire truth from the witness. But defendant's counsel clearly has no right to put the district attorney on the stand and engage in a "fishing ex-

in other cases. But a party is not entitled to delay the trial to procure his evidence.⁴¹

(III.) **Sufficiency, Presumptions and Burden of Proof.**—The challenge must be supported by evidence;⁴² but after a challenge has been denied, it is proved on the juror's statement alone unless the challenged party disputes the statement.⁴³ The presumption is in favor of the competency of the juror.⁴⁴ The burden is on the person who chal-

pedition" to find out the legitimate information which that officer has collected concerning the fitness of the juror, or on which to base the prosecution's peremptories. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

41. *Hodge v. State*, 26 Fla. 11, 7 So. 593, in order to procure witnesses to show bias of juror who says he has none.

[a] **The court need not halt the proceedings** while process is issued and served to compel the attendance of a witness whom counsel for defendant might readily have learned would be needed. *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

42. *Beckham v. State*, 113 Ala. 28, 38 So. 919; *State v. Pell*, 140 Iowa 655, 119 N. W. 154.

[a] **The party must stand ready to prove the truth of his challenge.** *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

[b] **On Refusal of Court To Compel Juror To Answer Challenger Must Produce Other Proof.**—A party cannot complain of the overruling of his challenge for cause based on the juror's having been guilty of treason, where the court refused to compel the juror to answer the question, and the challenger did not produce other proof. *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451.

[c] **Merely Objecting to Question Asked Is Not Sufficient.**—Where the juror was asked whether he was a qualified elector, counsel wishing to raise the point that he must have voted at the previous election cannot do so by merely objecting to the question asked and stating that the juror must first be asked whether he had voted at the previous election. Counsel might, if he chose, ask that question himself and so get the matter into the record. But as it was he left his challenge with no evidence to support it. *State v. Pell*, 140 Iowa 655, 119 N. W. 154.

[d] **On the examination the juror**

is properly accepted if some material fact is not shown. As where the questions brought out that the juror had sat on a jury which found certain other parties guilty of gaming, but no evidence was adduced showing that it was the same game that defendant was being tried for. That such evidence was afterwards introduced at the trial does not change the rule. *Turner v. State*, 114 Ga. 421, 40 S. E. 308.

[e] **All Facts Necessary To Support Challenge Must Be Shown.**—The question being as to whether the juror, being a Methodist, was opposed to slavery, and so biased in a freedom case, it was incumbent on the challenger to show either that such was the prevailing opinion among Methodists or that the individual juror had that opinion. *Reason v. Bridges*, 1 Cranch C. C. 477, 20 Fed. Cas. No. 11,617.

[f] It seems the proper practice is to introduce the newspapers which it is claimed jurors have read, and interrogate the editors thereof as to the extent to which the reports are verbatim reports of the evidence, where the source of the information on which opinions of jurors were formed is being investigated. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

43. *People v. Abbott*, 66 Cal. xviii, 4 Pac. 769.

44. *Ark.*—*Shaffstall v. Downey*, 87 Ark. 5, 112 S. W. 176. *Cal.*—*People v. Brotherton*, 47 Cal. 388. *Ga.*—*Jordan v. State*, 22 Ga. 545. *Kan.*—*State v. Hamilton*, 74 Kan. 461, 87 Pac. 363. *Mich.*—*Holt v. People*, 13 Mich. 224. *Miss.*—*Cody v. State*, 3 How. 27. *S. C.*—*State v. Weaver*, 58 S. C. 106, 36 S. E. 499. *Tenn.*—*King v. State*, 91 Tenn. 617, 20 S. W. 169; *Spence v. State*, 15 Lea 539. *Vt.*—*Richards v. Moore*, 60 Vt. 4-9, 15 Atl. 119; *Hammond v. Noble*, 57 Vt. 193; *Quinn v. Halbert*, 52 Vt. 353. *Wis.*—*Keenan v. State*, 8 Wis. 132.

See also *infra*, VII, E, 4, m (I).

lenges to show that the juror is not qualified;⁴⁵ but the challenging party having shown a prima facie ground for challenge, the burden shifts to show it does not exist.⁴⁶ Under the statute providing for examination on motion, the court determines the question according to the preponderance of the evidence as offered by either side.⁴⁷ If it appears probable that a juror is not indifferent between the parties he should be rejected, even in civil cases;⁴⁸ and in criminal cases doubts should always be resolved in favor of the accused,⁴⁹ so the best rule is to reject a juror in a criminal case on defendant's challenge whenever there is a reasonable doubt of the juror's impartiality.⁵⁰

[a] **Jurors put on the list and regularly summoned** are presumed to possess necessary qualifications. *Sprague v. Brown*, 21 R. I. 329, 43 Atl. 636.

[b] **Jurors drawn from the jury box** provided for by law are presumed to be qualified. *Skinner v. State*, 53 Miss. 399.

[c] **Presumption of Citizenship as Outweighing Doubtful Statement.**—In determining a question of citizenship, the presumption that one was a citizen of the country in which he lived, outweighs the statement of the juror that he had been told his father was a citizen of the United States but he did not know whether his father claimed such citizenship or not. *State v. Salge*, 1 Nev. 455.

Presumption that officials did their duty in selecting and summoning only proper jurors, see 16 STANDARD PROC. 998.

Presumption on appeal that trial court had before it proper evidence on which it based its ruling on challenge, see *infra*, VII, E, 4, m, (I).

45. *Ark.*—*Shaffstall v. Downey*, 87 Ark. 5, 112 S. W. 176. *Cal.*—*People v. Brotherton*, 47 Cal. 388. *Ind.*—*Morgan v. Stevenson*, 6 Ind. 169. *Kan.*—*State v. Hamilton*, 74 Kan. 461, 87 Pac. 363. *Mich.*—*Holt v. People*, 13 Mich. 224. *S. C.*—*State v. Weaver*, 58 S. C. 106, 36 S. E. 499. *Vt.*—*Richards v. Moore*, 60 Vt. 449, 15 Atl. 119; *Hammond v. Noble*, 57 Vt. 193.

See also 13 ENCY. OF EV. 1008.

46. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690, as where relationship by affinity having been shown, the opposite party must show that the relationship no longer continues.

[a] **Jurors having stated their conscientious scruples against the death penalty, and counsel having denied the challenge**, there need be no further

trial of the issue than to decide on the statement already made, where the defendant does not offer any proof in support of his denial, nor re-examine the jurors. *People v. Abbott*, 66 Cal. xviii, 4 Pac. 769.

47. *Claverius v. Com.*, 81 Va. 787.

48. *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

[a] **No Error Arises Where There Is Any Doubt.**—"The excusing of a person called as a juror from serving on the jury where there is any doubt of his fairness or qualifications is not ground of error." *Omaha & R. V. R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

[b] **Though Ground of Exclusion Not Sufficient.**—Though the bias may not have been so strong as to render it positively improper to allow the juror to be sworn, it was desirable to submit the case to jurors having no bias, and the trial court therefore exercised a sound discretion in excluding him. *Queen v. Hepburn*, 7 Cranch (U. S.) 290, 3 L. ed. 348.

49. *State v. Williams*, 28 Nev. 395, 82 Pac. 353.

[a] **Rule Conducive to Fewer Reversals.**—The trial courts by keeping this rule in mind and checking overzealous prosecuting attorneys by its application will cause fewer reversals for invasions of the defendant's right to an impartial jury. *State v. Casey*, 34 Nev. 154, 117 Pac. 5.

50. *Fla.*—*Walsingham v. State*, 61 Fla. 67, 56 So. 195. *Ind.*—*Noe v. State*, 92 Ind. 92. *Mich.*—*People v. Evans*, 72 Mich. 367, 40 N. W. 473; *Holt v. People*, 13 Mich. 224. *Neb.*—*Rhea v. State*, 63 Neb. 461, 88 N. W. 789, 64 Neb. 889, 97 N. W. 1070. *Okla.*—*Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 25 L. R. A. (N. S.) 985. *Va.*—*Wright v. Com.*, 32 Gratt. (73 Va.) 941. *Wis.*

k. *Determination of Challenge.*⁵¹—Some statutes provide generally that the same proceedings shall be had as on the trial of a challenge to the panel.⁵² The challenge should be promptly decided, by express provision of statute in some states.⁵³ Argument of counsel need not be permitted.⁵⁴ The competency or incompetency of a juror is to be determined from his whole examination and not merely from detached statements;⁵⁵ his statements and matters of record must be con-

Baker v. State, 88 Wis. 140, 59 N. W. 570.

[a] Where the trial court is in any doubt it is always better to exclude the juror to the end that a perfectly free and fair jury may be obtained. State v. Buralli, 27 Nev. 41, 71 Pac. 532.

[b] Where There Is "Serious Doubt."—In all cases "where there is a possibility for serious doubt as to the impartiality of a juror, from whatever cause" the court should exclude him. Dreyer v. State, 11 Tex. App. 631.

[c] Error in Excluding Will Be Harmless.—"When doubts arise, in such inquiries, an error in favor of the absolute impartiality of jurors can do no harm. But an error the other way may easily defeat the ends of justice." State v. Chatham Nat. Bank, 10 Mo. App. 482.

51. Presumptions, burden of proof and reasonable doubt, see *supra*, VII, E, 4, j, (III).

Presumption on appeal that one who served was qualified, see *infra*, VII, E, 4, m, (I).

52. See generally the statutes, and Cal.—Pen. Code, §1077. Nev.—Rev. Laws, 1912, §7151. Utah.—Comp. Laws, 1907, §4837.

Proceedings on challenge to panel, see *supra*, VII, E, 3, g, (III).

53. See generally the statutes.

[a] Upon a challenge, in proper form, being made, it becomes the imperative duty of the court to cause a trial of the issues presented. Powers v. Presgroves, 38 Miss. 227.

54. People v. Goldenson, 76 Cal. 323, 19 Pac. 161, it was not error to refuse to hear argument of counsel on challenge for actual bias after the trial thereof is concluded.

[a] Statute Forbids in Texas.—Code Crim. Proc., art. 678.

55. Cal.—McFadden v. Wallace, 38 Cal. 51. Neb.—Rhea v. State, 63 Neb.

461, 88 N. W. 789, 64 N. W. 889, 97 N. W. 1070. Nev.—State v. Casey, 34 Nev. 154, 117 Pac. 5; State v. Williams, 28 Nev. 395, 82 Pac. 353. R. I. Sansouwer v. Glenlyon Dye Works, 28 R. I. 539, 68 Atl. 545.

[a] All His Statements Must Be Taken Together.—This is "a principle of interpretation prevailing in logic, rhetoric, ethics and philosophy," which applies to jurors and witnesses alike. Butler v. State, 97 Ind. 378.

[b] Though portions of the testimony might give rise to a different inference, the ruling of the trial court will not be disturbed where the whole examination justifies the ruling. Marquez v. Territory, 13 Ariz. 135, 108 Pac. 258.

[c] Whole Examination and Demeanor of Juror Considered.—Where questions propounded were based largely on assumption and facts not supported by the record, and the juror had no knowledge of the facts in the case, nor opinion as to the guilt or innocence of defendant, the trial judge may consider the whole examination and the demeanor of the juror and did not abuse his discretion in holding the juror competent and without actual bias. State v. Gohl, 46 Wash. 408, 90 Pac. 259.

[d] Not From Single Statement Indicating Bias.—The determination as to competency is to be drawn, not from the answer to one question which may indicate bias, but from the whole examination. Baker v. Borello, 136 Cal. 160, 68 Pac. 591.

[e] Correct Answer Not Given at Once, Not Necessarily Disqualifying.—"Where good faith is manifested and the juror evidences the intention of deciding correctly, his failure to state at the moment that a question is propounded to him that he will comply with a particular provision of law will not always be sufficient to render him incompetent." State v. Rodriguez, 115 La. 1004, 40 So. 438.

sidered together.⁵⁶ The court is not bound exclusively by the answers of the juror as to his bias or prejudice.⁵⁷ Nor are jurors to be held incompetent on their mere supposition that they may be.⁵⁸ Where an answer to a second question shows that a previous question was misunderstood and removes the ground for challenge, the court properly overrules the challenge;⁵⁹ but where the juror has been coerced by threats of contempt, into changing his answers,⁶⁰ the court should ex-

[f] **One Statement as to Burden of Proof Not Conclusive.**—Where it appears from the whole examination that the juror will be guided by the instructions of the court on the presumption of innocence, burden of proof, etc., the court's discretion in overruling a challenge for actual bias will not be reversed notwithstanding that the juror in answer to certain questions said he would throw the burden of proving innocence upon the accused. *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

[g] **Where Juror Failed To Understand Some Questions.**—The mere fact that the juror does not understand some of the technical language used by the counsel and the court in examining into his competency, and so gives contradictory or apparently disqualifying answers, is no ground for reversal where from the examination as a whole it appears that when he understood the questions clearly his answers were satisfactory and showed him impartial. *Keeler v. State*, 73 Neb. 441, 103 N. W. 64.

[h] **Answers Made on Misconception of Law.**—The rule that a juror who has once expressed himself as entertaining a certain view on a question, cannot be heard to say he can lay aside that view and try the case without reference to it, does not apply where the juror has answered questions without clearly understanding their import, as where he answers questions involving the law of certain defenses, and upon further questioning discloses that he had a mistaken idea of the law which he is willing to lay aside under the court's instructions. *State v. Coney*, 31 Wash. 122, 71 Pac. 783.

56. *Chicago, R. I. & P. Ry. Co. v. Downey*, 85 Ill. App. 175.

[a] **All Statements in Another Case Must Be Considered.**—In determining the question of concealment based on the juror's alleged statements in another similar case, the whole examina-

tion in that other case must be considered and not mere isolated sentences. *Hern v. Southern Pac. Co.*, 29 Utah 127, 81 Pac. 902.

[b] **Juror's Statement Sufficient Though Record May Contradict.**—In determining whether a juror is incompetent because he has a case "pending for trial," the court should not confine his examination merely to the "trial list" for the case might be put on at any time by agreement. If from the juror's voir dire it appears he has such case pending the challenge should be allowed. *Chicago, R. I. & P. Ry. Co. v. Downey*, 85 Ill. App. 175.

57. *Johnson v. State*, 1 Okla. Crim. 221, 97 Pac. 1059, court may take steps to ascertain the disposition of the juror toward the defendant.

[a] **Impression of Fairness and Not Merely Statements.**—It is not merely what a juror says concerning his attitude toward the case, for he may be either over-sensitive, or desirous to evade sitting on the jury, but it is the impression for fairness or unfairness, which he makes upon the trial judge, that determines his impartiality. *Territory v. Robello*, 20 Hawaii 7.

[b] **May Consider Juror's Character and Individuality.**—The state of mind of the juror cannot in every case be determined from his answers to the questions but so much depends on his character and individuality that "the same answers made by two individuals may disqualify the one, but not necessarily the other." *State v. Thorne*, 41 Utah 114, 126 Pac. 286, Ann. Cas. 1915D, 90.

58. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51, juror thought his father might be stockholder in defendant company but there was not sufficient evidence thereof before the court.

59. *People v. Strauch*, 153 Ill. App. 544.

60. *State v. Fourchy*, 51 La. Ann. 228, 25 So. 109.

clude him on challenge for cause. A large latitude of discretion is necessarily given to the trial court in the trial of challenges.⁶¹

If challenge is allowed, the juror is discharged.⁶²

1. *Re-examination After Acceptance or Rejection.*⁶³ — (I.) *Right To Re-examine.* — The court may permit a re-examination⁶⁴ of a juror after

[a] **Trial Judge Thought Juror Trying To Evade Duty.**—The trial judge because of the juror's contradictory answers believed he was trying to evade jury duty and threatened him with contempt if he persisted in contradictory statements. The juror thereafter made his answers more in conformity to the proposition of law the court was trying to make clear. The supreme court said it was not good practice to accept a juror who had been so threatened, whether the answers for which he was deemed in contempt were to questions of law or fact, since the suspicion must remain that the juror would be influenced by his desire to answer in such a way as not to incur the threatened punishment, rather than in a frank manner disclosing the true state of his mind. *State v. Fourchy*, 51 La. Ann. 228, 25 So. 109.

61. *Ark.*—*Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749. *Idaho.*—*United States v. Alexander*, 2 Idaho 386, 17 Pac. 746. *Miss.*—*Head v. State*, 44 Miss. 731; *Gilliam v. Brown*, 43 Miss. 641.

62. See generally the statutes, and *Jackson v. State*, 103 Ga. 417, 30 S. E. 251; *Bullard v. State*, 14 Ga. App. 478, 81 S. E. 369; *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497.

63. Asking further questions after other side has cross-examined, see *supra*, VII, E, 4, i, (III), (A).

Right of court to examine jurors after they have been accepted and sworn, see *supra*, VII, E, 4, c, (III).

Time to challenge, see *supra*, VII, E, 4, c.

64. *Belt v. People*, 97 Ill. 461; *Dunn v. Wilmington*, etc. R. Co., 131 N. C. 416, 42 S. E. 862, on good cause shown.

[a] After having overruled the prisoner's objection to a juror, the court may on the suggestion of the commonwealth's attorney, reconsider the matter and discharge the juror. *Wormeley v. Com.*, 10 Gratt. (51 Va.) 658.

[b] **New Matter Brought Out on Opposite Party's Examination.**—*Com. v. Marion*, 232 Pa. 413, 81 Atl. 423.

[c] Permitted to correct misapprehension as to juror's answer. *Epps v. State*, 19 Ga. 102.

[d] Permitted where juror said he had misunderstood a question and had conscientious scruples, and had formed opinions, etc. *Com. v. Twitchell*, 1 Brewst. (Pa.) 551.

[e] Permitted as to Matter About Which Juror Not Questioned.—Properly permitted where juror called attention to possible disqualifying fact about which he had not been questioned *State v. West*, 46 La. Ann. 1009, 15 So. 418.

[f] **Juror Stated Would Not Convict.**—Under statute permitting juror to be challenged after he is sworn, it is proper to permit prosecution to re-examine a juror where an affidavit is produced showing that the juror had stated he would not convict defendant. *State v. Ames*, 91 Minn. 365, 98 N. W. 190.

[g] **Court's Attention Called to Closer Relationship.**—It was proper to permit a re-examination after acceptance and the jury had been sworn but before any evidence was introduced, where the court's attention was called to a matter indicating a closer business arrangement between the juror and one of the parties, than had been brought out on the original examination. *Quay v. Duluth*, etc. R. Co., 153 Mich. 567, 116 N. W. 1101, 18 L. R. A. (N. S.) 250.

[h] Permitted after the jurors had been allowed to separate, to see if anything had influenced them during the interim. *People v. Evans*, 72 Mich. 367, 40 N. W. 473.

[i] That a newspaper has printed a prejudicial account of the murder defendant is charged with committing, and of the empaneling of the jury, is no ground to challenge the whole array though it may have been a proper basis upon which to further examine the jurors already obtained upon the panel. *State v. Crane*, 202 Mo. 54, 100 S. W. 422. As to grounds for challenge to array, see *supra*, VII, E, 3, b.

his acceptance; but it is purely a discretionary matter,⁶⁵ and the request is properly refused in the absence of some showing, excusing the failure to bring the matter out on the first examination.⁶⁶ That the same jury has decided some matters at issue between the parties does not give the right to a re-examination before considering other matters.⁶⁷ The trial should not be stopped for the purpose of re-examining jurors as to the effect upon them of events happening in the court room during the trial.⁶⁸ Permitting the prosecution to ask an excluded juror further questions is harmless where the juror was

65. *Belt v. People*, 97 Ill. 461, it is a discretionary right "the same as permitting a further question to be asked of a witness after his examination has been closed."

[a] **Not Error To Refuse Retrial of Challenge.**—It is not error for the court to deny defendant's motion for a retrial of certain challenges after the jury has been completed and sworn to try the case. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

[b] **Appearance of Newspaper Article During Recess.**—One cannot as a matter of right claim the privilege of re-examining jurors after the panel has been completed and the recess of forty-eight hours has been taken, under the statute, in which to prepare peremptory challenges. The party must at least make some showing that something has meanwhile occurred to bias or prejudice the jurors. The mere fact that a newspaper article has appeared is not sufficient reason for giving the counsel permission to ask the jurors whether they read it. In the absence of even a statement by counsel that he had reason to believe some juror had read the article, the court is justified in assuming that no juror has disobeyed the court's instructions. *State v. Rose*, 92 Mo. 201, 4 S. W. 733, explaining *State v. Collins*, 86 Mo. 245.

[c] **Must Appear That Relationship Was Disqualifying.**—There was no abuse of discretion in refusing a party the right to re-examine where the only matter it was desired to inquire into was the juror's acquaintanceship with opposing counsel and there was nothing to show that was of a disqualifying nature. *Vojta v. Pelikan*, 15 Mo. App. 471.

66. *State v. Donelon*, 45 La. Ann. 744, 12 So. 922.

[a] That the question counsel now desired to ask "was overlooked," is

not a sufficient excuse. *Ferrell v. State*, 45 Fla. 26, 34 So. 220.

[b] **Properly Refused Where Matter Disclosed on Examination.**—The juror having stated that he had formed an opinion sufficient to warrant a challenge for cause, but defendant having passed him and the prosecution having accepted him after further examination, defendant cannot complain of the court's refusal to permit a further examination. *People v. Stonecipher*, 6 Cal. 405.

[c] **Applied to Struck Jury.**—Where jury was being selected by striking, one cannot have a restriking where he makes no showing of due diligence to ascertain the partiality of the juror at the time of striking. *Central R., etc. Co. v. Kent*, 87 Ga. 402, 13 S. E. 502.

67. *People v. Connor*, 142 N. Y. 130, 36 N. E. 807.

[a] **Plea of Not Guilty Tried After Special Plea.**—One is not entitled after trial of a special plea of former conviction decided against him, to stop the trial while he further examines the jurors as to their bias, because of their finding on the special plea, to try the plea of not guilty. *People v. Connor*, 142 N. Y. 130, 36 N. E. 807.

[b] **In Condemnation Proceedings on Trial of Damages.**—Where a separate jury has been demanded and denied, the defendant upon the matter of his damages coming up to be heard has no right to examine the individual jurors as to the then state of their minds. He might, however, by extrinsic evidence show that jurors had disqualified themselves. *Manhattan Bldg. Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330.

68. *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54, a deputy district attorney had been shot while in the court room but not in the immediate presence of the jury.

finally excluded.⁶⁹ It is proper to retender an excluded juror upon his returning to court and stating that he had incorrectly answered a question.⁷⁰

(II.) Procedure and Determination. — The court may itself re-examine a juror.⁷¹ A proper practice is to bring the matter to the court's attention by affidavit.⁷² The application for re-examination should set out the cause therefor.⁷³ On re-examination the juror is subject to discharge for the same reasons which would have warranted his discharge in the first instance;⁷⁴ and the circumstances may be such as to warrant a more stringent rule of exclusion than would have been warranted in the first instance;⁷⁵ but the court cannot arbitrarily set up a standard of its own beyond the statutory requirements.⁷⁶

69. *Republic v. Kapea*, 11 Hawaii 293.

70. *Hendrick v. Com.*, 5 Leigh (32 Va.) 707, juror had mistakenly said he was a freeholder. On the retender defendant challenged peremptorily.

71. *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448.

[a] **Proper on Suggestion That Juror Misunderstood.**—The court may re-examine any juror upon suggestion from any proper source that the juror had not understood questions, or was mistaken in his answers. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

[b] **Frivolous To Except Where Court Asked Juror If He Understood Questions.**—A bill of exceptions was deemed frivolous where the court on the suggestion of the district attorney asked a juror if he had understood certain questions, to which the juror replied affirmatively and remained on the jury. *State v. Offutt*, 38 La. Ann. 364, 365.

[c] **Defendant Cannot Complain Though He Did Not Join in Request.** There is clearly nothing of which defendant can complain, where the court re-examined a juror on the prosecuting attorney's suggestion and after such examination overruled the prosecution's challenge for cause. Defendant did not join in asking that the juror be excluded. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885.

72. *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *State v. Ames*, 91 Minn. 365, 98 N. W. 190.

[a] **Not by Mere General Questions by Counsel.**—After the jury is complete the proper practice is not to allow counsel to question the jurors generally as to their qualifications. If he has learned of anything which makes a juror incompetent he should in advance make

it known to the court, by affidavit or otherwise. *State v. Pritchard*, 16 Nev. 101.

73. *Baker v. State*, 3 Tex. App. 525.

[a] **Affidavit or motion should show what party believes, the facts on which based, and that he did not know of it before.** *State v. Pritchard*, 16 Nev. 101.

74. *Ochs v. People*, 124 Ill. 399, 16 N. E. 662, applies to bias as well as disqualification.

[a] **Juror Prejudiced Against Circumstantial Evidence.**—The court properly excused on the state's challenge, a juror who had been accepted but not sworn, on its being proved that he had previously stated he would not under any circumstances hang a man on circumstantial evidence. *Cluverius v. Com.*, 81 Va. 787.

Qualifications of jurors, see *infra*, VII, F.

75. *People v. Evans*, 72 Mich. 367, 40 N. W. 473.

[a] **Where the jury was permitted to separate on the re-examination, one should have been excused who had been exposed to the influence of public opinion, and had heard the case talked about by a number of people, notwithstanding the rule that mere knowledge does not disqualify. But having been chosen as a juror, to allow him to take into the jury box that knowledge of public sentiment was as bad as introducing evidence of public sentiment.** *People v. Evans*, 72 Mich. 367, 40 N. W. 473.

76. *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407, 419.

[a] **Relationship Not Within Statutory Degree.**—On re-examination after the juror had been accepted, it was error for the trial court to excuse a juror for a relationship with defend-

m. *Effect of Errors.*⁷⁷ — (I.) *General Rules.* — The decision of triers at common law was not subject to review;⁷⁸ and the same rule obtains where the court acts as trier by consent of the parties.⁷⁹ That the common-law decisions of triers was final does not affect the right to review decisions by the court which raise legal questions, however;⁸⁰ the trial court clearly has the right to revise its own rulings in the course of impaneling the jury.⁸¹ Errors of law by the court in respect to the proceedings before the triers is reviewable;⁸² and for refusing to appoint triers in a proper case, exception lies.⁸³ Where the power to determine the competency of jurors is committed to the trial court, its action is subject to review,⁸⁴ even where it was trying a challenge to the favor.⁸⁵ If the facts are undisputed, the trial court has

ant not shown to have been within the statutory degree. It amounts to giving the prosecution an additional peremptory. *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407, 419.

77. As affected by exhaustion of peremptories, see *infra*, VII, E, 6.

78. Ark.—*Milan v. State*, 24 Ark. 346; *Stewart v. State*, 13 Ark. 720. Colo.—*Solander v. People*, 2 Colo. 48. Ga.—*Galloway v. State*, 25 Ga. 596. Ill.—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. N. J.—*Patterson v. State*, 48 N. J. L. 38, 4 Atl. 449. N. Y.—*Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1; *Thomas v. People*, 67 N. Y. 218; *O'Brien v. People*, 36 N. Y. 276; *Sanchez v. People*, 22 N. Y. 147; *Freeman v. People*, 4 Denio 9, 47 Am. Dec. 216; *Smith v. Floyd*, 18 Barb. 522.

[a] *The Matter Is for Conscience of Triers.*—"If triers are admitted, the challenge to the favor is to be determined by the conscience and discretion of the triers, and from their findings there is no appeal." *State v. Porter*, 45 La. Ann. 661, 12 Co. 832.

79. *State v. Gray*, 19 Nev. 212, 8 Pac. 456; *Sanchez v. People*, 22 N. Y. 147; *People v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. Dec. 122. See also *Jordan v. State*, 22 Ga. 545.

[a] *Prisoner having consented that the question of the competency of a juror appearing under a misnomer be decided by the court, his decision upon the question of fact is final and conclusive.* *Moon v. State*, 68 Ga. 687.

80. *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 571; *Holt v. People*, 13 Mich. 224.

81. *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

82. *Solander v. People*, 2 Colo. 48.

[a] As where court refused to allow competent evidence to be given them, or misdirected them as to a matter of law. *People v. Bodine*, 1 Denio (N. Y.) 281.

83. *People v. Bodine*, 1 Denio (N. Y.) 281; *People v. Rathbun*, 21 Wend. (N. Y.) 509.

84. Ill.—*O'Fallon Coal, etc. Co. v. Laquet*, 198 Ill. 125, 64 N. E. 767; *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465. Mo.—*Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354. Va.—*Cluverius v. Com.*, 81 Va. 787; *Montague v. Com.*, 10 Gratt. (51 Va.) 767.

[a] *The impaneling of the jury is part of the trial within the meaning of the statute; "only errors of law occurring at the trial . . . can be reviewed."* *Palmer v. State*, 42 Ohio St. 596. See also *Hartnett v. State*, 42 Ohio St. 568.

[b] *Reviewable Because a Constitutional Right.*—"While the statute gives to the court the right to determine the question of the impartiality of the juror, yet, this being a constitutional right, this court will review the discretion of the lower court in passing upon this question." *State v. Rutten*, 13 Wash. 203, 43 Pac. 30.

85. *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465; *Montague v. Com.*, 10 Gratt. (51 Va.) 767, followed in *Cluverius v. Com.*, 81 Va. 787.

[a] *Construing Oklahoma Statute.* The decision of the trial court under that part of Rev. Laws, §4997, referring to jurors against whom no principal cause of challenge has been alleged, is

before it only a question of law, which is, of course, reviewable;⁸⁶ but the rule obtains that in so far as the court will not review questions of fact, a challenge to the favor may not present a reviewable question.⁸⁷ Ordinarily the question of prejudice, bias, or indifferency is one of fact only and so not reviewable;⁸⁸ and questions of competency are at least mixed questions of law and fact, and not reviewable.⁸⁹ Even

like the decision of the "challenges for favor" in the old books, and is not reviewable except for clear abuse of discretion. *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087.

86. *Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317, following *Holt v. People*, 13 Mich. 224.

[a] While great deference is paid to it, the ruling is not conclusive, and where the facts are practically undisputed it is subject to review like other discretionary matters. *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354.

87. U. S.—*United States v. McHenry*, 6 Blatchf. 503, 26 Fed. Cas. No. 15,681. Colo.—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608, citing *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *Solander v. People*, 2 Colo. 48. Ga.—*Eberhart v. State*, 47 Ga. 598; *Galloway v. State*, 25 Ga. 596; *Jordan v. State*, 22 Ga. 545. N. J.—*Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449.

[a] The Statute Has Not Changed the Rule.—Although challenge to the favor is no longer tried by triers, the rules applicable to a review have not been altered. Adjudications as to the indifference of the juror, made upon facts legally proved, are adjudications of fact which cannot be reviewed. *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

[b] Findings of law and fact on challenges to the favor are not reviewable. *State v. Vick*, 132 N. C. 995, 43 S. E. 626; *Baker v. Harris*, 60 N. C. 271; *State v. Benton*, 19 N. C. 196.

88. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *Rowell v. Boston*, etc. R. Co., 58 N. H. 514; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

[a] No Review Where Court Tries the Fact.—That the court as the "trier of the facts" found as a fact that a juror was indifferent, is not reviewable. *State v. Register*, 133 N. C. 746, 46 S. E. 21; *State v. Benton*, 19 N. C. 196.

[b] On a challenge propter affectum the court tries the fact unless triers are demanded "and of the fact found, either by the court or the triers there is no review." *State v. Mercer*, 67 N. C. 266.

[c] No Reversal Where There Is Evidence To Sustain.—On overruling of a challenge for bias and prejudice, if there be evidence to sustain the court's decision, the reviewing court will not reverse as the trial court's decision rests in its sound discretion. *Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968.

[d] Decision Must Be so Unsupported by Evidence as to Amount to Abuse of Discretion.—The decision is left to the discretion of the court to determine upon the evidence; and the decision must stand unless it is so unsupported by evidence as to be an abuse of sound discretion. *Sansouwer v. Glenlyon Dye Works*, 28 R. I. 539, 68 Atl. 545.

[e] Especially Where Affidavits on New Trial Conflicting.—The trial court, having found a juror free from prejudice, both in his voir dire examination and after conflicting affidavits on motion for a new trial, the supreme court will not disturb its findings. *Hughes v. State*, 109 Wis. 397, 85 N. W. 333, following *Schuster v. State*, 80 Wis. 107, 49 N. W. 30. See also *Embry v. State*, 138 Ga. 464, 75 S. E. 604; *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629.

89. *McCarthy v. Cass Ave. & F. Ry. Co.*, 92 Mo. 536, 4 S. W. 516.

[a] No Reversal Where Decision on Mixed Law and Fact.—In a prosecution of joint defendants for the unlawful sale of liquor in a certain place, the evidence showing that a juror knew of his own knowledge that one of the defendants sold intoxicating liquors there, the decision of the court in excluding him on the state's challenge for cause was upon a mixed question of law and fact as to whether such knowledge raised the presumption of

challenges based on statutory requirements are not reviewable in so far as they involve questions of fact,⁹⁰ though the distinction must sometimes be drawn that a disqualification under the statute may present a pure question of law, while for other causes it may be a question of fact.⁹¹ In other words, the ruling of the court is generally held

partiality or not, and its finding ought not to be set aside, unless it clearly appears that a contrary finding should have been made and that the case is one in which the law left nothing to the "conscience or discretion" of the trial court. *State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432.

[b] The qualification of a juror is a mixed question of law and fact submitted to the discretion of the court, and its exercise thereof will not be disturbed unless manifest error, to the prejudice of accused, is disclosed. *Horton v. United States*, 15 App. Cas. (D. C.) 310. See also *Howgate v. United States*, 7 App. Cas. (D. C.) 217.

[c] Whether a prospective juror is fair and impartial is a mixed question of law and fact to be determined in the first instance by the trial judge, and will be interfered with only when the evidence on voir dire is of such a character that it appears as a matter of law that the juror is so prejudiced or biased as to be unfair. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

90. *Louisville & N. R. Co. v. King*, 161 Ky. 324, 170 S. W. 938.

[a] **Rule Under New York Code.**

(1) Errors of law or fact, or both, may be reviewed "as where an issue of fact presented by the pleadings is tried by the court." Code Civ. Proc., §1180. (2) In *Butler v. Glens Falls*, etc. R. R. Co., 121 N. Y. 112, 118, 24 N. E. 187, the court says: "We ought not to interfere with a ruling sustaining a challenge, unless the evidence be of such a nature that in no possible view could it fairly be regarded as constituting even plausible ground for the decision." (3) If there was error in sustaining a challenge, reversal follows though the case was tried by a competent jury. *Hildreth v. City of Troy*, 161 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686. (4) But Code Crim. Proc., §415, provides that exceptions may be taken by defendant "upon a matter of law by which his substantial rights are prejudiced and not otherwise. . . .

In admitting or rejecting testimony on the trial of a challenge for actual bias to any juror who participated in the verdict, or in allowing or disallowing such challenge." This section "restored the law as it originally stood and the decision of the trial judge on the question of indifference is not reviewable, except in the absence of evidence to support it, in which case it is an error of law to which an exception lies." *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, *distinguishing* *Thomas v. People*, 67 N. Y. 218, and *Greenfield v. People*, 74 N. Y. 277 as (5) having been decided under the act of 1873 which provided for a review on writ of error or certiorari of any decision of the court on the trial of a challenge.

[b] **Rule Under South Dakota Statute.**—(1) Under Comp. Laws 7439 (Code Crim. Proc., §419), providing that exceptions may be taken only to decisions of law in allowing or disallowing a challenge, and to the improper admission or exclusion of evidence on the trial of a challenge, there is no right to except to the finding of the judge on the facts. *State v. Chapman*, 1 S. D. 414, 47 N. W. 411, 10 L. R. A. 432. (2) "The statute having prescribed the grounds for disqualification, when either of these grounds appear the trial court will reject the juror, but, if after a full examination of the juror personally, or by the testimony of other persons, the trial court finds upon the question, its decision will not be reversed unless it is made to appear that there was no legal evidence to support the judgment of the court below upon that issue." *Haugen v. Chicago, M. & St. P. R. Co.*, 3 S. D. 394, 53 N. W. 769.

91. *Coppersmith v. Mound City Ry. Co.*, 51 Mo. App. 357.

[a] **Distinction Between "Indifference" and Statutory Requirement.**—(1) "Numerous cases from *State v. Dodson*, 16 S. C. 459, to *State v. Roberson*, 54 S. C. 151, construing the statute, declare that it invests the Circuit

not subject to exception, unless it makes an error of law,⁹² or prejudices the defendant's rights.⁹³ By statute, the right of review has been denied in some jurisdictions;⁹⁴ and under such a statute reversal has

Court with exclusive power to determine whether a juror after examination on his voir dire, is indifferent in the cause. Whether a juror is indifferent in the cause is a question of fact which is not reviewable in this court, unless perhaps it should appear that the conclusion of the circuit court is wholly without any evidence to support it." *State v. Williamson*, 65 S. C. 242, 43 S. E. 671. See also *State v. Haines*, 36 S. C. 504, 15 S. E. 555; *State v. Prater*, 26 S. C. 198, 2 S. E. 108. (2) If the facts show that the juror did not have a qualification required by the constitution, the ruling may be set aside and a new trial granted on the ground that there has been no trial before a valid jury. *State v. Robertson*, 54 S. C. 147, 31 S. E. 868.

[b] **Distinction Applied as Between Principal Cause and Challenge to Favor.**—*State v. Potter*, 18 Conn. 166; *Shoemaker v. State*, 3 Wis. 823.

[c] A principal ground of challenge raises a question of law only, and for a wrongful decision thereon reversal may follow. But a challenge to the favor raises a question of fact, the decision of the trial court is based on the evidence, and a review thereof is limited by the rules respecting review of questions of fact. *Butler v. Glens Falls, etc. St. R. Co.*, 121 N. Y. 112, 24 N. E. 187. See also *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

[d] So in *Turner v. State*, 114 Ga. 421, 40 S. E. 308, the court says, in effect, that where the court decides a challenge to the favor, its decision is on a footing with that of triers, and is final and conclusive. But where the court is asked to set jurors aside because their answers on voir dire show they are disqualified, and no further evidence is introduced, the challenge is in effect one for principal cause; the decision is one of law only and is reviewable.

92. *Ga.*—*Eberhart v. State*, 47 Ga. 598; *Galloway v. State*, 25 Ga. 596. *Miss.*—*Head v. State*, 44 Miss. 731; *Gilliam v. Brown*, 43 Miss. 641. *N. J.* *Patterson v. State*, 48 N. J. L. 381, 4

Atl. 449. *N. C.*—*State v. Vick*, 132 N. C. 995, 43 S. E. 626; *Baker v. Harris*, 60 N. C. 271; *State v. Benton*, 19 N. C. 196. *Tex.*—*Pierson v. State*, 18 Tex. App. 524; *Wade v. State*, 12 Tex. App. 358. *Wis.*—*Shoemaker v. State*, 3 Wis. 823.

[a] **The qualification of a juror, challenged for actual bias**, is primarily for the trial court, and will not be disturbed on appeal, unless the disqualification is clearly shown as a matter of law. *State v. Morse*, 35 Ore. 462, 57 Pac. 631.

[b] **Statute Did Not Narrow the Discretion.**—The general rule is that the decision of the trial court on all challenges, other than principal challenges, is final and conclusive. The statute did not narrow the discretion of the trier. *Dew v. McDivitt*, 31 Ohio St. 139. See also *Serviss v. Stockstill*, 30 Ohio St. 418.

93. *Pierson v. State*, 18 Tex. App. 524; *Wade v. State*, 12 Tex. App. 358.

[a] **As in other cases**, one complaining of the way the jury was selected must show in what respect, if any, he was prejudiced. *State v. Cooper*, 74 W. Va. 472, 82 S. E. 358.

[b] **The finding on the juror's impartiality** will not be treated as erroneous "unless the error is clear." *Territory v. Robello*, 20 Hawaii 7. See also *King v. Ah Ko*, 4 Hawaii 301.

94. See generally the statutes, and *Thurman v. Com.*, 154 Ky. 555, 157 S. W. 919; *State v. Duvall*, 135 La. 710, 65 So. 904; *State v. Blue*, 134 La. 561, 64 So. 411; *State v. Kennedy*, 133 La. 945, 63 So. 476; *State v. Huff*, 118 La. 194, 42 So. 771; *State v. Thompson*, 116 La. 829, 41 So. 107; *State v. Kellogg*, 104 La. 580, 29 So. 285; *State v. Anderson*, 52 La. Ann. 101, 26 So. 781; *State v. Thomas*, 41 La. Ann. 1088, 6 So. 803; *State v. Shay*, 30 La. Ann. 114.

[a] In *Deaton v. Com.*, 157 Ky. 308, 163 S. W. 204, the court says that beginning with *Adwell v. Com.*, 17 B. Mon. (Ky.) 310, decided in 1856, and ending with *Daniel v. Com.*, 154 Ky. 601, 157 S. W. 1127, decided in 1913, there has been a long line of decisions that these challenges could not be re-

been denied even where the trial court refused to permit the examination of individual jurors.⁹⁵

Great latitude of discretion is necessarily given to the trial court in the trial of the challenge,⁹⁶ and where the decision is reviewable, the rule is not to interfere unless that discretion is abused;⁹⁷ and there

viewed. Where the court has expressed its opinion it has been done merely to secure a uniform administration of the criminal law. Moreover the section is not unconstitutional as the right of appeal itself is not guaranteed by the constitution. The legislature so long as it retains the right of trial by jury may make such regulations as it sees fit as to the manner of selecting that jury and may leave the determination with the circuit court. See also *Mount v. Com.*, 120 Ky. 398, 86 S. W. 707; *Powers v. Com.*, 114 Ky. 237, 70 S. W. 644; *Curtis v. Com.*, 110 Ky. 845, 62 S. W. 886; *Alderson v. Com.*, 25 Ky. L. Rep. 32, 74 S. W. 679.

95. *Apkins v. Com.*, 148 Ky. 662, 147 S. W. 376.

96. See *supra*, VII, E, 4, k.

97. **U. S.**—*Pearson v. Rocky Mountain Fuel Co.*, 219 Fed. 496, 135 C. C. A. 208, quoting with approval, *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *Southern Pacific Co. v. Rauh*, 49 Fed. 696, 1 C. C. A. 416, following Oregon cases, construing Oregon Code, and citing cases from many jurisdictions. **Ark.**—*Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749; *Benton v. State*, 30 Ark. 328. **Idaho.** *United States v. Alexander*, 2 Idaho 286, 17 Pac. 746. **Ind.**—*Noe v. State*, 92 Ind. 92; *Maffenbeier v. Koenig*, 59 Ind. App. 518, 108 N. E. 594; *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312; *Smith v. State*, 24 Ind. App. 688, 57 N. E. 572. **Neb.** *Bemis v. City of Omaha*, 81 Neb. 352, 116 N. W. 31; *Rhea v. State*, 63 Neb. 461, 88 N. W. 789, 64 Neb. 889, 97 N. W. 1670. **Okla.**—*Bradford v. Territory*, 2 Okla. 228, 37 Pac. 1061. **S. C.** *State v. Malloy*, 95 S. C. 441, 78 S. E. 995; *State v. Vaughn*, 95 S. C. 455, 79 S. E. 312. **Tex.**—*Withers v. State*, 30 Tex. App. 383, 17 S. W. 936; *Pierson v. State*, 18 Tex. App. 521; *Merkel v. State*, 75 Tex. Crim. 551, 171 S. W. 718, following *Pierson v. State*, 18 Tex. App. 524; *Mason v. State*, 15 Tex. App. 544. See also *Couts v. Neer*, 70 Tex. 165, 9 S. W. 40.

[a] "Gross abuse of discretion" required in Colorado to set aside finding of judge as to jurymen's bias, *Pearson v. Rocky Mountain Fuel Co.*, 219 Fed. 496, 135 C. C. A. 208, citing *Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Minich v. People*, 8 Colo. 440, 9 Pac. 4.

[b] **Must Be Grossly Abused or Contrary to Law.**—"In the trial of challenges for cause a large discretion is necessarily confided in the judge, and the same will not be revised on error or appeal unless it appears to have been grossly abused or exercised contrary to law." *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711.

[c] **Violation of Law or Gross and Injurious Exercise of Discretion.**—*Head v. State*, 44 Miss. 731; *Gilliam v. Brown*, 43 Miss. 641.

[d] **Applied as to Prejudice.**—The finding of the trial court on the question of prejudice growing out of his state of mind not reviewable in absence of abuse of discretion. *State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677.

[e] **Finding that a juror is indifferent is a matter in the discretion of the trial judge, and not reviewable.** *State v. Banner*, 149 N. C. 519, 63 S. E. 84.

[f] **Especially in Absence of Statutory Regulation or Court Rule.**—"In so far as there is an absence of statutory regulation or rule of court, the trial court must necessarily exercise a very large discretion in the impaneling of a jury; and the exercise of such discretion will not be disturbed except in case of its abuse or the violation of some rule of law." *Grace v. Dempsey*, 75 Wis. 213, 43 N. W. 1127.

[g] **Applied to Statutory Ground Based on Court's Opinion.**—The ruling of the trial court upon the statutory ground of challenge for a cause "which in the opinion of the court renders him an unfit person to sit on the jury," is addressed to the court's discretion, and

must be strong grounds for believing that the discretion has been abused.⁹⁸ At the same time the discretion is not unlimited.⁹⁹ Unless the trial court's decision was clearly against the evidence it should not be disturbed.¹ So where the answers to questions are contradictory or inconsistent, there arises a conflict of evidence, the trial court's decision whereof will not be disturbed.²

Where after a full examination, the juror's incompetency is doubtful there should be no reversal,³ and the trial court having not only his observation and examination to guide him, but often personal acquaintance with the jurors, his judgment should not be overruled unless error is manifest.⁴ The mere fact that the reviewing court thinks

reversal cannot be had unless that discretion be abused. *Southern Kansas Ry. Co. v. Sage*, 43 Tex. Civ. App. 38, 94 S. W. 1074.

[h] **Applied to Ruling as to Incompetency Growing Out of Business Relations.**—Determination by the trial court of the question of fact as to whether jurors were rendered incompetent by their business relationship with a bank of which the party was president or chief owner, will not be reviewed unless the trial court's discretion has been abused. *Twitchell v. Thompson*, 78 Ore. 285, 153 Pac. 45; *Harrison v. Pacific Ry., etc. Co.*, 72 Ore. 553, 144 Pac. 91.

[i] **The determination of actual bias** under the code rests in the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of some showing of abuse thereof. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

[j] **In passing on a motion for a new trial based upon an alleged incompetency of a juror**, the lower court exercises a sound discretion, in the absence of abuse of which the reviewing court will not disturb its ruling. *State v. Mott*, 29 Mont. 292, 74 Pac. 728.

98. *Smith v. State*, 24 Ind. App. 688, 57 N. E. 572.

99. *Joyce v. Metropolitan St. Ry. Co.*, 219 Mo. 344, 118 S. W. 21 (there is a limit to sound judicial discretion); *Withers v. State*, 30 Tex. App. 383, 17 S. W. 936, the discretion is not unlimited or arbitrary.

1. *State v. Jackson*, 167 Mo. 291, 66 S. W. 938; *Ruschenberg v. Southern Elect. R. Co.*, 161 Mo. 70, 61 S. W. 626; *Mahaney v. St. Louis, etc. R. Co.*, 108 Mo. 191, 18 S. W. 895; *State v. Cunningham*, 100 Mo. 352, 12 S. W.

376; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *McCarthy v. Cass Ave. & F. Ry. Co.*, 92 Mo. 536, 4 S. W. 516; *State v. Cook*, 84 Mo. 40.

2. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *People v. Brotherton*, 47 Cal. 388.

3. *Denver, etc. R. Co. v. Driscoll*, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

[a] **No Reversal for Mere Possible Error.**—A verdict will not be disturbed for "a mere possibility, or even probability that one of the jurors was incompetent." *State v. Mott*, 29 Mont. 292, 74 Pac. 728.

4. *State v. Simas*, 25 Nev. 432, 62 Pac. 242.

[a] **"So much depends upon the manner of the juror and his tone of voice, and the opportunities of the trial judge to see and know the jurors, that it has become the settled practice of this court not to interfere with his finding unless it is manifest he has erred."** *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70, 61 S. W. 626. To same effect see *State v. Bauerle*, 145 Mo. 1, 46 S. W. 609; *Montgomery v. Wabash, St. L. & P. Ry. Co.*, 90 Mo. 446, 2 S. W. 409.

[b] **"The determination of the court below is based more largely than in ordinary questions in litigation, upon the bearing, manner, appearance, etc., of the juror while giving his testimony."** *Trenor v. Central Pac. R. Co.*, 50 Cal. 222. See also *People v. Brotherton*, 47 Cal. 388.

[c] **The Trial Judge Sees as Well as Hears the Juror.**—This court can only read what he has said. The trial judge is in a much better position to decide. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618.

the challenge to the favor should have been allowed,⁵ or that it would have been safer to allow a challenge for actual bias,⁶ is no ground for reversal of the judgment. An error in rejecting a juror is not, as a general thing, as prejudicial as an error committed in accepting one;⁷ and generally the rulings of the trial court in respect to challenges cannot be reviewed where the jury can and will try solely on the evidence and law of the case.⁸

Where a person other than the one summoned has been permitted to serve on the jury by mistake, the error is harmless provided he was in all respects qualified and impartial.⁹ Nor is it ground for

[d] Though the answers of the juror disclose a state of mind closely bordering upon prejudice, he having asserted he can try the defendant fairly, it is for the trial court to determine and his rulings will not be disturbed. *People v. Hill*, 20 Cal. App. 407, 129 Pac. 475.

5. *Milan v. State*, 24 Ark. 346; *Stewart v. State*, 13 Ark. 720.

6. *Benton v. State*, 30 Ark. 328, followed in *Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749; *Lavender v. Hudgens*, 32 Ark. 763.

7. *La.—State v. West*, 46 La. Ann. 1009, 15 So. 418. *Mich.—Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 308. *W. Va.—Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

[a] Over-caution Is Not Ground for Reversal.—“It is no ground of error for the court to be more cautious and strict in securing an impartial jury than the law actually required.” *Atlas Min. Co. v. Johnston*, 23 Mich. 36.

[b] Rejection Is Usually Harmless; Retention May Be Prejudicial.—“There is an immense difference between discharging a juror, and retaining him. To discharge him can seldom, if ever, do any harm; while to retain him, if his competency is doubtful, may do an immense injury to one party or the other.” *State v. Miller*, 29 Kan. 43.

[c] In One Case No Competent Jury; in Other May Be Harmless.—If an incompetent person be permitted to sit over defendant's objection, the judgment is reversed because he has not been tried by a lawful jury. But the rejection of a qualified juror may do him no harm where a competent jury was selected. *People v. Arceo*, 32 Cal. 40.

[d] Rule in One Case Is Reverse of the Other.—“There is, however, a wide difference between excusing a

competent juror and retaining an incompetent. The rule is just the reverse unless the party objecting fails to exercise all of his peremptory challenges.” *City of Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698.

[e] The Trial Court's Discretion in Rejecting Jurors Is Greater Than in Retaining Them.—Retention of a juror who is not qualified results in prejudice to the party. But if there be substantial doubt as to the juror's competency, the trial court's discretion in excusing him should never be questioned on appeal. *Rhea v. State*, 63 Neb. 461, 88 N. W. 789, 64 Neb. 889, 97 N. W. 1070.

8. *State v. Banik*, 21 N. D. 417, 131 N. W. 262; *State v. Werner*, 16 N. D. 83, 112 N. W. 60.

9. *Hall v. City of Cadillac*, 114 Mich. 99, 72 N. W. 33.

[a] A son answered to his father's name and served, but no injustice appearing the verdict will not be set aside. *Hill v. Yates*, 12 East 229, 104 Eng. Reprint 89, holding that *Norman v. Beaumont*, Willes 484, 125 Eng. Reprint 1281, so far as it may seem to hold the contrary has been overruled.

[b] Where a son was under age and answered to his father's name and served, the verdict was set aside. *King v. Tremaine*, 7 D. & R. 684, 16 E. C. L. 318, distinguishing *Hill v. Yates*, 12 East 229, 104 Eng. Reprint 89, because the juror was disqualified.

[c] Contrary Holding.—Where a juror who was summoned did not attend but another served in his place, all parties being ignorant of the substitution, the verdict was set aside. *Dayton v. Church*, 7 Abb. N. C. (N. Y.) 367, following *People v. Ransom*, 7 Wend. (N. Y.) 417.

reversal that the person regularly summoned served, or was called, under a wrong name.¹⁰

The presumption on appeal is that one was qualified¹¹ who served on

10. *State v. Hunt*, 141 Mo. 626, 43 S. W. 389, the juror had shown himself qualified on his voir dire, and the mistake was corrected by the court as soon as it was discovered.

[a] **Wrong Name Called by Clerk.** That a person has served by a wrong name, he being in all respects qualified, and the error being one of inadvertence arising through the calling of the wrong name by the clerk, and it not appearing that the complaining party had desired to challenge him, no injury has occurred and there can be no reversal. *Com. v. Parsons*, 139 Mass. 281, 31 N. E. 767.

[b] **A mere dissimilarity in names** of the jurors and those on the sheriff's return is not sufficient to show that persons not summoned served on the jury. The difference may be due to a mere typographical or clerical error which could not prejudice defendant, and a reversal cannot be had therefor. *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362.

[c] **Error Not Known to Juror.** The mere fact that a juror, otherwise competent, has been drawn, summoned and sworn to try the case under a name by which he was known, but to which he was not legally entitled is no ground for setting aside the verdict. The fact that the name he went by was not his legal name was not discovered until after verdict, and was not known to himself until the motion for a new trial was made. *State v. Caymo*, 108 La. 218, 32 So. 351.

[d] **A mere misdescription of the juror** is no ground for reversal. The individual described in the venire as residing at a certain place was summoned, appeared, was examined, accepted by both sides, and served as a juror. On drawing his warrant he disclosed that his real name was "Horton Hall" instead of "Hall Horton," as appeared on the jury list. *State v. Newcomb*, 58 Wash. 444, 109 Pac. 355.

Failure to furnish defendant with a list, correctly stating the names of the jurors summoned as ground to challenge the array, see *supra*, VII, E, 3, b, (XI), (F).

Waiver of right to challenge where party had knowledge that juror was serving who was not the one summoned or selected, see *supra*, VII, E, 4, b, (VII).

Discharge of jury on learning that person not properly chosen is serving thereon, see *infra*, X.

11. Mo.—*State v. Brown*, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200. Neb. *Hart v. State*, 14 Neb. 572, 16 N. W. 905. N. C.—*State v. Mills*, 91 N. C. 581.

[a] **Not To Be Determined by Printed Record Alone.**—Decision as to competency is very much within the trial court's discretion. He sees and hears the juror, and the competency is not to be judged solely by the printed record of the juror's answers. *Com. v. Sushinskie*, 242 Pa. 406, 89 Atl. 564.

[b] **Competency Presumed Where Record Evidence Not Produced.**—Where it was doubtful whether the juror had served within the time forbidden by statute, and the court suggested that the record would show, the challenger not having introduced the record, the presumption is that the challenges were properly overruled. *State v. Hamilton*, 74 Kan. 461, 87 Pac. 363.

[c] **Presumed From Use of Word "Selected."**—Where the record says jurors "were drawn, selected, tried and sworn in the manner required by law," it is presumed that by the word "selected" it is intended that the jurors possessed all legal qualifications, and that they were selected according to law. *Ohio River R. Co. v. Blake*, 38 W. Va. 718, 18 S. E. 957.

[d] **Though the court may not expressly find that it was "satisfied"** that the juror could render an impartial verdict, the fact that the juror was permitted to serve, includes, by necessary implication, a finding by the court that it was so satisfied. *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476.

[e] **Presumption That Juror Was Freeholder.**—Where a challenge to a juror, because he was not a "householder," has been overruled, it will be presumed, in the absence of anything

a jury, and that the jury was impartial.¹² It will be assumed where the court overruled a challenge based upon the juror's expression of an opinion, that the court did not find such an expression as would render the juror incompetent.¹³

(II.) **Errors in Examination.**¹⁴ — Merely restricting the right to question jurors to an extent not warranted is not ground for reversal where no prejudice results,¹⁵ as where the juror was subsequently excused on challenge for cause,¹⁶ or did not sit in the case because excused for physical defects,¹⁷ or for some reason not clearly appearing.¹⁸

Errors in overruling questions on voir dire are immaterial, where court sustained a demurrer to the evidence.¹⁹ But where the evidence was evenly balanced reversal has been had because the court refused counsel the right to question jurors to an extent clearly proper;²⁰ and

to the contrary in the record, that the juror was a "freeholder," the statute reading "householder or freeholder," and the latter qualification not necessitating that the juror be a householder. *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

[f] **No Presumption of Disqualification Because of Newspaper Article.** The reviewing court will not presume that jurors were disqualified merely because an article prejudicial to defendant was printed in a newspaper having circulation in the county where the trial was had. *State v. Martin*, 29 Mont. 273, 74 Pac. 725.

[g] **Presumption May Be Overcome by Subsequent Event.**—Where, subsequent to the trial, the juror became naturalized, the presumption is that he was an alien at the time of trial, and the burden then shifts to those seeking to uphold the verdict. *Richards v. Moore*, 69 Vt. 449, 15 Atl. 119.

General presumption that jurors are competent and qualified, see *supra*, VII, E, 4, j, (III).

12. *State v. Smith*, 56 Minn. 78, 57 N. W. 325; *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741.

13. *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

14. **As to examination generally**, see *supra*, VII, E, 4, i.

15. *State v. Garner*, 135 La. 746, 66 So. 181 (defendant not permitted to cross-examine fully); *Burgess v. Singer Mfg. Co. (Tex. Civ. App.)*, 30 S. W. 1110, record must show appellant was injured.

[a] **Mere failure to permit a general question as to bias and interest** will not be ground for reversal in the absence of some showing that selection

of an impartial jury was interfered with. *Clay v. Western Maryland R. R. Co.*, 221 Pa. 439, 70 Atl. 807.

[b] **Where juror answered the question before the court overruled it**, counsel had the benefit thereof and could not complain. Replying to the contention that by the ruling counsel were restrained from asking the same question of subsequent jurors, the court held that the question was properly overruled. *State v. Thorne*, 41 Utah 414, 126 Pac. 286, Ann. Cas. 1915D, 90.

[c] **Question Answered in Response to Other Questions.**—Where a question has been disallowed, but juror subsequently answers it in response to other questions, and the challenge for cause, overruled, is based on that answer, there is nothing in which to base a claim of error in the disallowance of the question. *Southern Pacific Co. v. Rauh*, 49 Fed. 696, 1 C. C. A. 416.

[d] **Juror Answered in Another Manner.**—Though the prisoner has exhausted his peremptories, he is not entitled to a reversal merely because the court refused to permit a question to be answered where the juror had answered it in another manner. *State v. Bethune*, 93 S. C. 195, 75 S. E. 281.

16. *Eytinge v. Territory*, 12 Ariz. 131, 100 Pac. 443; *People v. Hamilton*, 62 Cal. 377.

17. *People v. Wheeler*, 185 Mich. 164, 151 N. W. 710, subsequently excused for deafness.

18. *Gregory v. State*, 148 Ala. 566, 42 So. 829.

19. *Corlett v. Leavenworth*, 27 Kan. 673, questions as to juror's interest as taxpayers overruled.

20. *American Bridge Works v. Pereira*, 79 Ill. App. 90.

in a capital case reversal has been had for the refusal to permit a question the answer to which must have disclosed the juror's bias.²¹ The asking of an improper question is not, of itself, ground for reversal.²² Where the juror sat in the case an error in overruling a proper question is waived if the juror was not challenged either for cause or peremptorily.²³

Error in the form of a question cannot be complained of by one who has made a similar error.²⁴ It will not be presumed that the jury were prejudiced by questions asked on their voir dire,²⁵ especially where the court gave the jury specific instructions against that effect.²⁶ Even if a question was put in the form of a hypothetical instruction which the court could not have made, no harm resulted where the juror was properly excluded on his answers to all the questions,²⁷ or where the form of the question put by counsel was not proper, but the juror did not serve.²⁸ If one considers that the court has gone so far in permitting questions on voir dire as to create prejudice in the minds of the jury, it is his duty to ask for an instruction repelling any such prejudice.²⁹ If the reviewing court thinks the party has been prejudiced by the ruling on the questions, it may reverse, though strictly the party had waived his rights by failure to challenge.³⁰

Technical error in excluding evidence offered on the examination, is

21. *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75, court refused question as to prejudice against negroes where one of that race was on trial.

22. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904; *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

[a] **Question Did Not Result in Exclusion of Any Juror.**—Assuming that it was error to ask jurors whether they were members of defendant insurance order, no harm results to defendant where all answered negatively and none were excluded on account of such membership. *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 So. 1006.

[b] **No Improper Juror Being Shown To Have Sat.**—The permitting of a question improper because it suggests that the juror may not be governed by his oath is harmless, where it does not appear that any improper juror sat in the case. *Fuller v. State*, 50 Tex. Crim. 14, 95 S. W. 541.

[c] **Answer Disclosed No Incompetency and Matter Not Followed Up.** Assuming it was improper to allow a certain question to be asked and answered, no substantial error appears where the jurors' answers did not disclose incompetency and the matter was

not pursued further. *People v. Plyler*, 126 Cal. 379, 58 Pac. 904.

[d] **Improper Assumption of Fact Fully Established.**—That the judge assumed the existence of a fact material to the prosecution's case, was harmless where the overwhelming testimony supported the fact assumed. *State v. David*, 131 Mo. 380, 33 S. W. 28.

23. *State v. Furbeck*, 29 Kan. 532, peremptory challenges were not exhausted.

24. *Henwood v. People*, 57 Colo. 544, 143 Pac. 373, it was objected that the prosecuting attorney had gone further than warranted in basing his questions upon defendant's supposed defense.

25. *O'Hare v. Chicago, etc. R. Co.*, 139 Ill. 151, 28 N. E. 923.

26. *Henwood v. People*, 57 Colo. 544, 143 Pac. 373.

27. *People v. Fanshawe*, 137 N. Y. 68, 32 N. E. 1102, the question was put to test juror's prejudice as to circumstantial evidence. The exception was to the exclusion of the juror rather than to the form of the question.

28. *Henwood v. People*, 57 Colo. 544, 143 Pac. 373.

29. *O'Hare v. Chicago, etc. R. Co.*, 139 Ill. 151, 28 N. E. 923.

30. *O'Rourke v. Yonkers R. Co.*, 32 App. Div. 8, 52 N. Y. Supp. 706.

harmless where one is not deprived of any substantial right;³³ and the mere refusal to hear evidence other than the statements of the juror has been held no ground for reversal since there could, at most, only be a conflict in the evidence.³²

(III.) **Erroneous Overruling of Challenge for Cause.**³³ — Whether a juror was disqualified for actual bias may be reviewed on an exception to the overruling of the challenge;³⁴ and if the evidence be capable of only one construction, and plainly and clearly shows the bias of the juror, the disallowance may be reviewed;³⁵ but unless the testimony upon the question of actual bias is so clear that the reviewing court can say as a matter of law that the juror was disqualified, the court's ruling will not be disturbed.³⁶ It has also been held that the verdict will not be set aside unless the selection of a disqualified juror was with some wrong intention, or injurious to appellant.³⁷ Where no other conclusion could reasonably have been reached other than as expressed in the verdict, the erroneous overruling of a challenge for cause has been held harmless error in civil cases.³⁸ Where the statute provides for a verdict by less than twelve there is no reversible error in overruling a challenge as to a juror who voted with the minority.³⁹

31. *State v. Fox*, 25 N. J. L. 566.

[a] **Juror Re-called and Peremptorily Challenged by Other Side.**—Defendant was not injured where the prosecuting attorney had the juror recalled and peremptorily challenged him, before defendant had exhausted his peremptory challenges. *Ellis v. State*, 25 Fla. 702, 6 So. 768.

32. *State v. Lowe*, 56 Kan. 594, 44 Pac. 20, reversal could only be "in an extreme case."

33. **Effect of forcing juror on party after peremptories exhausted**, see *infra*, VII, E, 6.

34. *People v. Wells*, 100 Cal. 227, 34 Pac. 718.

35. *People v. Chutnaeut*, 141 Cal. 682, 75 Pac. 340; *County of Mono v. Flanigan*, 130 Cal. 105, 62 Pac. 293; *Lombardi v. California St. Ry. Co.*, 124 Cal. 311, 57 Pac. 66.

36. *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *People v. Fredericks*, 136 Cal. 551, 39 Pac. 944; *People v. Henderson*, 28 Cal. 465.

37. *State v. Malony*, 1 Minn. 247.

Must be abuse of discretion where evidence conflicting. *Carter v. State*, 196 Ga. 272, 32 S. E. 345, 71 Am. St. Rep. 262.

38. *Railway Co. v. Smith*, 60 Ark. 221; *Williams v. Supreme Court of Honor*, 129 Ill. App. 263, court believed further examination would have shown juror competent.

[a] **Where Trial Judge Could Properly Have Directed Verdict.**—Where the verdict of the juror was the only verdict which could have been rendered consistent with the facts, the presence of a juror even though he was disqualified propter delictum is not ground for reversal. The trial court would have been justified in directing a verdict. *Raub v. Carpenter*, 187 U. S. 159, 23 Sup. Ct. 72, 47 L. ed. 119.

[b] **Only Controverted Fact Proven Against Appellant.**—Where a prejudiced juror had been permitted to serve, and the only controverted fact was clearly proven against appellant he cannot complain. *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465.

[c] **Jurors Disqualified by Opinion But Recovery Just.**—Though jurors were, strictly speaking, disqualified who had formed an opinion that plaintiff ought to recover, there being no dispute that defendant had appropriated plaintiff's property, the plaintiff was clearly entitled to recover and it appearing by the record that the damages awarded were much less than plaintiff's claim, it was clear that the jurors were not biased or prejudiced in plaintiff's favor. *Choctaw, O. & T. R. Co. v. True*, 35 Tex. Civ. App. 309, 80 S. W. 120.

39. *Williamson v. St. Louis Transit Co.*, 202 Mo. 345, 100 S. W. 1072.

[a] **Rule Applied Where One Juror More Than Necessary Concurred.**

In an equity case, errors in selecting the jury are of no vital importance.⁴⁰ An error in overruling a challenge for bias is not cured by an instruction by the court aimed at that bias.⁴¹ If a prisoner is deprived of any right by the court's refusal to sustain his challenge for cause, he was substantially injured and reversal follows.⁴² If the juror served and there was error in overruling a challenge for principal cause,⁴³ or if a juror who is disqualified under the statute has been permitted to serve over defendant's objection,⁴⁴ reversal will follow.

Even in a criminal case there will be no reversal unless some prejudice appears due to non-compliance with statutory provisions.⁴⁵ If no incompetent person sat on the jury, there will be no reversal even in a criminal case,⁴⁶ especially where the verdict was just.⁴⁷

(IV.) **Errors in Rejecting Jurors.**⁴⁸ — In civil cases particularly the rejection of a juror is almost wholly a matter within the court's discretion,⁴⁹ and reversal will not be had therefor, unless that discretion

Even though a juror was incompetent to serve, the verdict having been concurred in by ten jurors the party is not prejudiced where the statute provides that a concurrence of nine jurors shall be sufficient. *Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 990.

[b] **Rule Not Applied Where Some of Majority Subject to Same Challenge.** While ordinarily no reversal could be had if it appeared that the juror was not one of the nine who concurred in the verdict, a reversal was granted where it appeared that several of the jurors who did concur were subject to the same challenge, though it did not clearly appear whether the juror in question served or not. *Hunt v. Columbia*, 122 Mo. App. 31, 97 S. W. 955.

40. *O'Malley v. O'Malley*, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662, the verdict being only advisory.

41. *Chicago & A. R. Co. v. Adler*, 56 Ill. 344; *Meaux v. Town of Whitehall*, 8 Ill. App. 173.

42. *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724.

43. *United States v. Schneider*, 10 Mack. (D. C.) 381.

44. **Cal.**—*People v. Arceo*, 32 Cal. 40. **Neb.**—*Rhea v. State*, 63 Neb. 461, 88 N. W. 789, 64 Neb. 889, 97 N. W. 1070. **Okla.**—*Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985.

45. *State v. Ward*, 74 Mo. 253; *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724; *Com. v. Henderson*, 242 Pa. 372, 89 Atl. 567, citing many Pennsylvania cases.

[a] **Juror Unable To Read; Must Appear He Could Not Understand.**—Assuming that a juror should have been excluded on defendant's challenge for cause in that he could not read the state's evidence, there being no statute making that a ground for challenge, defendant could not have been prejudiced where it is not shown the juror could not understand defendant's evidence. *State v. Stockman*, 9 Kan. App. 422, 58 Pac. 1032.

46. **Ark.**—*Sullins v. State*, 79 Ark. 127, 95 S. W. 159. **Kan.**—*State v. Bancroft*, 22 Kan. 170. **La.**—*State v. West*, 46 La. Ann. 1009, 15 So. 418. **Tex.**—*Jones v. State*, 37 Tex. Crim. 433, 35 S. W. 975; *Woodard v. State*, 9 Tex. App. 412.

47. *Sullins v. State*, 79 Ark. 127, 95 S. W. 159.

48. **Exhaustion of panel as affecting excuse by court on own motion**, see *supra*, VII, E, 1, b.

Generally that right of challenge is one of exclusion and not inclusion, see *supra*, VII, E, 1, b.

That rejection is not generally so prejudicial as inclusion of juror, see *supra*, VII, E, 4, m, (I).

49. **Me.**—*Snow v. Weeks*, 75 Me. 105. **Nev.**—*Sherman v. Southern P. Ry. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287; *Murphy v. Southern P. Ry. Co.*, 31 Nev. 120, 101 Pac. 322. **Wis.**—*Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127; *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 444.

is abused,⁵⁰ or there is a clear error of law,⁵¹ or some showing of prejudice to the appellant.⁵² Generally the rejection of a juror cannot harm the party in a civil case;⁵³ and it must appear that appellant has been deprived of a fair trial,⁵⁴ or that an incompetent or biased juror served, before there can be a reversal.⁵⁵ Though the panel was thereby exhausted necessitating the calling of bystanders, no prejudice exists in civil cases.⁵⁶

50. *Nev.*—*Sherman v. Southern P. Ry. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287; *Murphy v. Southern P. Ry. Co.*, 31 Nev. 120, 101 Pac. 322. *Ohio*.—*Serviss v. Stockstill*, 30 Ohio St. 418. *W. Va.*—*Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015. *Wis.*—*Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127; *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 444.

[a] The mere improper exclusion followed by the substitution of an unexceptional juror is not reversible error unless some prejudice or abuse of discretion appear. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

51. *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127; *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 444.

52. *McKernan v. Los Angeles Gas & E. Co.*, 16 Cal. App. 280, 116 Pac. 677.

53. *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257; *Omaha etc. R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

[a] Allowance of Challenge on Ground for Exemption.—One cannot complain because the court allowed a challenge for cause based upon a fact entitling jurors to exemption. Though not technically a ground for challenge the party cannot insist upon their serving although they did not claim the exemption. *Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41; *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955.

[b] Though the rejection amounted to giving one party an additional peremptory, so far did it go beyond judicial discretion, the court said it would not reverse on that ground alone, no prejudice to appellant being shown as to the jury which tried the case. But in connection with other errors it was an additional reason for reversal. *Joyce v. Metropolitan St. Ry. Co.*, 219 Mo. 344, 118 S. W. 21.

54. *City of Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698; *Oklahoma City v. Meyers*, 4 Okla. 686, 46 Pac. 552.

55. *Northern Pac. R. Co. v. Herbert*,

116 U. S. 642, 6 Sup. Ct. 590, 29 L. ed. 755; *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

[a] No Particular Juror Need Sit. It is not necessary to determine whether a challenge for cause was improperly sustained or not. It was not material that the particular juror should sit, and his place was filled by one whose qualifications are not questioned. *Loudenback v. Lowry*, 4 Ohio Cir. Ct. 65.

[b] Qualified Juror Selected in Place of One Rejected.—Assuming that a qualified juror was improperly excused on the opposing party's challenge, the error is harmless where a juror was selected in his place to whom the party did not object. *Southern Pac. Co. v. Rauh*, 49 Fed. 696, 1 C. C. A. 416.

[c] New Trial Could Only Result in an Impartial Jury.—Where the error claimed consisted in permitting a re-examination and the rejection of the juror before evidence was introduced, the supreme court said that even if it was erroneous the error could not be corrected for a trial by the jury as at first constituted could not be required and a new trial would only result in a trial by an impartial jury which had already been had. *Gray v. Duluth, etc. R. Co.*, 153 Mich. 567, 116 N. W. 1101, 18 L. R. A. (N. S.) 250. See also *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477.

[d] Since one is not entitled to be tried by any particular juror the excluding of a juror is no ground for reversal, where no exception is taken to any juror who tried the case, and it does not appear that appellant did not have full opportunity to exercise all his peremptory challenges. *Asevado v. Orr*, 100 Cal. 293, 34 Pac. 777.

General rule that no one has any vested right in any particular juror, see *supra*, VII, E. 1, b.

56. *Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41.

[a] Must Appear Juror Was Not

Even in criminal cases the rejection of jurors is generally not reviewable,⁵⁷ unless the trial court's discretion has been abused,⁵⁸ or there has been some clear violation of law;⁵⁹ and there can be no reversal for an erroneous rejection unless some prejudice appear.⁶⁰ Generally an error in rejecting a juror cannot prejudice the defendant in a criminal case.⁶¹ The allowance of a challenge for implied bias is not subject to exception,⁶² and though the statute permits exceptions to the disallowance of a challenge, there can be no review of its allowance.⁶³ So the general rule is that the improper sustaining of a challenge for cause is no ground for reversal if the jury which tried

Acceptable.—"There is nothing to show that the juror so called was not acceptable and a good juror for the purposes of the trial." *Geiger v. Payne*, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571.

57. **La.**—*State v. Breaux*, 104 La. 540, 29 So. 222; *State v. Lewis*, 41 La. Ann. 590, 6 So. 536; *State v. Creech*, 38 La. Ann. 480; *State v. Carries*, 39 La. Ann. 931, 3 So. 56; *State v. Barnes*, 34 La. Ann. 395; *State v. Shields*, 33 La. Ann. 1410. **Me.**—*State v. Cady*, 80 Me. 413, 14 Atl. 940. **Nev.**—*State v. Vaughan*, 22 Nev. 285, 39 Pac. 733; *State v. Pritchard*, 15 Nev. 74; *State v. Larkin*, 11 Nev. 314.

[a] **Court's Power To Reject Is Practically Unlimited.**—(1) *Walsingham v. State*, 61 Fla. 67, 56 So. 195, construes Gen. St., §1492 and Declaration of Rights, §11 as giving the trial court practically an unlimited discretion to reject jurors in the interest of obtaining an impartial jury. (2) So in *Mathis v. State*, 45 Fla. 46, 34 So. 287, it is stated that the trial court's ruling "will not be disturbed or reversed by an appellate court, unless an abuse of sound judicial discretion is shown," following *Williams v. State*, 45 Fla. 128, 34 So. 279. See also *Mims v. State*, 42 Fla. 199, 27 So. 865; *Edwards v. State*, 39 Fla. 753, 23 So. 537.

[b] **Even Though a Wrong Reason Be Given.**—Prisoner cannot except to the action of the court in excluding a juror, even though a wrong reason may have been given for excluding. *State v. Peterson*, 149 N. C. 533, 63 S. E. 87.

[c] **Challenge Sustained in Wrong Form.**—"A judgment will not be reversed simply because a challenge good for favor was sustained in form for cause. As the jurors were incompetent and properly excluded, it matters not

here upon what form of challenge they were set aside." *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

[d] **Unimportant That Jurors Not Sworn Were Not Qualified.**—"If the prisoner was tried by lawful jurors, it is after the trial utterly unimportant what were the defects of other jurors, who were summoned and were not sworn." *United States v. Cornell*, 2 Mason 91, 25 Fed. Cas. No. 14,868.

58. *Republic v. Kapea*, 11 Hawaii 293.

59. *Republic v. Kapea*, 11 Hawaii 293.

60. *State v. Jackson*, 96 Mo. 200, 9 S. W. 624; *Holmes v. State*, 70 Tex. Crim. 423, 157 S. W. 487.

61. **Cal.**—*People v. Arceo*, 32 Cal. 40. **Kan.**—*State v. Miller*, 29 Kan. 43. **La.**—*State v. McCarthy*, 44 La. Ann. 323, 10 So. 673; *State v. Aarons*, 43 La. Ann. 406, 9 So. 114. **N. Y.**—*Armsby v. People*, 2 Thomp. & C. 157. **Va.** *Clore v. Com.*, 8 Gratt. (49 Va.) 606, new trial would not restore the juror.

[a] **Juror's Name Not On Assessment Roll.**—Assuming that it was erroneous to sustain a challenge to a juror because his name was not on the assessment roll, the error "could not possibly have injured the appellant and is therefore no ground for reversing the judgment." *State v. Ching Ling*, 16 Ore. 419, 18 Pac. 844.

62. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794; *People v. Atherton*, 51 Cal. 495.

63. *State v. Jones*, 32 Mont. 442, 80 Pac. 1095.

[a] **The allowance of a challenge is not made ground for exception by the statute, and the omission is based upon the sensible reason that when a person has been tried by a competent jury he has had all his rights preserved. A new trial would do no more as it is**

the case was free from exception.⁶⁴ If there be substantial doubt as to the juror's competency, the court's discretion will not be interfered with.⁶⁵ One cannot, on appeal, first object to the exclusion of a juror.⁶⁶ It will not be presumed that the ruling of the trial court in excusing a juror prejudiced the defendant.⁶⁷ Defendant cannot complain of the rejection of a juror to whom he objected.⁶⁸ Some states hold that the rejection of a juror on challenge for an insufficient cause is ground for reversal, where the regular panel becomes exhausted.⁶⁹ Where the full panel is not exhausted, the party is not prejudiced by the rejection of jurors.⁷⁰

not probable the excluded juror would sit therein. *People v. Murphy*, 45 Cal. 137.

64. Cal.—*People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Arceo*, 32 Cal. 40. La.—*State v. West*, 46 La. Ann. 1009, 15 So. 418. Mont.—*Territory v. Roberts*, 9 Mont. 12, 22 Pac. 132. Va.—*Fishburne v. Com.*, 103 Va. 1623, 50 S. E. 443, *overruling Montague v. Com.*, 10 Gratt. (51 Va.) 767.

65. *Rhea v. State*, 63 Neb. 461, 88 N. W. 789, 64 N. W. 889, 97 N. W. 1070.

66. *State v. Jackson*, 96 Mo. 200, 9 S. W. 624; *Voorhees v. Dorr*, 51 Barb. (N. Y.) 580.

[a] Where juror was excused through mistake of solicitor general who said his name was not on the jury list, and no objection was made by defendant to the substitution of another, no complaint can be made after verdict. Especially since the mistake could have been discovered by a mere inspection of the list. *Hardison v. State*, 95 Ga. 257, 22 S. E. 681.

[b] Where juror was excused, though court having misunderstood the answer, the court's attention should have been called to the mistake at once. *Boyd v. State*, 17 Ga. 194.

[c] Further Inquiry Not Made.—Defendant cannot complain because further inquiry was not made into the exact convictions of jurors as to capital punishment where the court excused them on the state's challenge, and defendant's counsel was not restricted in the matter of making such further inquiry as he desired. *Johnson v. State*, 24 Neb. 257, 51 N. W. 855.

[d] No Objection, Nor Examination.—Where record wholly fails to show any objection to the exclusion of a juror, or whether any examination of him was had, and objection was made

for first time on motion for new trial, it will not be considered on appeal. *State v. Jackson*, 96 Mo. 200, 9 S. W. 624.

67. *State v. Pray*, 126 Iowa 249, 99 N. W. 1065.

[a] **Presumption That Juror Excused for Cause.**—Where the statute requires a full jury of competent jurymen before peremptory challenges must be made, and the record discloses that the juror in question was not on the list when the peremptory challenging began, it sufficiently appears that he was excused for cause, and hence failure to excuse him on defendant's challenge for cause was harmless. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

68. *Bell v. State*, 115 Ala. 25, 22 So. 526.

[a] Though the prosecution concurred in the challenge. *People v. Warner*, 147 Cal. 546, 82 Pac. 196.

[b] **Improper Challenge to Struck Jury Allowed.**—Complaint was that jurymen's addresses were not on struck jury list. After exhausting his right to strike he was permitted to challenge for cause, and challenge allowed. He had no right to so challenge nor was the ground assigned sufficient. *State v. Rosenthal*, 85 N. J. L. 564, 89 Atl. 1045.

69. *Mooney v. People*, 7 Colo. 218, 3 Pac. 235.

[a] **The theory is that the panel is thereby depleted on insufficient grounds.** Where the prisoner is entitled to a list of the jurors, this may lead to his injury. *Stratton v. People*, 5 Colo. 276. Compare *Demato v. People*, 49 Colo. 147, 111 Pac. 703, Ann. Cas. 1912A, 783, 35 L. R. A. (N. S.) 621, where the court refuses to apply the rule, holding the challenge for cause, good.

70. *Com. v. Henderson*, 242 Pa. 372, 89 Atl. 567.

[a] There could be no prejudice

After acceptance of a juror his erroneous rejection on prosecution's motion and over defendant's objection has been held reversible error.⁷¹

5. Peremptory Challenges.⁷² — a. *Nature and History of Right.* (I.) *In General.* — The right to challenge peremptorily comes from the common law with the right of trial by jury itself,⁷³ the various statutes governing the same are usually directory as to the way and manner of exercise.⁷⁴ It is one of defendant's most important rights.⁷⁵ It is a valuable right, which statutes are liberally construed to allow.⁷⁶ The object is to exclude such jurors as the party may deem unfriendly

where the number to select from was not thereby illegally reduced. *State v. Barker*, 46 La. Ann. 798, 15 So. 98.

71. *Campbell v. State*, 144 Ga. 224, 87 S. E. 277, juror was not put upon court as a trier.

72. Restoring peremptories on discharge of juror on court's own motion; necessity and effect thereof, see *supra*, VII, D.

73. *State v. Stoughton*, 51 Vt. 362; *Lamb v. State*, 36 Wis. 424.

Extent of common law right, see *infra*, VII, E, 5, a, (III).

74. *State v. Stoughton*, 51 Vt. 362.

75. U. S.—*Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *Betts v. United States*, 132 Fed. 228, 65 C. C. A. 452. Cal.—*People v. Edwards*, 101 Cal. 543, 36 Pac. 7. S. C.—*State v. Briggs*, 27 S. C. 80, 2 S. E. 854, a sacred right.

[a] "It is among the most useful weapons of defense put in the hands of an accused person. It is the only method of cutting off underground, malevolent currents, visible at some times to no one except the accused and his counsel, and sometimes not even to both of them." *Betts v. United States*, 132 Fed. 228.

[b] **Chief Safeguard of Defendant.** "The right of peremptory challenge is one of the chief safeguards of a defendant against an unjust conviction." *People v. Edwards*, 101 Cal. 543, 36 Pac. 7.

[c] **Not a Mere Formal Right.** "The right of peremptory challenge is not a formal right merely but substantial and vital to the proper administration of criminal justice." *State v. Cardoza*, 11 S. C. 195.

76. See *infra*, the cases cited in this note.

[a] **The Question Is Has the Statute Deprived Rather Than Does it Permit Right.**—Whatever is merciful in its ef-

fects, if known to the law and practice ought to be allowed and hence the inquiry in every case should be whether the right of challenge has been taken away by any statute, rather than whether the statute permits it. *Hooper v. State*, 5 Yerg. (Tenn.) 422.

[b] **Cannot Deprive of Right by Insisting on Special Jury.**—Where in trials by the regular jury a prisoner is entitled to eight peremptories and the state to none, and under trial by a special jury both state and defendant are entitled to two peremptories, it is reversible error to compel a prisoner to either consent to being tried by a special jury, when he was legally entitled to a regular jury, or to submit to a continuance. *State v. Miller*, 6 W. Va. 600.

[c] **Changes in Procedure Held Not To Abolish.**—Where the statutes have allowed it, changes in procedure will not be construed to have omitted the right unless the statute regulating challenges is such that the right cannot be exercised. *Butler v. Hands*, 43 Colo. 541, 95 Pac. 920.

[d] **Where capital punishment was abolished it was held** (1) that the state's right to peremptory challenges was not abrogated. *State v. Chadbourne*, 74 Me. 506, reviewing the various statutes at length. (2) But the number given was reduced. See *State v. Smith*, 67 Me. 328.

[e] **That Total Number Would Exhaust Regular Panel Does Not Deprive.** The right of the prosecution to peremptory challenges is not lost merely because a statute which increases the defendant's number would, if all of the challenges of prosecution and defendant were used, reduce the jury to less than twelve of the regular venire. The court can in such case summon talesmen as in cases where jurors are ex-

or unfit to sit in the trial,⁷⁷ and is not for the purpose merely of obtaining an impartial jury.⁷⁸ In civil cases the prejudice which it is aimed to protect the party against is that which might grow out of the subject-matter of the controversy, while in criminal cases it is designed to protect against personal hatred or dislike of the party being tried.⁷⁹ Where the right is only statutory, it is not to be extended by construction.⁸⁰

In the federal courts, the state law governs in so far as the United States statutes have not regulated.⁸¹

(II.) **An Absolute Right.**—Peremptory challenges are to be made, or omitted, according to the judgment, will or caprice of the party entitled thereto.⁸² No reason can ever be required;⁸³ statutory provisions

used for cause. *Fouts v. State*, 8 Ohio St. 98.

[f] **Increasing to Defendant Without Mentioning Prosecution.**—The right of the prosecution to peremptory challenges is not taken away by a statute which increases the number to the defendant and does not specifically mention the prosecution. *Fouts v. State*, 8 Ohio St. 98.

77. *Curran v. Percival*, 21 Neb. 434, 32 N. W. 413.

78. *State v. Reed*, 47 N. H. 466, "in the tenderness of the law for human life, to give one tried for a capital offense this chance to obtain a favorable jury."

79. *Kan.*—*State v. Skinner*, 34 Kan. 256, 8 Pac. 420; *State v. Durcin*, 29 Kan. 688. *Mass.*—*Stone v. Segur*, 11 Allen 568. *Mich.*—*Stroh v. Hinchman*, 37 Mich. 400.

80. *State v. Cady*, 80 Me. 413, 14 Atl. 940.

[a] **Conferring in Civil Cases Does Not Extend Right in Criminal Cases.** Under a subdivision of the statute defining challenges for cause in criminal trials: "The same challenges shall be allowed in criminal prosecutions that are allowed to parties in civil cases," it will not be assumed that the legislature intended to increase the number of peremptories in criminal cases not capital, when it passed a subsequent statute giving peremptories in civil cases. Especially since the clause in question when first enacted read "The same challenges for cause shall be allowed, etc"; and the legislature has enacted separate and distinct orders covering procedure in civil and criminal actions. *Stevenson v. State*, 70 Ohio St. 11, 70 N. E. 510.

As to statutory right, see *infra*, VII, E, 5, a, (IV).

81. *United States v. Shackelford*, 18 How. (U. S.) 588, 15 L. ed. 495; *United States v. Randall*, Deady 524, 27 Fed. Cas. No. 16,118.

Order of interposing in federal courts, see *infra*, VII, E, 5, b, (I).

One of joint defendants cannot avail himself of rights under territorial statute after defendants have made challenges under act of congress, see *infra*, VII, E, 5, k, (II).

82. **U. S.**—*Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208. *Ala.*—*Hawkins v. State*, 9 Ala. 137, 44 Am. Dec. 431. *Colo.*—*Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. *Ill.*—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *American Bridge Works v. Pereira*, 79 Ill. App. 90. *Ind.*—*Kurtz v. State*, 145 Ind. 119, 42 N. E. 1102. *Md.*—*Turpin v. State*, 55 Md. 462. *Mo.*—*Mallison v. State*, 6 Mo. 399. *Mont.*—*Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958. *Pa.*—*Com. v. Evans*, 212 Pa. 369, 61 Atl. 989. *Tex.*—*Loggins v. State*, 12 Tex. App. 65.

[a] **The right is a personal privilege** which can only be exercised by the party or by some one authorized on his behalf. *Steele v. Com.*, 3 Dana (Ky.) 84, misdemeanor case tried under statute without accused or his counsel being present. A mere volunteer wished to challenge. It was not error for the court to refuse permission.

[b] **Upon Mere Dislike.**—As said by Lord Coke, they are allowed to a party "upon his own dislike, without showing any cause." *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

83. *Cal.*—*People v. Jenks*, 24 Cal. 11; *People v. Kohle*, 4 Cal. 198. *Fla.*

designating grounds for such challenges do not change the rule.⁸⁴ The right is just as absolute as the right to challenge for cause.⁸⁵ Under the rule that the right of challenge is a right to refuse and not to select particular jurymen,⁸⁶ one cannot except to the challenges of a co-defendant;⁸⁷ nor can either party complain of the challenge of the

Barber v. State, 13 Fla. 675. **ILL.**—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *East St. Louis Electric R. Co. v. Snow*, 88 Ill. App. 660; *American Bridge Works v. Pereira*, 79 Ill. App. 90. **IA.**—*State v. Hunter*, 118 Iowa 686, 92 N. W. 872. **MD.**—*Turpin v. State*, 55 Md. 462. **MICH.**—*People v. Eggleston*, 186 Mich. 510, 152 N. W. 944. **MINN.**—*State v. Armington*, 25 Minn. 29. **N. Y.**—*People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105. **ORE.**—*State v. Steeves*, 29 Ore. 85, 43 Pac. 947. **PA.** *Com. v. Evans*, 212 Pa. 369, 61 Atl. 989. **TENN.**—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458. **TEX.**—*Loggins v. State*, 12 Tex. App. 65. **W. VA.**—*State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

[a] **For Any Reason or for No Reason.**—Defendant could always challenge “a juror apparently indifferent, whom he distrusted for any reason or for no reason.” *Lamb v. State*, 36 Wis. 424.

[b] **No Issue of Fact Can Arise.**—“This definition shows that no issue of fact can possibly arise with regard to the reasons for such challenge.” *People v. Edwards*, 163 Cal. 752, 127 Pac. 58.

[c] **For Reasons Not Ground for Challenge for Cause.**—The right of peremptory challenge was conferred for the express purpose of enabling parties accused of crime to reject from the jury persons whom they had reason to distrust for secret, undisclosed grounds, not sufficient to be made available as causes for legal challenge. *State v. Fourchy*, 51 La. Ann. 228, 25 So. 109.

[d] “It is not the purpose of the law to base a peremptory challenge upon a challenge for cause, but rather that peremptory challenges may be had to a limited degree independently of any cause.” *Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465.

[e] **No Suggestion of Rebuke Should Be Made by Court.**—The trial court should not by his orders to the sheriff respecting the summoning of a special venire make any “suggestion convey-

ing an apparent rebuke to counsel for making the challenge . . . The right to except to a limited number of jurors without assigning any cause is given by law to suitors, and for its exercise they are responsible to no one.” But it was not reversible error because the party’s peremptories were not exhausted. *Capehart v. Stewart*, 80 N. C. 101.

[f] **Action Is Not Subject To Review.**—“The action of a litigant in exercising his peremptory challenges is not open to review.” *Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958.

[g] **Excluding Negroes Does Not Show Discrimination.**—The mere fact that the state in the proper exercise of its peremptory challenges has stricken off negroes, does not show any discrimination. *Whitney v. State*, 43 Tex. Crim. 197, 63 S. W. 879.

84. See *Christie v. State*, 44 Ind. 408.

[a] The words “shall be a sufficient cause for peremptory challenge,” as found in a statute have been construed to mean merely that the party has “an absolute right of challenge” for the specified cause. For “peremptory challenges have been understood generally to be such as are allowed without assigning any cause.” *Christie v. State*, 44 Ind. 408.

[b] Where a statute said certain things “shall be ground for peremptory challenge” the court said it was “meaningless nonsense” if it meant anything more than that it was a disqualification and ground for challenge. *Terrell v. State*, 69 Ark. 449, 64 S. W. 223, quoted with approval in *Langford v. State*, 98 Ark. 327, 135 S. W. 895.

85. **CAL.**—*Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297. **IND.**—*Kurtz v. State*, 145 Ind. 119, 42 N. E. 1102. **IA.**—*Smith v. State*, 4 Greene 189.

Nature and right to challenge for cause, see *supra*, VII, E, 4, a.

86. See *supra*, VII, E, 1, b.

87. **U. S.**—*United States v. Marchant*, 12 Wheat. 480, 6 L. ed. 700. **KAN.** *State v. Durcin*, 29 Kaa. 683. **LA.**

other;⁸⁸ and that defendant accepted jurors on a former partial trial does not deprive the prosecution of its right to challenge those jurors when they are presented on the new trial.⁸⁹

(III.) **Extent of the Common-Law Right.**—At common law peremptories were allowed only in trials for felonies,⁹⁰ and the decisions usually say that it was allowed only in capital cases;⁹¹ but it has been distinctly held to apply to all felonies whether capital or not.⁹²

State v. Cazeau, 8 La. Ann. 109. **N. C.** *State v. Jacobs*, 106 N. C. 695, 10 S. E. 1931; *State v. Smith*, 24 N. C. 402. **S. C.**—*State v. Wise*, 7 Rich. 412. **Tenn.** *Hill v. State*, 2 Yerg. 246. **Vt.**—*State v. Meaker*, 54 Vt. 112.

[a] **Applied in a Condemnation Case.**—*Fitzpatrick v. Joliet*, 87 Ill. 58.

[b] **"A juror challenged by one prisoner is entirely withdrawn from the case."** *Maton v. People*, 15 Ill. 536.

[c] **After Acceptance by Co-defendant.**—Challenge by one of joint defendants of a juror who has been accepted by the other is no error as to such other. *State v. Doolittle*, 58 N. H. 92.

[d] **Though proper practice required joining in challenge, if the court permits one to challenge without the consent of the other, the error is harmless.** *State v. Cady*, 80 Me. 413, 14 Atl. 940; *State v. Moore*, 75 N. J. L. 619, 68 Atl. 165.

88. *State v. Durr*, 39 La. Ann. 751, 2 So. 546.

89. *Reid v. State*, 50 Ga. 556, the theory of the prisoner was that the state had taken advantage of the knowledge that the juror was acceptable to him.

90. **U. S.**—*United States v. Deylin*, 6 Blatchf. 71, 25 Fed. Cas. No. 14,953; *United States v. Smithers*, 2 Cranch C. C. 38, 27 Fed. Cas. No. 16,347. **Kan.** *State v. Skinner*, 34 Kan. 256, 8 Pac. 429. **Ky.**—*Montie v. Com.*, 3 J. J. Marsh. 132. **Miss.**—*Smith v. State*, 57 Miss. 822. **Pa.**—*Com. v. Evans*, 212 Pa. 369, 61 Atl. 989. **S. C.**—*State v. McQuaige*, 5 S. C. 429. **Eng.**—*Creed v. Fisher*, 9 Exch. 472, 18 Jur. 228, 23 L. J. Exch. 143, 2 Wkly. Rep. 199.

[a] **Where the act is a common-law felony and is charged as such, and the statute gives peremptories in all cases of felony, such challenges should be allowed.** *United States v. Browning*, 1 Cranch C. C. 339, 24 Fed. Cas. No. 14,673; *United States v. McLaughlin*, 1 Cranch C. C. 444, 26 Fed. Cas. No. 15,697.

[b] **"Clergyable Felonies" And Misdemeanors Distinguished.**—"It is admitted only in favor of life and though it may be demanded even in clergyable felonies; it can never be allowed to a defendant accused of a mere misdemeanor." *State v. Allen*, 8 Rich. (S. C.) 448.

91. **U. S.**—*United States v. Cottingham*, 2 Blatchf. 470, 25 Fed. Cas. No. 14,872; *United States v. Devlin*, 6 Blatchf. 71, 25 Fed. Cas. No. 14,953; *United States v. Randall*, Deady 524, 27 Fed. Cas. No. 16,118. **Ala.**—*Dorgan v. State*, 72 Ala. 173. **Ill.**—*Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823; *East St. Louis Electric R. Co. v. Snow*, 83 Ill. App. 660. **Md.**—*Turpin v. State*, 55 Md. 462. **N. Y.**—*Freeman v. People*, 4 Denio 9, 47 Am. Dec. 216; *Waterford, etc. Turnpike v. People*, 9 Barb. 161; *People v. Aichinson*, 7 How. Pr. 241. **Pa.**—*Com. v. Brown*, 23 Pa. Super. 470; *Com. v. Hand*, 3 Phila. 403. **E. I.** *Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465; *State v. Sutton*, 10 R. I. 159. **S. C.**—*State v. Allen*, 8 Rich. 448. **Wis.**—*Lamb v. State*, 36 Wis. 424.

[a] **"In favorem vitae"** is the old common law expression. Blackstone says it is a right given to prisoners, "full of that tenderness and humanity to prisoners for which our English laws are justly famous." See 4 Blackstone 353, quoted with approval in full or in substance in many cases. See **U. S.** *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. ed. 1011. **Ala.** *Hawkins v. State*, 9 Ala. 137, 44 Am. Dec. 431. **Kan.**—*State v. Durein*, 29 Kan. 688. **Mo.**—*State v. Hays*, 23 Mo. 287; *Mallison v. State*, 6 Mo. 399. **Pa.** *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724; *Com. v. Evans*, 212 Pa. 369, 61 Atl. 989. **Tex.**—*Loggins v. State*, 12 Tex. App. 65. **Wis.**—*Lamb v. State*, 36 Wis. 424.

92. *Gray v. Reg.*, 11 Cl. & F. 427, 8 Jur. 879, 8 Eng. Reprint 1161.

At common law, the right is limited to the accused;⁹³ and in no case can the prosecution exercise the right except under some statute authorizing it.⁹⁴ Even in criminal cases the right is said not to be a constitutional right, but to exist only by virtue of the statute.⁹⁵ If the punishment may be death the peremptories are allowed though it

[a] "In favorem vitæ" is a reason not a principle upon which the right to peremptory challenges rests. The judges trace the phrase from its original use, through the various text writers and statutes showing the error in the contention that unless the prisoner's life was in danger he could not challenge peremptorily. *Gray v. Reg.*, 11 Cl. & F. 427, 8 Jur. 879, 8 Eng. Reprint 1164.

[b] Statute Has Not Taken Away Common Law Privilege.—"It is a common law privilege, in all cases of felony, which has not been taken away by an act of assembly." *United States v. Browning*, 1 Cranch C. C. 330, 24 Fed. Cas. No. 14,673, construing the Virginia statute.

93. **U. S.**—*United States v. Marchant*, 12 Wheat. 480, 6 L. ed. 700. **La.** *State v. Durr*, 39 La. Ann. 751, 2 So. 546. **Mo.**—*Mallison v. State*, 6 Mo. 399. **N. H.**—*State v. Reed*, 47 N. H. 466. **W. Va.**—*State v. Miller*, 6 W. Va. 600.

[a] Effect of Statute, 33 Edw. I. By early common law the prosecution could challenge to an unlimited extent. But this statute provided that the prosecutors for the crown "shall assign of their challenge a cause certain." See **U. S.**—*Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. ed. 578. **Fla.**—*Mathis v. State*, 31 Fla. 291, 12 So. 681. **Ga.**—*Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641. **Md.**—*Turpin v. State*, 55 Md. 462. **N. Y.**—*People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Waterford etc. Turnpike v. People*, 9 Barb. 161; *People v. Aichinson*, 7 How. Pr. 241; *People v. Henries*, 1 Park. Crim. 579. **N. C.** *State v. Bone*, 52 N. C. 121. **Pa.**—*Com. v. Brown*, 23 Pa. Super. 470. **R. I.** *Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. **S. C.** *State v. Stalmaker*, 2 Brev. 1; *State v. Barrontine*, 2 Nott & M. 553. **Vt.** *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

94. **N. H.**—*State v. Drake*, 59 N. H. 21; *State v. Reed*, 47 N. H. 466. **N. Y.** *People v. Aichinson*, 7 How. Pr. 241.

Pa.—*Jewell v. Com.*, 22 Pa. 94. **S. C.** *State v. Stalmaker*, 2 Brev. 1; *State v. Barrontine*, 2 Nott & M. 553.

[a] Even in a Capital Case.—*State v. Carver*, 1 Ohio Dec. 135, 2 West. L. J. 426.

[b] In discussion of the state's rights the court says: "The right to peremptory challenges is purely a creature of the statute and it cannot be extended beyond its obvious purview." *Shoeffler v. State*, 3 Wis. 823.

95. *State v. Smith*, 132 Iowa 645, 109 N. W. 115.

[a] Is Purely a Statutory Right. "The right of peremptory challenge is purely a statutory right, and can only be exercised in such cases and to the extent expressly authorized and allowed by statute." *Stevenson v. State*, 70 Ohio St. 11, 70 N. E. 510.

[b] Distinguished From Challenge for Actual or Implied Bias.—In an elaborate opinion in which the constitutional limitations upon the power to regulate challenges for implied and actual bias is defined the court says, "There is also a broad and clear distinction between these causes of challenge and the right to interpose a peremptory challenge as is usually allowed by statutory enactments. The former challenges exist at law as matter of right. The latter is by favor of the legislature only." *State v. McClear*, 11 Nev. 39.

[c] "The right of peremptory challenge is not an undeniable right, like the right to challenge for cause, but a right conferred and regulated by statute, a tenderness of the law in favor of life and liberty." *State v. Meaker*, 54 Vt. 112.

[d] It is a Matter of Grace by the Legislature.—The constitution does not secure the right in criminal cases. It is "a privilege only granted to the accused as a matter of free grace by the legislature." *Mahon v. State*, 127 Tenn. 535, 156 S. W. 458.

be not certain that the case will prove to be such as warrants the infliction of that punishment.⁹⁶

In civil suits the right to challenge peremptorily was unknown at common law,⁹⁷ and, unless it is given by some statute it does not exist as a matter of right,⁹⁸ though the privilege has been extended by some courts as a matter of courtesy, or custom, rather than strict right.⁹⁹

(IV.) **Extent of the Statutory Right.**—The right now exists in most states in all civil and criminal cases by express provision of statute;¹ and is given to the prosecution in criminal cases as well as to the defendant by most statutes.² It applies to misdemeanors as well as to

96. *United States v. Black*, 2 Cranch C. C. 195, 24 Fed. Cas. No. 14,601; *Dull v. People*, 4 Denio (N. Y.) 91.

[a] **Given in Absence of Statute Expressly Prescribing.**—The court approved the practice of permitting peremptories where the punishment for a second offense was death and reversed for failure to permit any challenge in prosecution for perjury, though the statute did not expressly give it, some perjuries being punishable by death, and all, which were a second offense, being so punishable. *Hooper v. State*, 5 Yerg. (Tenn.) 422.

[b] **Given Though Indictment Not Clearly Charging Second Offense.** Where punishment has been so mitigated for a first offense that the right would not exist, if it would exist for a second offense because the prisoner would then be subject to capital punishment, it must be allowed though the indictment does not indicate that it is for a second offense. *State v. Allen*, 8 Rich. (S. C.) 448.

97. *Mass.*—*Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391. *Mich.*—*Ayres v. Hubbard*, 88 Mich. 155, 50 N. W. 111. *N. J.*—*Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67, 54 Atl. 527. *S. C.*—*Burckhalter v. Coward*, 16 S. C. 435.

98. *Ala.*—*Brown v. Rome & D. R. Co.*, 86 Ala. 206, 5 So. 195. *Colo.*—*Butler v. Hands*, 43 Colo. 541, 95 Pac. 929. *Ill.*—*North American Restaurant & O. House v. McElligott*, 227 Ill. 317, 81 N. E. 388; *Gordon v. Chicago*, 201 Ill. 623, 60 N. E. 823. *Mass.*—*Stone v. Segur*, 11 Allen 568. *Mich.*—*La v. Conyer's Appeal*, 18 Mich. 479. *R. I.*—*Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465; *State v. Sutton*, 16 R. I. 159. *Tenn.*—*Bruce v. Beall*, 100 Tenn. 573, 47 S. W. 204. *Wash.*—*Crandall v. Puget Sound, etc. Co.*, 77

Wash. 37, 137 Pac. 319; *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823. *Eng.*—*Marsh v. Coppock*, 9 Car. & P. 480, 38 E. C. L. 284.

[a] **Not Based on Common Law or General Principles.**—The right in civil cases "is not derived from the common law or based upon any general principle, but is conventional, and comes entirely from this statute." *Burckhalter v. Coward*, 16 S. C. 435.

99. *Curran v. Percival*, 21 Neb. 434, 32 N. W. 413.

[a] "In England no peremptory challenges are even now allowed in civil cases, as a matter of right, though usually conceded by the courts as a matter of courtesy." *Bruce v. Beall*, 100 Tenn. 573, 47 S. W. 204.

1. See generally the statutes, and the following: *Colo.*—*Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072. *Conn.*—*State v. Neuner*, 49 Conn. 232. *Ill.*—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *East St. Louis Elect. R. Co. v. Snow*, 88 Ill. App. 660. *Md.*—*Turpin v. State*, 55 Md. 462. *Mass.*—*Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391. *N. J.*—*Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527; *State v. Rachman*, 68 N. J. L. 120, 53 Atl. 1046. *Pa.*—*McDermott v. Hoffman*, 70 Pa. 31.

[a] **History of the early statutes and how far the common law practice was adopted**, see *Waterford etc. Turnpike v. People*, 9 Barb. (N. Y.) 161; also *Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527, giving the history of the practice in New Jersey and reviewing the statutes at length.

[b] **In civil suits given to both parties; but in criminal only to defendant.** *Va. Code*, 1904, §§3154, 4021, 4023; *W. Va. Code*, §§2780, 4056, 5579.

2. See generally the statutes, and the following: *Colo.*—*Carpenter v.*

felonies;³ but it has been abolished in criminal cases in at least one jurisdiction.⁴

A statute giving the right in civil cases is not unconstitutional.⁵ Nor is a statute giving peremptories to the commonwealth unconstitutional as being an invasion of the right to trial by jury,⁶ or as being an *ex post facto* law, when applied to a prosecution for a crime committed before the law went into effect.⁷

(V.) Jurors or Juries Subject—Peremptories may be exercised against

People, 31 Colo. 284, 72 Pac. 1072. Ill. *Denovan v. People*, 139 Ill. 412, 28 N. E. 564. Ky.—*Buford v. Com.*, 14 B. Mon. 21. La.—*State v. Durr*, 39 La. Ann. 751, 2 So. 546. Md.—*Turpin v. State*, 55 Md. 462. Mass.—*Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391. Mo.—*Mallison v. State*, 6 Mo. 399, reviewing early statutes. N. J.—*Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527; *Cook v. State*, 24 N. J. L. 843. N. Y.—*People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Walter v. People*, 32 N. Y. 147; *People v. Caniff*, 2 Park. Crim. 586. Pa.—*Com. v. Marion*, 232 Pa. 413, 81 Atl. 423; *Com. v. Evans*, 212 Pa. 369, 61 Atl. 989; *Com. v. Brown*, 23 Pa. Super. 470; *Com. v. Hand*, 3 Phila. 403. Eng.—*Reg. v. Frost*, 9 Car. & P. 129, 38 E. C. L. 87.

[a] Early statutes in New York construed, see *People v. Henries*, 1 Park. Crim. 579, and *People v. Aichinson*, 7 How. Pr. 241, which dissented from *Waterford etc. Turnpike v. People*, 9 Barb. 161, and held that the early statutes did not permit peremptories to the state.

[b] Statutes specifically denying right to prosecution. Va. Code, 1904, §4021; W. Va. Code, §2780 in justice court.

3. See generally the statutes, and Ky.—*Buford v. Com.*, 14 B. Mon. 24. Md.—*Turpin v. State*, 55 Md. 462. N. J. *Leary v. North Jersey St. Ry. Co.*, 69 N. J. L. 67, 54 Atl. 527. Pa.—*Com. v. Addis*, 1 Browne 285.

4. *Herndon v. State*, 2 Ala. App. 118, 56 So. 85; *Adom v. State*, 1 Ala. App. 68, 55 So. 546.

Striking jurors as substitute, see *infra*, VII, E, 5, a, (VII).

5. *Cregier v. Bunton*, 2 Strobb. (S. C.) 447.

[a] Reason.—“The act does not introduce anything new and unknown before. It merely extends a well known right to a new class of cases, in the

selection of those who are to compose the jury.” *Cregier v. Bunton*, 2 Strobb. (S. C.) 487.

6. Ga.—*Boon v. State*, 1 Ga. 618. N. Y.—*Walter v. People*, 32 N. Y. 147. Pa.—*Warren v. Com.*, 37 Pa. 45. Vt. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249.

[a] Merely a Preliminary to the Trial, and No Vested Right in Any Particular Juror.—The statute does not, in any sense, deprive the defendant of a jury trial, but is merely a preliminary to the trial like all other procedure by which the jury is selected. Besides the party has no vested right to be tried by any particular juror drawn on the panel. *State v. Wilson*, 48 N. H. 393.

[b] On Two Grounds: Analogy To Standing Aside and Legislative Right To Control Selection.—The crown by its right to stand jurors aside possessed all the advantages obtained by peremptory challenges. The matter of selecting the jury is one which the legislature may properly regulate. *State v. Ward*, 61 Vt. 153, 17 Atl. 483.

[c] Tends To Prevent Mistrial.—“There can be no doubt that giving the prosecuting attorney a peremptory challenge of two jurors tends to prevent hung-juries and mistrials.” *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875, followed in *State v. Hall*, 31 W. Va. 505, 7 S. E. 422.

7. *Walston v. Com.*, 16 B. Mon. (Ky.) 15.

[a] Reasons.—It does not alter any rule of evidence; does not create or aggravate the crime, or increase the punishment. It divests the prisoner of no right for all he is entitled to is an impartial jury. He has no right to select that jury but only a limited right to reject certain jurors. *Walston v. Com.*, 16 B. Mon. (Ky.) 15.

Increasing number as being *ex post facto* law, see *infra*, VII, E, 5, g, (I).

persons called to fill the panel as well as to those upon the regular panel.⁸ In some jurisdictions the right to challenge peremptorily applies to special juries;⁹ in others it does not.¹⁰ By the weight of authority peremptories are not allowed against viewers in condemnation proceedings;¹¹ but it has been permitted under some statutes.¹² The right applies to a special tribunal created under the statute of forcible entry and detainer,¹³ and in an inquest of damages,¹⁴ and to a court held under a statute for obtaining possession of leased land by summary process.¹⁵

(VI.) **Plea as Affecting Right.**—At common law the prisoner was not allowed his peremptories unless he had pleaded not guilty,¹⁶ and to

8. *Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391 (applied to bystanders); *Olson v. Solverson*, 71 Wis. 663, 38 S. W. 329.

[a] It extends to every juror called until the challenges allowed by the statute are exhausted. *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093.

[b] "The statute plainly requires the same proceedings with regard to talesmen as is taken in impaneling the other jurors. This includes the right of peremptory challenge, if the number permitted has not been already exhausted." *Mitchell v. Mitchell*, 80 Tex. 101, 15 S. W. 705.

[c] **Forbidden by Statute.**—(1) Under a former statute which provided for peremptories against "two of the jury so empaneled," one could not challenge a juror called to fill a vacancy caused by the challenge of the other party in civil cases (*Carnow v. Phoenix Ins. Co.*, 46 S. C. 79, 24 S. E. 74; *Burckhalter v. Coward*, 16 S. C. 435; *Huff v. Watkins*, 15 S. C. 82, 40 Am. Rep. 680; *Durant v. Ashmore*, 2 Rich. L. (S. C.) 184), (2) or in criminal cases. *State v. Cardoza*, 11 S. C. 195; *State v. Smalls*, 11 S. C. 262. See also *Charleston v. Kleinback*, 2 Speers (S. C.) 448. (3) This rule applied even where plaintiff announced "no objection to the jury as it then stood" and the defendant then excused two on peremptory. It was reversible error to permit plaintiff to then exercise peremptory over defendant's objection. *Gunter v. Graniteville Mfg. Co.*, 15 S. C. 443.

Waiver of challenge does not waive right to challenge the substituted juror, see *infra*, VII, E, 5, d, (11).

9. *Butler v. Hands*, 13 Colo. 541, 95 Pac. 920, under a statute providing

that when the regular panel of jurors was not in attendance party may demand a special jury of six.

10. *Creed v. Fisher*, 9 Exch. 472, 18 Jur. 228, 23 L. J. Exch. 143, 2 Wkly. Rep. 196.

11. *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. (Pa.) 362; *Schwenk v. Umsted*, 6 Serg. & R. (Pa.) 351.

[a] **Reasons.**—Statute "relates entirely to proceedings in court." *Barrett v. Bangor*, 70 Me. 335.

[b] "These appraisals bear no resemblance to ordinary legal trials." *In re Convers' Appeal*, 18 Mich. 459.

[c] Right exists only when given by statute, and since condemnation statute does not prescribe there is no right. *Brown v. Rome & D. R. Co.*, 86 Ala. 206, 5 So. 195.

12. *Pettis v. Pomfret*, 28 Conn. 566, a cause before a jury for reassessment of damages for land taken for a highway is a "legal demand of one's right." This is the definition of a civil suit.

Specifically Allowed Under Some Condemnation Statutes.—See Ohio Rev. Sts., §§11051, 11052; Shannon's Code (Tenn.) §1853.

13. *Quinebaug Bank v. Tarbox*, 20 Conn. 510, a complaint under that statute "is now treated as a mere civil remedy."

In Justice's Court.—See generally the title "Justices of the Peace."

14. *Hill v. Bloomer*, 1 Pin. (Wis.) 463, though technically not a trial of a cause, there is no error in permitting.

15. *Miner v. Brown*, 20 Conn. 519.

16. *Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823; *Brooks v. Com.*, 2 Rob. (41 Va.) 845.

[a] **Rule Stated by Lord Hale.** "Plead not guilty or plead any other

some extent this practice has been carried into the statutes.¹⁷ Peremptories were never allowed on the trial of a collateral issue.¹⁸

(VII.) **Striking Jurors as Equivalent.**¹⁹ — A peremptory challenge may be had to a juror upon a struck list, according to some authorities;²⁰ but in other states, the statutory provision for striking is considered a substitute for the right to challenge peremptorily,²¹ and there can be no peremptory after both sides have struck.²² Even though a sufficient number do not appear it is held in some states that those who did appear were not subject to peremptory challenge;²³ but it has been held that where only part of the jury appeared after the striking, peremptories could be exercised as to any of the jury then made up by the addition of talesmen.²⁴

b. *Order of Interposing.*²⁵ — (I.) **In General.** — In the absence of a statutory rule, the order of interposing peremptory challenges is within

matter of fact triable by the same jury, and plead over to the felony." See *Com. v. Hand*, 3 Phila. (Pa.) 403, citing, 2 Pleas of the Crown 26-28.

17. See generally the statutes, and *State v. Reed*, 47 N. H. 466, the statute formerly read "Except when standing mute," and now reads "unless he stand wilfully mute."

18. *Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823; *Rex v. Radcliffe*, 1 W. Bl. 3, 1 Wils. 150, Fost. Cr. L. 40, 96 Eng. Reprint 2.

[a] **Issue as to Whether Defendant Same Person Formerly Convicted.**—Applying the common law rule, the prisoner was not allowed peremptories on trial of the issue as to whether he was the same person as one formerly convicted. *Brooks v. Com.*, 2 Rob. (41 Va.) 845.

[b] **Insanity Issue Is Not Trial for Offense Under Statute.**—This rule applied where the statute read "every person arraigned and put on his trial for any offense" etc. A hearing on the issue of insanity was not a "trial for any offense." *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

19. As to special or struck jury, see *infra*, VII, G.

Permitting peremptory to struck jury where statute did not allow, see *infra*, VII, E, 5, n, (II), (B).

20. *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50; *Cook v. State*, 24 N. J. L. 843; *McDermott v. Hoffman*, 70 Pa. 31.

[a] **In Kentucky in civil cases after eighteen jurors are drawn three are stricken by each party.** But it seems

they have their right of peremptory also. See *Cumberland Tel. & Tel. Co. v. Ware's Admx.*, 115 Ky. 581, 74 S. W. 289.

21. *Ga.*—*O'Byrne v. State*, 29 Ga. 36. *Ind.*—*May v. Hoover*, 112 Ind. 455, 14 N. E. 472. *Minn.*—*Watson v. St. Paul City R. Co.*, 42 Minn. 46, 43 N. W. 904; *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545.

[a] **In misdemeanor cases the practice of striking jurors from list is a legal equivalent for challenging peremptorily.** *Smith v. State*, 11 Ga. App. 89, 74 S. E. 711, citing *O'Byrne v. State*, 29 Ga. 36.

22. *Blanchard v. Brown*, 1 Wall. Jr. 309, 3 Fed. Cas. No. 1,507.

[a] **Can't Strike Those Who Have Passed.**—Under a statute reading "the first twelve of those who shall appear and are not challenged for cause, or set aside by the court, shall be the jury," one who demands a struck jury has no right to peremptorily challenge the twelve who have passed into the box unchallenged for cause. *State v. Moore*, 28 Ohio St. 595; *Cleveland, etc. R. R. Co. v. Stanley*, 7 Ohio St. 155.

23. *Branch v. Dawson*, 36 Minn. 193, 30 N. W. 545.

24. *Cleveland, P. & A. R. Co. v. Stanley*, 7 Ohio St. 155, peremptories are not confined to the talesmen.

25. **Order of interposing challenges,** see generally *supra*, VII, E, 2.

That party may wait until his challenge for cause is decided before interposing his peremptory, see *supra*, VII, E, 2.

the trial court's discretion.²⁶ as it is where the statutory method has been waived.²⁷ The discretion of the trial court will not be interfered with unless abused;²⁸ and in the absence of some showing to the contrary, it will be assumed the trial court adopted a rule which has been followed in impaneling the jury.²⁹ The courts are not authorized to limit or restrict the right, or prescribe rules which shall render it unavailing.³⁰ Where there is no statute the common-law practice should

26. **U. S.**—*Emanuel v. United States*, 196 Fed. 317, 116 C. C. A. 137, following *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208. See also *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. ed. 1011. **Ill.**—*Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823. **Ia.**—*State v. Shelledy*, 8 Iowa 477; *State v. Pierce*, 8 Iowa 231. **Kan.**—*State v. McCorekle*, 74 Kan. 280, 86 Pac. 134. **Md.**—*Turpin v. State*, 55 Md. 462. **Mo.**—*State v. Hays*, 23 Mo. 287. **Neb.**—*Johnson v. State*, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B, 965; *Gravely v. State*, 45 Neb. 878, 64 N. W. 452. **Ohio.**—*Schufflin v. State*, 20 Ohio St. 233. **S. C.**—*Ward v. Charleston etc. Ry. Co.*, 19 S. C. 521, 45 Am. Rep. 794. **Vt.**—*State v. Flint*, 60 Vt. 304, 14 Atl. 178. **Wis.**—*Santry v. State*, 67 Wis. 65, 30 N. W. 226.

[a] **Rule of Criminal Cases Does Not Apply to Civil.**—The order in which peremptory challenges shall be exercised in a civil action is a matter for regulation by the trial court in its sound discretion. The provision as to challenges being as in criminal cases could have no effect as to order, since when that statute was adopted peremptory challenges were permitted only to defendants in criminal proceedings. *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 277.

[b] **Rule of Civil Cases Does Not Apply to Criminal.**—See *State v. McCorekle*, 74 Kan. 280, 86 Pac. 134.

[c] **Fixed by General Rule or Special Order in New Hampshire.**—"The supreme court may, by general rules or special order prescribe the mode . . . of exercising the right of peremptory challenge." Pub. St., ch. 227, §14; *Osipow etc. Co. v. Canner*, 54 N. H. 295; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

[d] In Pennsylvania there is no established rule of general application, rules of court or the established practice in the different counties control. *Com. v. Marion*, 232 Pa. 413, 81 Atl.

423; *Com. v. Evans*, 25 Pa. Super. 239; *Com. v. Brown*, 23 Pa. Super. 470.

27. *McCauley v. Chicago C. Ry. Co.*, 163 Ill. App. 176, where statutory method of challenging in panels of four was waived.

28. **Ill.**—*Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823; *McCauley v. Chicago C. Ry. Co.*, 163 Ill. App. 176. **Ia.** *State v. Shelledy*, 8 Iowa 477; *State v. Pierce*, 8 Iowa 231. **Kan.**—*State v. McCorekle*, 74 Kan. 280, 86 Pac. 134; *State v. Bailey*, 32 Kan. 83, 3 Pac. 769. **Md.**—*Turpin v. State*, 55 Md. 462. **Neb.**—*Gravely v. State*, 45 Neb. 878, 64 N. W. 452. **Vt.**—*State v. Flint*, 60 Vt. 304, 14 Atl. 178. **Wis.**—*Santry v. State*, 67 Wis. 65, 30 N. W. 226.

[a] **Both Parties Compelled To Challenge At One Time.**—Where the court in its discretion compelled both parties to challenge at the same time, defendant is not prejudiced any more than is the state, by the fact that same jurors might be stricken off by opposite party. Lists of names from which to strike were handed parties at same time. *State v. Hays*, 23 Mo. 287.

29. *State v. Shelledy*, 8 Iowa 477.

30. **U. S.**—*Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208. **Ark.**—*Williams v. State*, 63 Ark. 527, 39 S. W. 709. **Cal.**—*People v. Jenks*, 24 Cal. 11. **Ill.**—*Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *American Bridge Works v. Pereira*, 79 Ill. App. 90.

[a] **Must Not Compel Exercise in Sets of Four.**—Under the rule that the court cannot by any mode of impaneling either abridge or destroy the defendant's right to challenge, a ruling that the defendant must exercise his right in sets of four or be held to have waived each time such of the four as he does not use, is reversible error. *Schumaker v. State*, 5 Wis. 324.

[b] **Must Not Make Defendant's Right Dependent on State.**—A ruling by the court whereby the defendant's right to exercise his challenges is made

not be abridged.³¹ and, especially in criminal cases, the courts should permit the freest exercise of the right within the limits fixed by the legislature.³² It has been suggested that even a legislative rule might be objectionable if arbitrary.³³ However, the right in civil cases is a high privilege, which should be exercised strictly.³⁴

In the federal courts the order varies in the different districts.³⁵ While the state practice may be followed, the court is not bound to do so.³⁶

(II.) **Court's Duty To Define Order.**—The court is not bound to define beforehand the order in which peremptories shall be interposed,³⁷ but it is a proper practice to do so on request of either party.³⁸

(III.) **Who Must Challenge First.**—The prisoner is not entitled as a matter of right to have the prosecution challenge first.³⁹ The English rule requires that the prisoner challenge first,⁴⁰ and that is the rule by statute in some states,⁴¹ though the more usual rule is that the prosecution must first challenge.⁴² In civil suits most statutes compel the plaintiff to challenge first.⁴³ The statutory rule is not changed

13 Sup. Ct. 136, 36 L. ed. 1011; *Radford v. United States*, 129 Fed. 49, 63 C. C. A. 491.

37. *Com. v. White*, 208 Mass. 202, 94 N. E. 391, in civil or criminal cases.

Announcing to prisoner when he must challenge, see *infra*, VII, E, 5, c, (II).

38. *Com. v. White*, 208 Mass. 202, 94 N. E. 391, especially in important cases.

39. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *Turpin v. State*, 55 Md. 462.

[a] *But compare* *Spigener v. State*, 62 Ala. 383, where it is held that in the absence of statute the correct practice is that the state must challenge first, and it was reversible error to compel defendant to do so.

40. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *Turpin v. State*, 55 Md. 462.

41. See generally the statutes, and *Minn. R. L.*, 1905, §5399; *Okla. Rev. Laws*, 1910, §5867.

42. See generally the statutes, and *Ark.—Kirke's Dig.*, 1904, §2367. *Cal. Pen. Code*, §1088. *Mo.—Rev. St.*, 1909, §5228; *State v. Degonia*, 69 Mo. 485; *State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271.

43. See generally the statutes, and *Colo.—Mills' Ann. Code*, §184. *Haw. Rev. Laws*, §1792. *Mo.—Rev. St.*, 1909, §7281. *Wash.—Rem. & Bal. Code*, §333. *Wis.—St.*, 1915, §2851.

[a] **An interpleader**, in an attachment suit is technically the plaintiff and the plaintiff is defendant. Hence

to depend upon the state's exercising its right is reversible error. *Smith v. State*, 4 Greene (Iowa) 189.

Reversible error to refuse to give proper number, see *infra*, VII, E, 5, n.

31. *Lewis v. United States*, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. ed. 1011; *Lamb v. State*, 36 Wis. 424.

[a] **It is a curtailment of the common law practice**, sanctioned by statute in this state, to compel defendant to challenge the jurors peremptorily one by one as they are passed for cause. He is entitled to be presented with a full panel before challenging. *Lamb v. State*, 36 Wis. 424.

32. *Cal.—People v. Edwards*, 101 Cal. 543, 36 Pac. 7. *Ia.—State v. Hunter*, 118 Iowa 686, 92 N. W. 872. *Vt. State v. Flint*, 60 Vt. 304, 14 Atl. 178.

[a] **Names Must Be Restored to Box.**—It was an interference with the right and ground for reversal not to restore the names to the box, of a jury who came in with a verdict while the jury was being impanelled, as the proportion of names of those defendant might wish to challenge peremptorily was disarranged. *People v. Edwards*, 101 Cal. 543, 36 Pac. 7.

33. *State v. Flint*, 60 Vt. 304, 14 Atl. 178.

34. *Furman v. Applegate*, 23 N. J. L. 28.

35. *Emanuel v. United States*, 196 Fed. 317, 116 C. C. A. 137.

36. *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *Lewis v. United States*, 146 U. S. 370,

though the defendant has the burden of proof.⁴⁴ Where the statute does not in terms require either party in a civil suit to challenge first, the practical effect is to make the plaintiff challenge first as he must make the first move toward going to trial.⁴⁵ But in some states, the defendant must make the first challenge.⁴⁶

The statutes are mandatory so far as they require the prosecution,⁴⁷ or the plaintiff in a civil action,⁴⁸ to challenge first.

Effect of Making Wrong Party Challenge First.—In criminal cases it is reversible error to deny defendant's statutory right to have the prosecution challenge first.⁴⁹ If the record shows defendant was not prejudiced, failure to permit him to exercise his challenges in the statutory method is not ground for reversal.⁵⁰

In a civil case it must appear not only that the defendant was forced to interpose his challenges first, but that some prejudice resulted, or he did not have a competent jury;⁵¹ but where a plaintiff was erroneously compelled to interpose his peremptories before an interpleader in attachment it was held that the interpleader must show no prejudice resulted.⁵²

(IV.) Alternating in Challenges.—The statutes frequently provide expressly for alternating the peremptory challenges after challenges for cause are all disallowed,⁵³ or where no peremptory challenges have

the interpleader must first challenge. *Cunningham v. Prusansky*, 59 Mo. App. 498.

44. *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

45. *Charleston v. Kleinback*, 2 Speers (S. C.) 418.

46. See generally the statutes, and Miss. Rev. Laws, 1905, §4170; Lord's Laws (Ore.), §126.

47. *State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271; *People v. McQuade*, 119 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

[a] **Procedure Not Substantially Departed From.**—After passing "for bias" and "for favor," prosecution may refuse to exercise peremptory, and pass the juror after defendant's examination. So long as prisoner is not compelled to challenge until after prosecution has fully exhausted his right he cannot complain. *People v. Miles*, 143 N. Y. 282, 38 N. E. 456.

[b] Prosecution may pass the jurors, declining to challenge, and after the defendant has challenged, may challenge although defendant objects thereto. Jurors were not sworn. *People v. Majors*, 65 Cal. 138, 3 Pac. 797, 52 Am. Rep. 295.

[c] So before jury is sworn prosecution may challenge though on pass-

ing the panel to defendant he did not challenge. The prosecution in such case has challenged first. *People v. McCarty*, 48 Cal. 557.

48. *Cunningham v. Prusansky*, 59 Mo. App. 498.

49. *State v. Steeley*, 65 Mo. 218, 27 Am. Rep. 271.

50. *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084, *distinguishing* *Territory v. Barrett*, 8 N. M. 70, 42 Pac. 66, and *Territory v. Lermo*, 8 N. M. 566, 46 Pac. 16, where it did not appear that defendant was not injured.

[a] The question as to whether defendant was required to exercise his peremptory challenges prematurely becomes purely academic and need not be decided when the record shows that the subsequent examination by the prosecution did not result in the exclusion of any jurors for cause, and hence the defendant was only called upon to exercise his peremptories upon the same jurors as he would have been had his contention been upheld by the trial judge. *Emmett v. United States*, 196 Fed. 317, 116 C. C. A. 137.

51. *Hegney v. Head*, 126 Mo. 619, 29 S. W. 587.

52. *Cunningham v. Prusansky*, 59 Mo. App. 498.

53. See generally the statutes.

been taken until the panel was full.⁵⁴ In the absence of a statutory rule, alternating of challenges has been recognized as a fair and equitable rule;⁵⁵ but defendant cannot be compelled to alternate peremptories, except through the method of swearing each juror in turn as he is passed for cause.⁵⁶ In the absence of a statutory rule to that effect the prosecution need not first exhaust its peremptory challenges;⁵⁷ but in those jurisdictions where a full panel of competent jurors, plus a number equal to the number of peremptories is required, the rule sometimes compels the prosecution to first exhaust its challenges.⁵⁸ The rule as to alternating must be preserved so far as is practicable,⁵⁹ but does not give to the defendant an absolute right to the last challenge.⁶⁰ A defendant who is entitled to separate chal-

54. See generally the statutes, and *State v. Sloan*, 22 Mont. 293, 56 Pac. 364, rule applies to criminal cases by virtue of Code, §9270.

55. Ia.—*State v. Pierce*, 8 Iowa 231. Neb.—*Gravely v. State*, 45 Neb. 878, 64 N. W. 452. Ohio.—*Schufflin v. State*, 20 Ohio St. 233; *Thurman v. State*, 4 Ohio Cir. Ct. 141.

[a] If the court delays swearing the jury until after it is completed, it is just and reasonable that the defendant should alternate with the state in taking his challenges. *State v. Pritchard*, 15 Nev. 74.

[b] No Abuse of Discretion Not To Require.—Though perhaps a more orderly way would have been to require the state to exercise its first peremptory, and then have given each of the defendant's two, there is no abuse of discretion where under the rule enforced by the court each defendant had one peremptory left after the state's challenges were exhausted. *State v. McCorkle*, 74 Kan. 280, 86 Pac. 134.

[c] There was no reversible error in ruling that state should first exercise one and then the defendant two where the state has but half the number defendant has. *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

[d] Statute Held Not to Require Alternating.—Under a statute reading "the state shall first exhaust its peremptory challenges, or waive the same, and the defendant afterward," the order is not alternative but the state must first exhaust all its peremptories, or waive them, before defendant is called upon to challenge. *State v. Bowens*, 17 Iowa 46.

[e] After jurors have been pronounced competent in a misdemeanor

case, the court properly requires the jury to be selected in the same manner as if there had been no challenge. Accordingly it is proper to require defendant to exercise the first right to strike, under the alternating rule. *Nobles v. State*, 127 Ga. 212, 56 S. E. 125.

56. *State v. Pritchard*, 15 Nev. 74.

57. *Gravely v. State*, 45 Neb. 878, 64 N. W. 452.

[a] In the absence of a statute, a rule requiring "finds no warrant certainly either in the letter or spirit of our law, and has neither necessity nor fairness to recommend it." *State v. Pierce*, 8 Iowa 231.

58. *State v. Mathews*, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136.

59. *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

60. *O'Malley v. O'Malley*, 46 Mont. 549, 129 Pac. 501, Ann. Cas. 1914B, 662; *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

[a] If by reason of waivers by the plaintiff or state and the continued peremptory challenge by defendant the latter's challenges become exhausted before the plaintiff's, the plaintiff may exercise his challenge as to jurors brought into the box after his waiver. *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

[b] The announcement of a waiver only waives the right to challenge as to jurors then on the panel. As long as the party has challenges remaining he may exercise them on jurors called to fill vacancies. *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529.

lenges must alternate with plaintiff like any other defendant.⁶¹ Where the defendant is entitled to double the number of peremptories given to the state the proper practice is to compel him, in alternating his challenges, to use two peremptories to the state's one,⁶² except in so far as the rule has been changed by statute.⁶³

c. *Withdrawal*.—The general rule is that a peremptory challenge having been made, cannot be withdrawn;⁶⁴ but it is largely within the discretion of the court to permit a withdrawal of such challenges,⁶⁵

61. *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 481, 148 Pac. 330.

62. *Idaho*.—*State v. Browne*, 4 Idaho 723, 44 Pac. 552. *Kan.*—*State v. McCormick*, 74 Kan. 280, 86 Pac. 134; *State v. Bailey*, 32 Kan. 83, 3 Pac. 769. *Mont.* *State v. Peel*, 23 Mont. 358, 59 Pac. 169, 75 Am. St. Rep. 529; *State v. Sloan*, 22 Mont. 293, 56 Pac. 364. *Neb.* *Gravely v. State*, 45 Neb. 878, 64 N. W. 452. *Ore.*—*State v. Caseday*, 58 Ore. 429, 115 Pac. 287. *Wash.*—*State v. Vance*, 29 Wash. 435, 70 Pac. 34; *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

[a] Though the statute says each shall challenge one in alternating, in criminal cases the purpose and intent of the whole statute necessitates that the state shall challenge one, and then the defendant two. *State v. Eddon*, 8 Wash. 292, 36 Pac. 139.

[b] Aside from any statute the court says "on account of the disparity between the number allowed to each party in criminal cases it would be impracticable to have them alternate one by one. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

[c] *State Reserves Challenges Till Equal Number Made by Defendant*. In a criminal case, where the state has three challenges and the defendant six, the state may reserve its challenges until three challenges have been made by prisoner. This rule does not apply in civil cases. *Smith v. Day*, 2 Penn. (Del.) 245, 45 Ad. 396.

[d] The state and defendant have the right of alternate challenge and if it be not exercised in full it is not thereby lost. Under this rule the state challenges one and two defendants four and the state is not bound to challenge until after such four challenges are made. *Ronnds v. State*, 57 Wis. 45, 14 N. W. 865, following *Schmucker v. State*, 5 Wis. 324, wherein it was held error to compel a defendant to exercise four challenges or waive four.

63. *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084.

[a] Under a statute which reads, "Provided, further, that no defendant shall be required to exercise any peremptory challenge as to any particular juror until the territory shall have finally passed upon and accepted such juror," it was erroneous to compel the defendant to alternate with the prosecution giving the territory first one peremptory and then the defendant two. *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084.

64. *Md.*—*Biddle v. State*, 67 Md. 304, 10 Atl. 794. *N. J.*—*Furman v. Applegate*, 23 N. J. L. 28. *Pa.*—*Com. v. Twitchell*, 1 Brewst. 551. *Eng.*—*Rex v. Parry*, 7 C. & P. 836, 32 E. C. L. 598.

[a] *Would Amount to Increasing Number*.—Prisoner cannot after challenging and having juror set aside recall and examine him for cause. To do so would amount to increasing his number of peremptory challenges. *State v. Coleman*, 8 S. C. 237.

[b] *Though Disqualification Subsequently Discovered*.—It was proper to refuse counsel permission to withdraw a peremptory where he had a conversation with juror immediately after he was stood aside and then discovered the existence of ground for challenge for cause. *State v. Price*, 10 Rich. L. (S. C.) 351.

65. *Vojta v. Pelikan*, 15 Mo. App. 471; *Garrison v. Portland*, 2 Ore. 123.

[a] *Permitted Where Juror Excused After Being Sworn*.—A juror having been excused on the commonwealth's challenge for cause based on a matter not discovered until after he was sworn, and numerous peremptory challenges having been made both before and after the juror was sworn, the court permitted the prisoner to waive any challenges previously made by him.

and they may be permitted where it is withdrawn immediately after being made and before another juror has been called,⁶⁶ or the juror has retired.⁶⁷ Where the panel has become exhausted the prisoner may be permitted to retract a challenge.⁶⁸ Error in permitting the state to challenge at a wrong time may be cured by permitting the withdrawal of the challenge, and restoring the juror.⁶⁹ Withdrawal cannot be made capriciously,⁷⁰ and it is clearly proper to refuse to extend the privilege where the only object was to enable the party to avoid the effect of having subsequently drawn a less desirable juror,⁷¹ or after both parties have finished their examination and have exhausted their peremptories.⁷²

d. *Waiver*. — (1.) *In General*. — The right to challenge peremptorily may be waived.⁷³ This may be done by the prosecution,⁷⁴ or by the defendant⁷⁵ in a criminal action. When one is given an opportunity to challenge peremptorily and fails to exercise it, the right must be deemed to be waived.⁷⁶ So the right to challenge peremptorily is clearly

Com. v. Twombly, 10 Pick. (Mass.) 480 (note).

[b] *Allowed To Permit Further Examination on Discovery of Disqualification*. — In *Savage v. State*, 18 Fla. 909, the state was permitted to withdraw a peremptory and re-examine a juror who had not absented himself. This was held to be within the sound discretion of the court so long as the juror was present, and the matter discovered was that he was disqualified in law. If the challenge for cause be not sustained the peremptory stands.

Restoration of peremptories upon excuse by court on own motion, see *supra*, VII, D.

66. *Garrison v. Portland*, 2 Ore. 123.

67. *Savage v. State*, 18 Fla. 909; *Garrison v. Portland*, 2 Ore. 123.

68. *United States v. Porter*, 2 Dall. 245, 27 Fed. Cas. No. 16,073, 1 L. ed. 409.

[a] *Withdrawn by consent after venire exhausted*. Com. v. Hailstock, 2 Gratt. (43 Va.) 534.

[b] *Circumstances Amounting to Withdrawal*. — After defendant had exhausted his peremptory challenges and the panel being exhausted the court directed a venire to issue whereupon one of defendant's counsel stated in effect that in order not to detain the court they would consent to recall jurors "to whom we objected upon no other grounds except our intention to exhaust the panel," expressly excepting those objected to for cause and "without waiving any of our rights."

This amounted to a withdrawal of previous peremptories. *State v. Weaver*, 58 S. C. 106, 36 N. E. 499.

69. *Leonard v. State*, 66 Ala. 461.

70. *Vojta v. Pelikan*, 15 Mo. App. 471.

71. *Biddle v. State*, 67 Md. 304, 10 Atl. 794.

72. *Vojta v. Pelikan*, 15 Mo. App. 471.

73. *Ala.*—*Murray v. State*, 48 Ala. 675. *Ind.*—*McDonald v. State*, 172 Ind. 393, 88 N. E. 673. *Mo.*—*State v. Yandell*, 201 Mo. 646, 100 S. W. 466.

[a] *Plaintiff failing to challenge first does not waive his right to challenge peremptorily*. *Charleston v. Kleinback*, 2 Speers (S. C.) 418.

74. *Murray v. State*, 48 Ala. 675.

75. *Murray v. State*, 48 Ala. 675; *State v. Bell*, 166 Mo. 106, 65 S. W. 736, explaining *State v. Davis*, 66 Mo. 684, 27 Am. Rep. 387, where the suggestion came from the prosecution and hence there was no voluntary waiver.

76. *Del.*—*State v. Lynn*, 3 Penne. 316, 51 Atl. 878; *State v. Brown*, 2 Marv. 380, 36 Atl. 458. *Ind.*—*McDonald v. State*, 172 Ind. 393, 88 N. E. 673. *Pa.*—*Com. v. Ware*, 137 Pa. 465, 20 Atl. 806; *Com. v. Brown*, 23 Pa. Super. 470; *Com. v. Marra*, 8 Phila. 440.

[a] *No waiver can be based upon a mere misunderstanding of counsel as to when challenge was to be made there being no statute or court rule, nor request for direction by the court.*

waived where one does not appear at the trial until after the jury has been sworn.⁷⁷ But where the court insists upon the challenge being made at a particular time and in contravention of the prisoner's statutory rights, acquiescence in the court's ruling is not a waiver.⁷⁸

One who claims a peremptory is being exercised when his adversary is not entitled to it must object at the time the peremptory is made, or he waives the objection.⁷⁹ One waives his right to a greater number of challenges by failing to object to the lesser number offered;⁸⁰ but where he excepts to the ruling of the court as to the number of challenges to which he is entitled, he does not waive his rights by not formally challenging beyond that number.⁸¹ The defendant can waive his right to have a complete panel before making his peremptory challenges,⁸² and he waives his right to have a greater number on the panel than prescribed by the court, by not raising the question before the jury is sworn.⁸³ He may waive his right to a statutory interval between presentation of a full panel and the making of his peremptories,⁸⁴ but by that waiver he does not waive his right to a complete panel.⁸⁵ The defendant's right to challenge is not waived by making the preliminary examination.⁸⁶

(II.) Under "Alternating Challenge" and "Full Panel" Rules.—By stat-

Com. v. White, 208 Mass. 202, 94 N. E. 391.

[b] **Waived by Interposing a Particular Challenge for Cause.**—On the jury being tendered to plaintiff and counsel stating that he has no objection except as to any who might be stockholders of defendant company one juror stepped down, another was put in his place and the jury then tendered to defendant. This amounted to a waiver of peremptories by plaintiff. Ward v. Charleston City R. Co., 19 S. C. 521, 45 Am. Rep. 794.

77. Dotterer v. Scott, 29 Pa. Super. 553.

[a] **Party Had Notice But Failed To Appear.**—Jury was sworn, and court adjourned till next day without commencing to take testimony. At opening of case next day, party demanded right to have eight additional jurors drawn so that he might challenge peremptorily. Dotterer v. Scott, 29 Pa. Super. 553.

That challenge must be before jury sworn, see *infra*, VII, E, 5, e, (II).

78. People v. Carpenter, 36 Hun (N. Y.) 315, 16 Abb. N. C. 128, 3 N. Y. Crim. 92.

[c] **Error May Be Preserved by Challenging at Proper Time.**—The court having by an unauthorized ruling shortened defendant's statutory time to make a peremptory challenge,

he does not waive his rights by not excepting at the time the ruling is made, but may subsequently challenge peremptorily and base error on the court's overruling of his challenge because not sooner offered. State v. Fritchard, 15 Nev. 74.

79. Gilchrist v. Brande, 58 Wis. 184, 15 N. W. 817, he cannot wait till juror is excused and then insist upon his reinstatement.

80. State v. Yandell, 201 Mo. 646, 100 S. W. 466; State v. Ray, 53 Mo. 345.

Number of challenges, see *infra*, VII, E, 5, g.

81. State v. Stokley, 88 Kan. 281, 128 Pac. 189; State v. Durein, 29 Kan. 688; Fowler v. State, 8 Baxt. (Tenn.) 573, court need not be compelled to rule twice on the same matter.

82. State v. Bell, 166 Mo. 106, 65 S. W. 736; State v. Robertson, 71 Mo. 446; State v. Waters, 62 Mo. 196.

83. State v. Yandell, 201 Mo. 646, 100 S. W. 466; State v. Bell, 166 Mo. 106, 65 S. W. 736; State v. Robertson, 71 Mo. 446.

84. State v. Gilmore, 95 Mo. 551, 8 S. W. 359, 912; State v. Waters, 62 Mo. 196; State v. Klinger, 46 Mo. 224.

85. State v. Waters, 62 Mo. 196.

86. Shelby v. Com., 91 Ky. 563, 16 S. W. 461.

ute it is sometimes provided that on alternating, each party is deemed to have waived one challenge each time he passes the jury without challenging.⁸⁷ Under a rule requiring challenges to be made singly and alternatively, the jurors not being sworn until all are accepted, one does not waive his right to challenge peremptorily by withholding all his challenges until the box is filled;⁸⁸ but where the parties have adopted the alternate mode and one has waived his last challenge, he cannot challenge a juror substituted for one challenged by the party entitled to the final challenge.⁸⁹ Where the practice is to wait until the box is full and then challenge alternately, one passing his first challenge does not waive his right to his remaining challenges.⁹⁰ One who has clearly waived but one challenge has been held not to waive all his remaining challenges, under statutes requiring alternating challenge in such manner as the parties may agree or the court order.⁹¹

Some courts hold that the party is entitled to exercise his right of challenge after once passing a full panel, as to any of the jurors upon the panel as changed by substitution of another juror.⁹² But the more usual holding is that the court may refuse to permit a peremptory to jurors after one chance to challenge them has been passed,⁹³ and there

87. See generally the statutes, and *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817.

[a] **Not Binding on Federal Court.** *United States v. Daubner*, 17 Fed. 793, construing the Wisconsin statute and the United States statutes.

88. *Moore v. People*, 31 Colo. 336, 73 Pac. 30.

89. *Patton's Admr. v. Ash*, 7 Serg. & R. (Pa.) 116.

[a] **Where Court Ordered Last Challenge Given to State.**—Defendant waives his right to peremptory challenges as yet unexercised, where the parties, proceeding on the theory that the state was entitled to eight and accused to sixteen, had been challenging alternately, the state one and accused two. On its being discovered that the state had but six challenges of which five had been used, the court directed accused to use his six remaining challenges, giving the state the last challenge. The defendant then waived his eleventh challenge. This amounted to a waiver of all his remaining challenges. *Gravely v. State*, 45 Neb. 878, 64 N. W. 452.

90. *Colo.*—*Moore v. People*, 31 Colo. 336, 73 Pac. 30. *Ia.*—*Fountain v. West*, 23 Iowa 9, 92 Am. Dec. 405. *Pa.* *Kennedy v. Dale*, 4 Watts & S. 176, explaining *Patton's Admr. v. Ash*, 7 Serg. & R. 116, as not laying down a different rule.

91. *State v. Hunter*, 118 Iowa 686, 92 N. W. 872, wherein defendant's counsel announced "we waive one more challenge," and the trial court held that the box being then filled a waiver of one was a waiver of all.

92. *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297; *Koch v. State*, 32 Ohio St. 352.

[a] **Provided the Jury Has Not Been Accepted and Sworn.**—*Santry v. State*, 67 Wis. 65, 30 N. W. 226, *distinguishing* *Lamb v. State*, 36 Wis. 424; *State v. Cameron*, 2 Pin. 490, 2 Chand. 172. See also *Rounds v. State*, 57 Wis. 45, 14 N. W. 865; *Schumaker v. State*, 5 Wis. 324.

[b] **Reasons for Rule.**—The right to challenge is absolute up to the time the jury is sworn. The jury may have been satisfactory at time it was passed, but the subsequent changes may have rendered it desirable to the party that the particular juror do not sit. *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

[c] **A new jury was created when the new juror was called into the panel.** *Koch v. State*, 32 Ohio St. 352.

93. *Ala.*—*Sparks v. State*, 59 Ala. 82. *Colo.*—*Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. *Ky.*—*Shelby v. Com.*, 91 Ky. 563, 16 S. W. 461. *Miss.*—*Funderburk v. State*, 75 Miss. 20, 21 So. 658. *Utah.*—*State v. Riley*, 41 Utah 225, 126 Pac. 294. *Wash.*—*Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241, after

must be some good cause shown before the challenge will then be permitted as to jurors who were in the box when the first opportunity was passed.⁹⁴ Peremptories may be exercised as to jurors called as substitutes for those excused on challenge, however,⁹⁵ by express provision

counsel announced "we will take the jury."

[a] **After Indicating His Acceptance, a Party Waives the Right as to Those Accepted.**—The usual practice is to require the peremptories to be made by the parties alternately, one at a time, beginning with defendant. Either party may indicate at any time that he is satisfied with the jury and thereby he waives his remaining peremptories as to the jurors passed and accepted. *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093; *State v. Scott*, 41 Minn. 365, 43 N. W. 62.

[b] **After certain jurors have been accepted and sworn**, though before the panel is filled, the defendant cannot as a matter of right challenge them at any time before the panel is completed, but is deemed to have waived his right to challenge those he has accepted. *State v. Anderson*, 4 Nev. 265; followed in *State v. Roderigas*, 7 Nev. 328.

[c] **Is Discretionary With Court in Civil Case.**—In a civil case, it is proper after tender of a full jury and the challenge of some of them to restrict the challenges thereafter to the jurors who are freshly summoned. It is not necessary that it be so done but is a matter within the sound discretion of the court. *Tatum v. Preston*, 53 Miss. 674.

[d] **The challenge is "exhausted"** within the code as to those passed without challenge. They are considered as accepted. *Munday v. Com.*, 81 Ky. 233, 5 Ky. L. Rep. 67.

[e] **After Special Venire Exhausted.** After eight jurors had been impaneled out of the original special venire, and it becoming exhausted a new venire was ordered, the defendant could not peremptorily challenge any of the eight previously accepted. *Drake v. State*, 5 Tex. App. 649.

[f] **Where parties have adopted the practice of alternately exercising their peremptories while the jurors were being examined and before the panel was filled**, it being appellant's turn when the panel was filled he cannot pass his

challenge and subsequently exercise it after the other party expressed his satisfaction with the jury. *Vance v. Richardson*, 110 Cal. 414, 42 Pac. 909.

[g] **Can Only Challenge Jurors Subsequently Brought Into Box.**—Under the statute it is the intent that both parties have their full number of challenges so far as they wish to exercise them, but after plaintiff waives his challenge to the jury as then constituted he can only challenge jurors brought into the box to take the place of those subsequently excused. *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

94. *Locke v. Com.*, 144 Ky. 232, 137 S. W. 1043, following *Munday v. Com.*, 81 Ky. 233, 5 Ky. L. Rep. 67. See also *Wiggins v. Com.*, 104 Ky. 765, 47 S. W. 1073.

[a] **Rule applied where counsel indicated their acceptance of eight jurors and then desired to challenge one of the eight before the box had again been filled.** *Colvin v. Com.*, 22 Ky. L. Rep. 1407, 60 S. W. 701.

[b] **Rule Applied After Declination of Challenge.**—It is the general practice in civil cases to tender the right first to plaintiff and then to the defendant, and if either declines when tendered, and so announces, his right is ended unless the court under peculiar circumstances allows the right to be revived as to either. *Ward v. Charleston, etc. R. Co.*, 19 S. C. 521, 45 Am. Rep. 794.

95. **U. S.**—*United States v. Daubner*, 17 Fed. 793. **Colo.**—*Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. **Del.** *State v. Lynn*, 3 Penne. 316, 51 Atl. 878; *Smith v. Day*, 2 Penne. 245, 45 Atl. 396; *State v. Brown*, 2 Marv. 380, 36 Atl. 458; *Haw v. Chesapeake & D. Canal Co.*, 5 Har. 245. **Minn.**—*Lerum v. Geving*, 97 Minn. 269, 105 N. W. 967; *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093. **Wash.**—*Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241.

[a] **After challenge by co-defendant a defendant may challenge the substituted juror.** *Fitzpatrick v. Joliet*, 87 Ill. 58.

of statute in some states,⁹⁶ and it is not necessary for the party to expressly reserve his right to challenge the substituted jurors.⁹⁷ Where the jurors are required to be kept in the custody of the court, the right to challenge must be so exercised, or waived, so as not to interfere with the court's control of the jurymen.⁹⁸

c. *Time To Interpose*.⁹⁹—(I.) In General.—The time when the peremptory challenge shall be interposed is subject to reasonable court rules and regulations,¹ which may be either in the form of a fixed rule, or any limitation prescribed in a particular case so long as the right to challenge is not taken away.²

Announcing Right to Prisoner.³—At common law, the custom was in capital cases at least, to announce to the prisoner when he was brought to the bar, that he might challenge at any time before the juror was sworn.⁴ The ancient formality, with some slight modification,⁵ is found

96. See generally the statutes.

97. *Lerum v. Geving*, 97 Minn. 269, 105 N. W. 967, explaining that what is said in that regard in *Swanson v. Mendenhall*, 89 Minn. 56, 82 N. W. 1093, was rather by way of emphasizing the fact that there had been no waiver, than as qualifying the rule.

98. *People v. Kuok Wah Choi*, 2 Idaho 90, 6 Pac. 112.

[a] **Rule Applied on Adjournment Before Jury Complete.**—So where the ordinary method was to examine and either accept or reject each juror swearing in those accepted and putting them in care of the proper officer, if the method be adopted of drawing twelve names before any are challenged, and there be a recess or adjournment, the peremptory challenges should be exercised or waived upon all who have been passed for cause, so those accepted may be sworn to try the cause, and may remain under the control of the court. *People v. Kuok Wah Choi*, 2 Idaho 90, 6 Pac. 112.

99. **Order of interposing challenges**, see *supra*, VII, E, 5, b.

1. **Colo.**—*Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. **Ind.**—*McDonald v. State*, 172 Ind. 393, 88 N. E. 673. **Md.**—*Rogers v. State*, 89 Md. 424, 43 Atl. 922. **Mass.**—*Com. v. White*, 208 Mass. 202, 94 N. E. 391; *Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391. **Pa.**—*Com. v. Marion*, 232 Pa. 413, 81 Atl. 423; *Com. v. Brown*, 23 Pa. Super. 470.

2. *McDonald v. State*, 172 Ind. 393, 88 N. E. 673.

[a] Since the statute gives defendant the absolute right to challenge the juror at any time before he is sworn,

the court cannot by any rule or order deprive him of that right. *State v. Pritchard*, 15 Nev. 74.

3. **Duty of court to define order**, see *supra*, VII, E, 5, b, (II).

4. *Drake v. State*, 51 Ala. 30.

[a] **Common-Law Practice.**—Under the ancient practice after the clerk announced to the prisoner that the good men now called and appearing are to pass on his life and death, he further admonished him to challenge them before they were sworn. The jury are then told to look upon the prisoner and are severally sworn. As soon as the oath was begun by the juror taking the book it becomes too late to challenge. *State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398, citing *Hale's Pleas of the Crown*, p. 293, and other authorities.

[b] **The ancient formula in use both in England and this country is** "Those men that you shall have called and personally appear are to pass between our sovereign (or the state) and you upon your trial of life and death; if therefore you will challenge them or any of them, your time is to speak to them as they come to the book to be sworn and before they are sworn." *State v. Davis*, 80 N. C. 412.

5. **Ga.**—*Williams v. State*, 60 Ga. 367, 27 Am. Rep. 412. **Minn.**—*State v. Armstrong*, 25 Minn. 29. **N. J.**—See *State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398. **N. Y.**—*People v. Carpenter*, 36 Hun 315, 16 Abb. N. C. 128, 3 N. Y. Crim. 92.

[a] **Good Practice But Not Necessary.**—Substituting the words *State of Alabama* for the reference to the sovereign it is good practice to use the

in some jurisdictions, by express provision of statute.⁶ Where the practice requires it the court should not neglect the duty,⁷ but it is not reversible error to fail to do so unless prejudice appears;⁸ and there is none where the right of challenge was exercised fully.⁹ If defendant is not represented by counsel, it is reversible error to fail to call the matter to his attention;¹⁰ but there can be no prejudice where defendant is represented by counsel.¹¹ The court's failure does not give the defendant any additional peremptories.¹² A mere conversation between court and counsel about the jurors is not a substantial compliance with statute.¹³ The statutes sometimes require the clerk to read over the names of the jurors in presence of parties and counsel, and counsel may then challenge.¹⁴

common-law form but it is not necessary. *Drake v. State*, 51 Ala. 30.

6. See generally the statutes.

[a] **Statutory Construction in Georgia.**—Penal Code, §999, reads: "On calling each juror, he shall be presented to the accused in such a manner that he can distinctly see him." This is "the ancient mode of commanding his attention to the personnel of the panel, and of warning him to exercise the right of challenge." *Cochran v. State*, 62 Ga. 731. This was "the common-law plan." *Williams v. State*, 60 Ga. 367, 27 Am. Rep. 412.

7. *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Mortier*, 58 Cal. 262.

8. *People v. Moore*, 103 Cal. 508, 37 Pac. 510; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Mortier*, 58 Cal. 262.

[a] **Prisoner Cannot Complain of Court's Effort To Cure the Omission.** The clerk not having informed prisoner of his right to challenge, the prisoner cannot complain of the court's action, taken on suggestion of the commonwealth's attorney, after the jury was selected but not sworn, in calling back the entire panel, and giving the prisoner an opportunity to challenge the array or any particular juror, after which the jury was again impaneled. *Hall v. Com.*, 89 Va. 171, 15 S. E. 517.

9. *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Mortier*, 58 Cal. 262.

[a] If the defendant was given the full benefit of his peremptory challenge he is not prejudiced by the court's

failure. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

[b] **Contradictory Statement in Record Disregarded.**—Where the minutes show that six persons were peremptorily challenged, by the defendant, and three by the people, a contradictory statement in the bill of exceptions that defendant did not challenge, will be disregarded. *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362.

10. *People v. Moore*, 103 Cal. 508, 37 Pac. 510.

[a] **Sufficient Where Prosecuting Attorney Gave the Warning.**—Where defendant was not represented by counsel and had refused to have one appointed for him, and the state's attorney said to him immediately before the swearing of individual jurors, "It is your challenge," he cannot complain of the failure of the court to inform him that if he intended to challenge an individual juror he must do so when he appeared and before he was sworn. *State v. Mead*, 27 S. D. 381, 131 N. W. 305.

11. *People v. Ellsworth*, 92 Cal. 594, 28 Pac. 604; *People v. O'Brien*, 88 Cal. 483, 26 Pac. 362; *People v. Mortier*, 58 Cal. 262.

12. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

13. *People v. Moore*, 103 Cal. 508, 37 Pac. 510.

14. N. C. Rev., §§1964, 2263.

[a] **Not Necessary in Absence of Statute.**—Though it may have once been the law it is not now the law that the panel must be all called over once in the prisoner's hearing before he enters upon his right of challenge. *State v. Hallback*, 40 S. C. 338, 18 S. E. 919, explaining *State v. Briggs*,

(II.) **Before Juror Sworn.**—The common law practice permitted the peremptory challenging of the juror at any time before he was sworn;¹⁵ and in many states, the absolute right to challenge peremptorily is allowed at any time before,¹⁶ but not after,¹⁷ the jury is sworn. Even after a general waiver of the right to challenge, the court may in its

27 S. C. 80, 2 S. E. 854, and *State v. Williams*, 2 Hill (S. C.) 381.

15. **Ala.**—*Murray v. State*, 48 Ala. 675. **Colo.**—*Moore v. People*, 31 Colo. 336, 73 Pac. 30; *Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. **Fla.**—*Bradham v. State*, 41 Fla. 541, 26 So. 730.

III.—*Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216. **Ind.**—*Jackson v. Pittsford*, 8 Blackf. 194; *Beauchamp v. State*, 6 Blackf. 299. **La.**—*State v. Durr*, 39 La. Ann. 751, 2 So. 546; *State v. Roland*, 38 La. Ann. 18. **Mass.**—*Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391. **N. Y.**—*People v. Carpenter*, 36 Hun 315, 16 Abb. N. C. 128, 3 N. Y. Crim. 92. **Pa.**—*Zell v. Com.*, 94 Pa. 258; *Com. v. Marra*, 8 Phila. 440. **Eng.**—*Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 87.

16. **Ala.**—*Murray v. State*, 48 Ala. 675. **Cal.**—*People v. Ah You*, 47 Cal. 121; *People v. Jenks*, 24 Cal. 11; *People v. Rodriguez*, 10 Cal. 50; *People v. Kohle*, 4 Cal. 198. **Fla.**—*Wolf v. State*, 73 So. 740; *Ellis v. State*, 25 Fla. 702, 6 So. 768; *Mann v. State*, 23 Fla. 610, 3 So. 207; *Barber v. State*, 13 Fla. 675. **Ia.**—*State v. Hunter*, 118 Iowa 686, 92 N. W. 872; *Spencer v. DeFrance*, 3 G. Gr. 216. **La.**—*State v. Wren*, 48 La. Ann. 803, 19 So. 745; *State v. Durr*, 39 La. Ann. 751, 2 So. 546; *State v. Roland*, 38 La. Ann. 18. **Md.**—*Rogers v. State*, 89 Md. 424, 43 Atl. 922. **Ohio.**—*Hooker v. State*, 4 Ohio 348. **Pa.**—*Com. v. Marion*, 232 Pa. 413, 81 Atl. 423, and cases there cited. **Vt.**—*State v. Spaulding*, 60 Vt. 228, 14 Atl. 769.

[a] **Absolute Until Challenges Exhausted.**—The right to challenge is absolute until the juror is sworn and no circumstances can interfere with this right so long as the number given by law is not exhausted. *Hendrick v. Com.*, 5 Leigh (32 Va.) 707.

[b] **Statute not prescribing any other time** and there being no court rule or order, nor any evidence of waiver the right exists until the jury is sworn. *Com. v. White*, 208 Mass. 202, 94 N. E. 391; *Sackett v. Ruder*, 152 Mass. 397, 25 N. E. 736, 9 L. R.

A. 391. *Compare Com. v. Rogers*, 7 Mete. (Mass.) 500, 41 Am. Dec. 458, and *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, where it is held the challenge must be before the court interrogates as to bias or prejudice.

[c] In *Com. v. Knapp*, 9 Pick (Mass.) 496, 20 Am. Dec. 491, it was held that the prisoner was entitled to challenge peremptorily after having examined the juror on voir dire although that examination disclosed no ground for challenge. For the manner of the juror's answer may "excite distrust in the mind of the prisoner."

[d] **Civil and Criminal Cases.**—(1) In civil cases it is a purely statutory right of which neither party can be deprived until the jury is sworn. *Ayres v. Hubbard*, 88 Mich. 155, 50 N. W. 111. See also *In re Hamper's Appeal*, 51 Mich. 71, 16 N. W. 236; *Hunter v. Parsons*, 22 Mich. 96. (2) In criminal cases it continues till jury is sworn. *People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Jhons v. People*, 25 Mich. 499.

[e] **Court Cannot Shorten Statutory Time.**—Where the statute gives the right to challenge until the juror is sworn, the trial court cannot shorten the time by announcing to defendant that he will be deemed to have accepted all the jurors then in the box if he passes his challenge. *State v. Pritchard*, 15 Nev. 74.

[f] **Not at Any Precise Point of Time Previous.**—"We are not aware of any system under which it is absolutely necessary that the right of challenge should be exercised at any precise point of time, before the jurors are sworn." *People v. Kohle*, 4 Cal. 198.

[g] **The trial is not entered upon,** nor the cause submitted to the jury, until the parties have elected the jurors, or some step has been taken in putting the case before them. Until that time the challenge should be allowed. *Spigener v. State*, 62 Ala. 383.

17. See *infra*, VII, E, 5, e, (IV).

discretion permit a party to exercise his right at any time before the jury is sworn provided the party is acting in good faith, and not with intent to gain advantage or delay the cause.¹⁸ But in other jurisdictions it is held that the right is not an open one at all times until the jury is sworn and irrespective of all else.¹⁹ Whether the challenge can be interposed after the clerk has started to administer the oath has caused some conflict of opinion.²⁰

(III.) **Before or After Acceptance.**—In the absence of a statutory regulation, the challenge has been permitted at any time before the juror is accepted,²¹ during the drawing of the jury.²² Peremptory challenges

18. *State v. Hunter*, 118 Iowa 686, 92 N. W. 872; *Spencer v. De France*, 3 G. Gr. (Iowa) 216; *Jhons v. People*, 25 Mich. 499.

19. *State v. Scott*, 41 Minn. 365, 43 N. W. 62.

[a] **Reasonable Opportunity Must Be Given.**—The spirit of the statute is complied with when a reasonable opportunity is given to challenge. *McDonald v. State*, 172 Ind. 393, 88 N. E. 673, overruling the earlier Indiana cases so far as they may be considered in conflict.

[b] **Jury Re-sworn To Try Special Issue.**—When the same jury after finding the prisoner guilty is charged to inquire into the fact of a previous conviction, even though they be again sworn on the prisoner's request, he is not entitled to again challenge peremptorily. *Reg. v. Key*, 3 C. & K. 371, 2 Den. C. C. 347, 15 Jur. 1065, 21 L. J. M. C. 35, T. & M. 623.

20. *Mayers v. Smith*, 121 Ill. 442, 15 N. E. 216.

[a] **Must Be Before Oath Is Commenced.**—*State v. Durr*, 39 La. Ann. 701, 2 So. 546; *State v. Roland*, 38 La. Ann. 18.

[b] **Distinction Based on Time of Swearing Jurors.**—Attention has been called to the fact that by the English practice each individual juror is sworn as soon as he has been examined and an opportunity given to challenge, while the practice in many states is to direct the juror to take his seat at the conclusion of his examination and the oath is later administered. Where this is the practice it has been held the peremptory challenge should be before he takes his seat. *Mayers v. Smith*, 121 Ill. 442, 15 N. E. 216.

[c] **Civil and Criminal Cases Distinguished in New Jersey.**—In civil cases the statute clearly gives the right

only "as their names are drawn from the box." *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67, 54 Atl. 527.

[d] In criminal cases, the statute relating to the time for interposing challenges (Laws, 1887, p. 132, c. 47) by its terms applies only to challenges for cause. This leaves peremptory challenges to be governed by the rule that requires challenge before oath commenced. *State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398.

[e] In *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218, the court refused to reverse where the trial judge had permitted the prosecution to challenge while the clerk was administering the oath, and after defendant's counsel had passed the juror for cause, and prosecution's challenge for cause had been overruled. The court distinguishes *State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398, as arising on a claim by the prisoner that his right to challenge had been curtailed. Both cases distinguish *Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67, 54 Atl. 527, as being a civil case.

[f] Where jurors are sworn separately challenge may be at any time "before the book has been tendered to the juror, or the formula of affirmation has been commenced." *Com. v. Marra*, 8 Phila. (Pa.) 440.

[g] **English Rule Challenge Must Be Made as the Jurors Come to the Book.**—As soon as oath is commenced it is too late, and that commencement is when the juror takes the book by direction of the proper officer. *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 87. It cannot be after the juror has taken the book but before he has kissed it. *Reg. v. Giorgetti*, 4 F. & F. 546.

21. *State v. Haines*, 36 S. C. 504, 15 S. E. 555.

22. **While the Panel Is Being Called.**

may be exercised after the juror has been tendered to the opposite party but before acceptance by him according to some authorities;²² but under some statutes, the challenge must be made before the juror is so tendered.²³ A practice has prevailed in some states of giving the prisoner a certain time after the panel is complete, in which to announce his peremptory challenges.²⁴ In some jurisdictions one may, of right, peremptorily challenge jurors after acceptance.²⁵ In other

Graves v. Hargan, 21 B. L. 404, 45 Atl. 152.

[d] In Civil Actions Before Jury Charged.—Either party to a civil action may claim the right to challenge before the jury are charged with the case, *Charleston v. Klumbach*, 2 Speers (S. C.) 418.

23. Ala.—*Daniels v. State*, 88 Ala. 230, 7 So. 327. See also *Murray v. State*, 48 Ala. 676. Cal.—*People v. Dolan*, 96 Cal. 315, 31 Pac. 107; *People v. McPart*, 48 Cal. 547. La.—*State v. Carnellus*, 118 La. 149, 12 So. 754; *State v. Durr*, 39 La. Ann. 751, 2 So. 546; *State v. Roland*, 38 La. Ann. 18. Pa.—*Commonwealth v. Hottig*, 16 Pa. Super. 355.

[e] Rule Applied Where Statute Permitted Acceptance in Panels of Four. *Reed's Ill. St.*, 1900, ch. 78, §§21 and 22, provides that in impaneling jurors in civil or criminal cases, they should be passed on and accepted in panels of four. Under this statute until both sides accept the panel of four, either side is permitted to challenge peremptorily a juror theretofore tendered to the other side. *People v. Gray*, 251 Ill. 431, 98 S. E. 208, *disapproving* *Mayers v. Smith*, 121 Ill. 442, 13 N. E. 216, as holding that after the acceptance neither party can challenge peremptorily as a matter of right.

[h] Before the Prisoner Has Spoken. The court may permit the state to exercise its right of peremptory challenge after having presented the juror to the prisoner but before the prisoner has spoken. *State v. Corley*, 43 S. C. 127, 20 S. E. 989; *State v. Haines*, 36 S. C. 404, 10 S. E. 322.

[c] After Passing Jury With Juror Included.—That the party has once passed the jury, including the juror afterward sought to be challenged, does not cut off his right to challenge at any time before the jury is sworn. *Silcox v. Long*, 78 Cal. 111, 50 Pac. 697.

[d] After Jurors Examined. Where a juror has been passed but not

sworn and defendant has challenged several jurors thereafter there is no prejudicial error in permitting the juror to be thereafter further examined by the people and challenged peremptorily. *People v. Dolan*, 96 Cal. 315, 31 Pac. 107.

[e] In a civil case after once expressing satisfaction with the jury, there is no error in permitting a party to exercise a peremptory, the jury being not yet complete. *Adams v. Olive*, 48 Ala. 551.

24. See generally the statutes, and *Stewart v. State*, 50 Miss. 587; *State v. Fuller*, 114 N. C. 885, 19 S. E. 797.

[a] Defendant having exhausted his peremptories, it was held reversible error to permit plaintiff to peremptorily challenge a juror after he had been passed and accepted. To do so gave plaintiff "a manifest advantage," since he could take a chance on defendant's challenging the juror, and then exclude him if he did not. *Dunn v. Wilmington & W. R. Co.*, 131 N. C. 446, 42 S. E. 862.

25. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[a] In computing the time Thanksgiving Day is not excluded, the statute respecting that day providing merely that it shall be considered a holiday the same as Sunday, as regards presenting for payment or acceptance commercial paper. *State v. Green*, 66 Mo. 631.

[b] Cutting Down Time Not Ex Post Facto.—Where by a former statute a defendant was entitled to have forty-eight hours in which to announce their challenges after the panel was complete, a statute cutting this time down to twenty-four hours is not unconstitutional as being ex post facto though passed after the crime was committed. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

26. Fla.—*Wolf v. State*, 73 So. 740. La.—*State v. Wren*, 48 La. Ann. 803, 19 So. 745. Md.—*Rogers v. State*, 89

jurisdictions the court may in its discretion permit the peremptory after acceptance,²⁷ but before the juror is sworn,²⁸ upon good cause being shown therefor.²⁹ Of course, in so permitting no discrimination

Md. 424, 43 Atl. 922. Mich.—*People v. Carrier*, 46 Mich. 442, 9 N. W. 487; *Jhous v. People*, 25 Mich. 429.

[a] **To Both Prosecution and Prisoner.**—Being given of right to the prisoner, should be the right of prosecution which has a less number. *Mann v. State*, 23 Fla. 610, 3 So. 207.

[b] Assuming that defendant by merely passing the juror has accepted him, he is not deprived of his right to peremptory challenge until the juror has been sworn. *State v. Spaulding*, 60 Vt. 228, 14 Atl. 769.

27. *United States v. Davis*, 103 Fed. 457 (reviewing at length the Tennessee cases and statutes); *Jones v. Vanzandt*, 2 McLean 611, 13 Fed. Cas. No. 7,502. Ark.—*Carr v. State*, 81 Ark. 589, 99 S. W. 831; *Allen v. State*, 70 Ark. 337, 68 S. W. 28. Cal.—*Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238; *People v. Montgomery*, 53 Cal. 576. Colo.—*Nicholson v. People*, 31 Colo. 53, 71 Pac. 377. Idaho. *State v. Cren*, 10 Idaho 88, 76 Pac. 1013. Ill.—*People v. Gray*, 251 Ill. 431, 96 N. E. 268; *Mayers v. Smith*, 121 Ill. 442, 15 N. E. 216; *People v. Joyce*, 154 Ill. App. 13. Ind.—*McDonald v. State*, 172 Ind. 393, 88 N. E. 673. N. D. *Comeford v. Morwood*, 34 N. D. 276, 158 N. W. 258. S. C.—*Cunow v. Phoenix Ins. Co.*, 46 S. C. 79, 24 S. E. 74.

[a] **Where Other Side Has Not Exhausted Peremptories.**—Discretionary with court to permit peremptory challenge after acceptance of juror, where other side has not exhausted its peremptory challenges. *Dewein v. State*, 114 Ark. 479, 170 S. W. 582; *McGough v. State*, 114 Ark. 391, 167 S. W. 837.

[b] **All Peremptories Exhausted But One.**—After acceptance of juror it was not error to permit the state to exercise its right of peremptory challenge on him, where it appears that defendant had exhausted all his peremptory challenges on one. *Dewein v. State*, 114 Ark. 477, 170 S. W. 582, *aff'd* *McGough v. State*, 114 Ark. 391, 167 S. W. 837; *Carr v. State*, 81 Ark. 589, 99 S. W. 831; *Allen v. State*, 70 Ark. 337, 68 S. W. 28.

[c] **For Reasons Occurring to Prosecution**

After Accepting.—Though a juror has been accepted the prosecution may challenge him peremptorily before the jury is sworn, "there occurring to the prosecution reasons for objecting to the juror not known to be existing when the juror was accepted. *Republic v. Kapua*, 11 Hawaii 125.

[d] **Not Reversible Error To Refuse.**—After jurors have been accepted by defendant and by state but before they are sworn it is not reversible error to refuse to permit defendant to exercise a peremptory. *State v. Cameron*, 2 Pin. (Wis.) 490, 2 Chandl. 172. See also *Comeford v. Morwood*, 34 N. D. 276, 158 N. W. 258.

[e] **Reversal Only for Abuse of Discretion.**—It is discretionary with the court to permit the challenge after acceptance by the other party and court's ruling will not be disturbed unless that discretion be abused. *State v. Pendarvis*, 88 S. C. 548, 71 S. E. 45.

28. See *supra*, VII, E, 5, c, (11).

[a] **Presumption That Juror Not Sworn.**—The record showing merely that the state was permitted to challenge after the juror was accepted, it will be presumed that the challenge was before the juror was sworn. *Daniels v. State*, 70 Ark. 84, 88 S. W. 844. Necessity for challenge before juror sworn, see *supra*, VII, E, 5, c, (11).

29. Ala.—*Andrews v. State*, 152 Ala. 16, 44 So. 626; *Cage v. State*, 151 Ala. 84, 44 So. 381. Idaho.—*State v. Cren*, 10 Idaho 88, 76 Pac. 1013, "the object of the court should be to get a fair and impartial jury." Ind.—*McDonald v. State*, 172 Ind. 393, 88 N. E. 673, the court recognizes that "new conditions" may arise calling for a relaxation of the rule.

[a] **Juror Passed Inadvertently.** The stenographer who was asking statutory questions passed juror who was at once accepted by defense. The solicitor general immediately announced that the stenographer had no power to accept and the court thereupon permitted the solicitor to reset the juror. *West v. State*, 79 Ga. 775, 4 S. E. 225.

[b] **In Pennsylvania There Is No**

must be shown as between the parties.³⁰ and it has been held reversible error to deny the right where the acceptance was clearly through inadvertence.³¹

In some states it is reversible error to permit the state to challenge over the defendant's objection after the juror has been passed by both sides,³² especially after the defendant's challenges are exhausted.³³

(IV.) After Jury Sworn.—The general rule is that the peremptory challenge cannot be made after the jury is sworn.³⁴ But some cases hold that it is discretionary with the court to permit a peremptory

Established Rule of General Application.—Rules of court, or the established practice in the different counties control. Under the act of 1901 when jurors are called singly the right must be exercised before each juror is sworn. Ordinarily there can be no peremptory challenge after acceptance, but unless some statute, rule of court or established custom forbids, the court may in its discretion permit peremptories after acceptance, where the cross-examination of the other party brings out some new fact. *Com. v. Marion*, 222 Pa. 413, 70 Atl. 807, *distinguishing Com. v. Evans*, 212 Pa. 369, 61 Atl. 989, where the court refused to permit a peremptory after juror was passed and accepted, on the ground that to do so would permit speculating on the chance that the other side might challenge for cause. But there was no further examination, the opposite party accepting the juror immediately upon his being passed for cause. See also *Com. v. Hettig*, 46 Pa. Super. 395, where the prosecution was allowed to challenge after passing the juror under a wrong impression as to his name, and before the defense had taken any initiative as to challenging or interrogating.

[c] **Presumed Court Had Some Good Reason.**—In the absence of some showing to the contrary it will be presumed that the trial court had some good reason for permitting a peremptory challenge after the jury had been accepted by both sides. *Curnow v. Phoenix Ins. Co.*, 46 S. C. 79, 24 S. E. 74.

30. *Cook v. State*, 85 Miss. 738, 38 So. 110.

[a] **If Permitted to State, Should Be to Defendant.**—Where the state has been accorded the privilege of peremptory challenge after the full panel has been rendered to defendant and

accepted, it was reversible error to then refuse to permit defendant to challenge peremptorily the juror who was chosen to fill the vacancy. *Cook v. State*, 85 Miss. 738, 38 So. 110.

31. *Clarke v. Goode*, 6 J. J. Marsh. (Ky.) 637.

[a] **Reversible Error To Refuse Where No Evidence of Trifling With Court.**—Without deciding whether the defendant had strictly any right to challenge after acceptance, and assuming it was a matter of discretion for the court, there being no evidence of any intent to trifle with the court or to take unfair advantage, it was an abuse of discretion to refuse to permit the peremptory where one of two counsel accepted the juror, but the other objected. *Clarke v. Goode*, 6 J. J. Marsh. (Ky.) 637.

32. *Sparks v. State*, 59 Ala. 82.

33. *Temple v. State* (Ark.), 189 S. W. 855, citing many Arkansas cases and stating that the rule as applied in many of them does not require the challenges to be exhausted.

34. *Cal.*—*People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969. *Fla.* *Mathis v. State*, 45 Fla. 46, 34 So. 287; *Bradham v. State*, 41 Fla. 541, 26 So. 730. *Nev.*—*State v. Hartly*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33. *N. D.*—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1603.

See also *supra*, VII, E, 5, e, (II).

[a] **Not After Selection in Capital Case.**—"It is well settled that, after the selection of a juror in a capital case, a peremptory challenge cannot be interposed and this whether the jury has been completed or not. . . . In a capital case each juror is impaneled as he is selected." *Black v. State*, 48 Tex. Crim. 63, 81 S. W. 302, *following Horbach v. State*, 43 Tex. 242. See also *State v. Ezell*, 41 Tex. 35.

challenge after the juror has been sworn,³⁵ for good cause shown;³⁶ but on the other hand, it has been held reversible error to permit it, in the face of an express objection.³⁷ The absolute right cannot be

35. *State v. Wren*, 48 La. Ann. 803, 19 So. 745; *State v. Roland*, 38 La. Ann. 18.

[a] Where the statute makes no other provision than that the challenge shall be taken before the juror is sworn, the court may permit it to be taken afterward. *State v. Pritchard*, 15 Nev. 74; *State v. Anderson*, 4 Nev. 265.

[b] **No Prejudice Where Substituted Juror Not Challenged.**—Where a juror was excused on accused's challenge after the jury was sworn, and no challenge was made as to the juror selected in his place, there can be no prejudicial error. *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

36. *Allen v. State*, 70 Ark. 337, 68 S. W. 28.

[a] **No Error To Refuse Where No Cause Shown.**—If the record fails to show any reason given for challenging a juror after he has been accepted and sworn, it fails to show any error in refusing to allow the challenge. *Allen v. State*, 70 Ark. 337, 68 S. W. 28.

[b] **Should Not Be Permitted Arbitrarily After Other's Peremptories Exhausted.**—Where the juror has been accepted and sworn the state should not be permitted to arbitrarily challenge him after defendant's challenges are exhausted. *Williams v. State*, 63 Ark. 327, 30 S. W. 709.

[c] **Permitted Where Conscientious Scruples Disclosed.**—The court did not act arbitrarily but its act was based on reason where it permitted the prosecution to peremptorily challenge a juror who after being taken on jury, disclosed he had conscientious scruples against capital punishment. *Brower v. State*, 71 Ark. 145, 78 S. W. 773.

[d] There is a conflict as to whether the statute providing court "for cause shown" may permit challenge to individual juror after he is sworn, is applicable to peremptory. The theory of one line of cases is that after jury-man has been sworn the right to challenge peremptorily has expired. *People v. Hughes*, 117 N. Y. 29, 32 N. E. 1105.

[e] The other theory is that the words "for cause" as used in the

section mean that it is not a matter of right but may be permitted in the exercise of a sound discretion. No set rule can be laid down for what might be an abuse of discretion in one case might be a fair exercise in another. So where the matter inquired into, though not developing ground for challenge for cause, was reasonably calculated to leave the juror in a position of hostility toward the prosecuting officer, it was proper to allow a peremptory especially where defendant had peremptories left. *People v. Durrant*, 116 Cal. 179, 48 Pac. 75; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *People v. Bennerly*, 87 Cal. 117, 25 Pac. 266; *People v. Montgomery*, 53 Cal. 576. And was the rule under the old practice act. *People v. Scoggins*, 37 Cal. 676; *People v. Jenks*, 24 Cal. 11; *People v. Reynolds*, 16 Cal. 128; *People v. Rodriguez*, 10 Cal. 50.

[f] But compare *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407, where the court says "If the court, after a juror has been sworn to try the case, can permit him to be challenged, without cause, the words 'for cause' should be stricken from the statute," citing *People v. Durrant*, 116 Cal. 179, 48 Pac. 75, as upholding that position.

For citation of statutes and application to challenge for cause, see *supra*, VII, E, 4, c.

[g] Defendant is entitled to his full number of strikes from a new jury list where he discovers after striking from the first list, and before the cause is submitted to the jury that persons thereon had served on the grand jury which brought in the bill. *Cobb v. State*, 45 Ga. 11.

37. *People v. Dolan*, 51 Mich. 610, 17 N. W. 78.

[a] **The Theory Is That the Right Is Purely Statutory.**—The statute provides that the first twelve persons who shall be approved, shall be sworn, and shall try the case. A jury so sworn cannot be set aside except by consent of the party. *Ayres v. Hubbard*, 88 Mich. 155, 40 N. W. 111.

[b] **Is Unnecessary Discharge With in Former Jeopardy Rule.**—The discharge, by the state, of a juror on

claimed after the jury have been sworn,³⁸ but an exception has been made to this rule where the jury is sworn in at the beginning of the term and is not sworn to try the particular case.³⁹ It is clearly too late after the case has been submitted to the jury, even though the party did not know until then of facts which would have induced the use of peremptory.⁴⁰

f. Form and Sufficiency.—The details as to the manner in which parties shall interpose their peremptory challenges is a matter within

peremptory challenge after the jury had been impaneled and sworn, but before testimony given, the prisoner objecting thereto, was an unnecessary discharge of the jury within the rule as to former jeopardy. *Gillespie v. State*, 168 Ind. 208, 80 N. E. 829.

38. Fla.—*Myers v. State*, 43 Fla. 599, 31 So. 273. La.—*State v. Durr*, 39 La. Ann. 751, 2 So. 546; *State v. Roland*, 38 La. Ann. 18. Mich.—*Ayres v. Hubbard*, 88 Mich. 155, 50 N. W. 144; *Thorp v. Denning*, 78 Mich. 124, 43 N. W. 1097. Pa.—*Dotterer v. Scott*, 22 Pa. Super. 553.

[a] **Not a Matter of Right But Discretionary.**—Permission to challenge after the juror is sworn is not a matter of right, but is wholly discretionary with the trial court. *State v. Pritchard*, 15 Nev. 74; *State v. Anderson*, 4 Nev. 265.

[b] **Even Where Juror Sworn Too Soon.**—After a juror has been accepted and sworn, even conceding that he was sworn too soon since the jury was not yet completed, defendant cannot peremptorily challenge him merely because he preferred to challenge him rather than the last juror examined. *Hawkins v. United States*, 116 Fed. 569, 53 C. C. A. 663.

39. *Sackett v. Ruden*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

[a] **Civil and Criminal Cases Distinguished.**—In civil cases the panel is divided into juries of twelve and the whole sworn. In criminal cases the jurors are called, sworn and impaneled anew in each case. So the practice has grown up, there being no statutory or court rule, of permitting challenges in civil cases at any time, "before anything else has been done." And by analogy the same rule applies to bystanders called to replace jurors on the regular panel. In criminal cases as soon as the prisoner is called to the bar, the clerk informs him of his right to challenge peremptorily any juror

after he is called but before he is sworn. *Sackett v. Ruden*, 152 Mass. 397, 25 N. E. 736, 9 L. R. A. 391.

[b] **Where Jury Sworn Generally at Beginning of Term.**—The fact that in cases not capital the jurors for the week are sworn generally at the commencement of the week does not take away the right to challenge at any time before the jury is accepted. *Spigener v. State*, 62 Ala. 383.

40. *Kurtz v. State*, 145 Ind. 119, 42 N. E. 1102, juror disclosed matters on opening statement. *Compare Peoria, D. & E. Ry. Co. v. Puckett*, 52 Ill. App. 222, where it was said to be reversible error for the court to permit it against the objection of the other party, and after the opening statement, "without good cause shown."

[a] The reason that swearing the juror is held to determine the election is that the administration of the oath is the commencement of the trial—the submission of the issue to the jury. *Spigener v. State*, 62 Ala. 383.

[b] **Though Matter Would Have Been Sufficient Ground for Challenge for Cause.**—After the entire jury has been accepted and sworn and the prosecution has opened, it is too late to peremptorily challenge a juror though the defendant states he has learned that the juror had expressed an opinion as to defendant's guilt or innocence. Had such a request been made after juror sworn but before the jury was completed the court would have been authorized under the statute to permit the challenge. *Hawkins v. United States*, 116 Fed. 569, 53 C. C. A. 663.

[c] **New Trial Not Granted on Discovery After Verdict.**—The mere fact that something is discovered by the losing party after verdict, which, if known at the time of trial would have induced counsel to challenge the juror peremptorily, is not ground for a new trial where the juror has not

the discretion of the trial judge, and will not be reviewed in the absence of abuse.⁴¹ An order by counsel to the juror to stand aside is, in effect, a peremptory challenge though no judicial action was requested;⁴² but a mere exception to a statement of the court respecting the right to challenge, is not a challenge of the juror.⁴³ The statutes usually provide that the challenge may be oral;⁴⁴ but it is sometimes provided that the challenge shall be in writing addressed to the clerk.⁴⁵

g. *Number of Challenges Generally.*⁴⁶ — (I.) *In General.* — Originally at common law the prosecution could challenge peremptorily without limit,⁴⁷ while the prisoner had thirty-five challenges.⁴⁸ Later, however, the right of the prosecution was entirely abrogated.⁴⁹

Statutes now generally fix the number of peremptory challenges allowed in both civil and criminal cases;⁵⁰ and the statute in force at the time of the trial governs the number to be given, in the absence of a

by false answers or otherwise, misled the litigant to his prejudice. *Hern v. Southern Pac. Co.*, 29 Utah 127, 81 Pac. 902.

41. *Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823.

42. *Crider v. Lifsey*, 10 Heisk. (Tenn.) 456, it was properly treated by the court as a peremptory challenge.

43. *Fink v. United American Fire Ins. Co.*, 114 Minn. 177, 130 N. W. 944.

44. See generally the statutes.

45. See generally the statutes.

46. As affected by consolidation of actions, see *infra*, VII, E, 5, h.

As affected by consolidation of indictments, see *infra*, VII, E, 5, i.

Rights of joint parties in civil suits, see *infra*, VII, E, 5, j.

Rights where defendants are indicted or tried together, see *infra*, VII, E, 5, k.

47. U. S.—*Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 300, 30 L. ed. 378. Ga.—*Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641. Md.—*Turpin v. State*, 35 Md. 462. N. Y.—*Waterford, etc. Turnpike v. People*, 9 Barb. 161. S. C.—*State v. Barrontine*, 2 Nott & M. 553. Vt.—*State v. Ward*, 61 Vt. 153, 17 Atl. 183.

48. U. S.—*United States v. Hall*, 44 Fed. 883, 10 L. R. A. 323. Ga.—*Sealy v. State*, 1 Ga. 213, 44 Am. Dec. 641. Md.—*Turpin v. State*, 35 Md. 462. N. C.—*State v. Gwynn*, 1 N. C. 479, 2 N. E. 349. Pa.—*Comm. v. Brown*, 23 Pa. Super. 470; *Com. v. Hand*, 3 Phila. 403. S. C.—*State v. Allen*, 8 Rich. L. 448. Tex.—*Conley v. State*, 38 Tex. 646. Wis.—*Lamb v. State*, 3d Wis. 404.

[a] Common Law Changed From

Time to Time.—It was first 35, later 20, and still later 35 for high treason. See U. S.—*United States v. Shackelford*, 18 How. 588, 15 L. ed. 495. Ky.—*Montee v. Com.*, 3 J. J. Marsh. 132. R. I.—*Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. W. Va.—*State v. Miller*, 6 W. Va. 600.

[b] Common Law Number Proper Where No Statute.—“In the absence of a statutory charge made by congress we would still have the number of challenges provided by the common law.” *United States v. Hall*, 44 Fed. 883, 10 L. R. A. 323.

49. See *supra*, VII, C; VII, E, 5, a, (I).

50. See generally the statutes, and the following: Colo.—*Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072. Conn.—*State v. McGee*, 80 Conn. 614, 69 Atl. 1049; *State v. Neuner*, 49 Conn. 233. Fla.—*Mathis v. State*, 31 Fla. 291, 12 So. 681. Ill.—*North American Restaurant & O. House v. McElligott*, 227 Ill. 317, 81 N. E. 388; *Illinois, I. & M. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Schmidt v. Chicago & N. W. Ry. Co.*, 83 Ill. 405; *Kroer v. People*, 78 Ill. 294; *Chicago, R. I. & P. R. Co. v. Downey*, 85 Ill. App. 175. Ind.—*Snodgrass v. Hunt*, 15 Ind. 774; *Bouchamp v. State*, 6 Blackf. 399. Ia.—*State v. Carson*, 8 La. Ann. 109. Me.—*State v. Gearing*, 74 Me. 152. Md.—*Eugers v. State*, 89 Md. 474, 43 Atl. 922. Mass.—*Sackett v. Rider*, 150 Mass. 407, 25 N. E. 735, 9 L. R. A. 401; *Stone v. Segur*, 11 Allen 568. Mich.—*People v. Welmer*, 119 Mich.

saving clause.⁵¹ Though some of the early cases state that the tendency has been to enlarge and increase the number of peremptory challenges in criminal cases,⁵² the general policy of the law has been to

248, 68 N. W. 141; *Strah v. Hinchman*, 37 Mich. 400, Minn.—*Swanson v. Mendonhall*, 80 Minn. 56, 82 N. W. 1093. Miss.—*Smith v. State*, 57 Miss. 822. Mo.—*City of Milan v. Allen*, 175 S. W. 931; *State v. Stevenson*, 93 Mo. 91, 5 S. W. 810. Nev.—*State v. McClear*, 11 Nev. 39. N. J.—*Leary v. North Jersey St. R. Co.*, 69 N. J. L. 67, 54 Atl. 527. N. Y.—*Dawney v. Pinucane*, 205 N. Y. 271, 98 N. E. 101, *affirmed* 130 N. Y. Supp. 988; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *People v. Keating*, 61 Hun 260, 16 N. Y. Supp. 748, 10 N. Y. Crim. 48, 40 N. Y. St. 828. Ohio.—*Stevenson v. State*, 70 Ohio St. 11, 70 N. E. 510; *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476. Okla.—*Codman v. United States*, 14 Okla. 108, 76 Pac. 672. Pa. Com. v. *Marion*, 232 Pa. 413, 81 Atl. 422; *Com. v. Evans*, 212 Pa. 369, 61 Atl. 989; *McDermott v. Hoffman*, 70 Pa. 31. S. C.—*State v. Anderson*, 59 S. C. 229, 37 S. E. 820. Tenn.—*Foutch v. State*, 100 Tenn. 334, 45 S. W. 678; *Allen v. State*, 7 Coldw. 357. W. Va. *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006; *State v. Baltimore*, etc. R. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

[4] In Rhode Island the statute provides (1) that "Either party in a civil action, or in any criminal proceeding, may, . . . challenge . . . any qualified jurors called for the trial of said cause or proceeding, not exceeding one in four." Gen. Laws, ch. 291, §2. This statute is "unique," no similar statute is to be found in any other state. The maximum number allowable to either party is five, as jurors excused for cause are not to be considered in arriving at the number in proportion to which the number of peremptories is determined. Twelve jurors not subject to challenge for cause having been obtained either party may challenge three. Six jurors being then added each party has one more peremptory; and for the two then added, one more each. Twenty-two jurors will then have been called in all, and each party will have had five peremptories. This construction limits the number of peremptories while other

construction not only leaves the number unlimited but makes it depend upon and to increase without limit in proportion to the number of challenges for cause. *Stevens v. Union R. Co.*, 26 R. I. 90, 68 Atl. 492, 66 L. R. A. 465. (2) The effect of our statute is to put crimes of every degree and all civil cases upon the same footing. The excluded offenses were formerly all capital crimes. *State v. Sutton*, 10 R. I. 159.

[b] Giving state unfair advantage might be unconstitutional if it gave the state so many peremptory challenges as to make it very difficult to obtain a jury at all. *State v. Wilson*, 48 N. H. 398.

51. *Heike v. United States*, 192 Fed. 83, 112 C. C. A. 615; *Edmonson v. State* (Tex. Crim.), 44 S. W. 154.

[a] Effect of Saving Clause in Penal Code.—Where an offense was a misdemeanor at the time it was committed, but the grade of the offense was raised to a felony by the Penal Code which went into effect prior to the trial, defendant is only entitled to peremptories as for a misdemeanor, since the saving clause of the Penal Code provides that offenses committed prior to its taking effect shall be prosecuted in the same manner and under the same procedure as if the act had not been passed. *Heike v. United States*, 192 Fed. 83, 112 C. C. A. 615.

[b] What Law Governs as Affected by Enabling Act.—Under the Enabling Act providing that all cases then pending "shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that territory." A defendant's right to peremptories must be determined by the statute relative to the territory and not by that of the state. *Harris v. United States*, 4 Okla. Crim. 217, 111 Pac. 982.

No vested right in any particular number, see *infra*, this section.

52. *People v. Keating*, 61 Hun 260, 16 N. Y. Supp. 748, 10 N. Y. Crim. 48, 40 N. Y. St. 828 (reviewing the history of the practice); *Dull v. People*, 4 Denio (N. Y.) 91.

restrict and make definite the maximum number of peremptory challenges,⁵³ the tendency being to restrict the privileges of defendants and increase those of the prosecution,⁵⁴ so that the prosecution and the prisoner both have the same number.⁵⁵ Increasing the number allowed to the prosecution subsequent to the commission of the crime is not void as being *ex post facto* law;⁵⁶ nor is the right to any particular number in the nature of a vested right which cannot be taken away.⁵⁷ Though it has been said that where the statutes were conflicting it would not be supposed the legislature intended to be more unfavorable to defendants in criminal cases than to suitors in civil cases,⁵⁸ the fact that a statute does not give the state as many peremptories for a higher as for a lower grade of offense does not affect its validity.⁵⁹ Where a proceeding is not strictly criminal, one cannot complain because he is given only the number allowed as for a civil case.⁶⁰ Where the number to be given depends upon particular circumstances, it will be presumed, if a challenge was allowed that the circumstances warranting it were shown.⁶¹

(II.) Different Number in Different Localities or Courts. — In some jurisdictions, a different number of peremptories is given in some localities

53. *Stevens v. Union R. Co.*, 26 R. I. 99, 58 Atl. 492, 66 L. R. A. 465.

54. *Lorenz v. United States*, 24 App. Cas. (D. C.) 337.

55. See generally the statutes, and *Conn.—State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 83. *Idaho.—State v. Browne*, 4 Idaho 723, 44 Pac. 552. *N. Y.—People v. McQuade*, 110 N. Y. 284, 18 N. E. 159, 1 L. R. A. 273; *Waterford, etc. Turnpike v. People*, 9 Barb. 161.

[a] **Earlier Statute Construed.** Where one statute provided that "in all actions . . . each party shall have" three peremptories; and another gave "each party accused" twenty, it was held that the state had three and the accused twenty. *Wiley v. State*, 4 Blackf. (Ind.) 458.

56. *Ala.—South v. State*, 86 Ala. 617, 6 So. 52. *Conn.—State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, it is a mere mode of procedure. *Okl.—Harris v. United States*, 4 Okla. Crim. 317, 111 Pac. 982.

[a] **"New Matter" Within Revision Statute.**—A change in number is "new matter" within provision of statute providing for a revision of the laws by commissioners and it could be changed by a general act adopting the commissioners' report. *Mathis v. State*, 31 Fla. 291, 12 So. 681.

57. *State v. Smith*, 132 Iowa 645, 129 N. W. 115; *State v. Shreve*, 81

Iowa 615, 47 N. W. 899; *Edmonson v. State* (Tex. Crim.), 44 S. W. 154.

[a] "The granting or withholding of peremptory challenges is solely a matter of procedure." *Harris v. United States*, 4 Okla. Crim. 317, 111 Pac. 982.

[b] **It Is Not Interference With Right to Trial by Jury.**—*State v. Wyse*, 32 S. C. 45, 10 S. E. 612.

Generally as to which statute controls, see *supra*, this section.

Effect of statute abolishing capital punishment, see *infra*, VII, F, 5, g, (IV).

58. *Wiley v. State*, 4 Blackf. (Ind.) 458.

59. *Foutch v. State*, 100 Tenn. 334, 45 S. W. 678. That is a matter for the legislature and not for the court to cure.

60. See *Dorgan v. State*, 72 Ala. 173.

[a] In bastardy proceedings, there being no peremptories allowed by the statute the defendant cannot complain because allowed the number given in civil cases, since the proceeding is not strictly either a civil or a criminal case but is sui generis. *Dorgan v. State*, 72 Ala. 173. See also *Kremling v. Lallman*, 16 Neb. 280, 20 N. W. 382.

61. *Cable v. State*, 8 Blackf. (Ind.) 531.

than in others.⁶² Under such a statute, the *locus fori*, and not the *locus delicti*, governs.⁶³ Where the statute gives a different number in different courts, as is sometimes the case,⁶⁴ the number given in the court where tried governs though the case was transferred from another court.⁶⁵

(III.) **Determined by Grade of Offense.**—The statutes in most states determine the number according to the grade of the offense as being a felony or a misdemeanor.⁶⁶ Generally for a statutory crime not known at common law, the peremptories as for a misdemeanor should be given.⁶⁷ Where the statute does not define what is a misdemeanor and what is a felony, the common law distinction cannot be followed to determine the grade of the offense;⁶⁸ but if the offense has merely been denounced by its common law name, and it was a felony at common law, peremptories as for a felony should be allowed.⁶⁹ If the statute describ-

62. See generally the statutes, and *State v. May*, 168 Mo. 122, 67 S. W. 566.

[a] **Constitutional To Prescribe Different Number in Different Cities.** The power of the legislature to prescribe the number of peremptory challenges is limited only by the necessity of having an impartial jury. There is nothing in the fourteenth amendment to the federal constitution which forbids a different number being prescribed when the jury is drawn from cities differing in size. Such a provision is an aid to the procuring of impartial jurors, and so long as the statute operates equally upon all persons similarly situated it is valid. *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. ed. 578, affirming 88 Mo. 344.

63. *State v. May*, 168 Mo. 122, 67 S. W. 566, applied to state's challenges.

64. See generally the statutes.

65. *Grant v. State*, 89 Ga. 393, 15 S. E. 488, transferred from superior to county court.

66. See generally the statutes, and *State v. Davidson*, 71 Kan. 494, 80 Pac. 241; *State v. Cannon*, 72 N. J. L. 46, 60 Atl. 177; *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

[a] **Formerly rule (1) in Pennsylvania** (see *Shuster v. Com.*, 38 Pa. 206; *Com. v. Hand*, 3 Phila. 463), (2) and in Kentucky. See *Com. v. Bailey*, 7 J. J. Marsh. 246; *Montee v. Com.*, 3 J. J. Marsh. 132; *Hayden v. Com.*, 10 E. Mon. 185.

[b] **Effect of Rule.**—The fact that the statute limits the number of peremptories according to the offense

charged against him of itself would preclude putting defendant on trial for a crime other than that charged in the information. *People v. Comstock*, 55 Mich. 405, 21 N. W. 384.

67. *United States v. Daubner*, 17 Fed. 793, applied to making and presenting a false claim.

[a] **Breaking, or attempting to break, into a post-office** is purely a statutory and not a common-law crime, and is not one of the crimes known as felonies within the principles established in interpreting statutes using the term without further definition; it follows that defendant is only entitled to peremptories as for a misdemeanor. *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272, reviewing at length the rules for determining whether a crime is a felony or a misdemeanor.

68. *Keagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. ed. 709; *United States v. Coppersmith*, 4 Fed. 198, 2 Flipp. 546; *United States v. Daubner*, 17 Fed. 793.

[a] **Based on Abolishment of Forfeitures.**—The United States statutes not defining what is a misdemeanor, and what is a felony, it is needful to determine the line by other than the common-law distinction, which was any offense which worked forfeiture of lands, or goods, or both, since such forfeitures are abolished in most states. *Considine v. United States*, 112 Fed. 342, 50 C. C. A. 272.

69. *United States v. Coppersmith*, 4 Fed. 198, 2 Flipp. 546.

[a] Where a statute uses the word "rob" in its common-law sense, the defendant is entitled to challenges as

ing the offense states that the offender shall be "guilty of a misdemeanor," peremptories for a misdemeanor only can be given.⁷⁰

(IV.) **Determined by Punishment To Be Inflicted.**—The number is based directly on the punishment to be inflicted in some states.⁷¹ By the weight of authority, where the number of challenges is determinable by the penalty, the defendant is entitled to the number provided for under the maximum and not the minimum punishment prescribed for the crime charged.⁷² But it has been held that it is only where the maximum punishment is fixed by law, that the defendant is en-

for a felony, robbery being a felony at common law. *Harrison v. United States*, 163 U. S. 140, 16 Sup. Ct. 961, 41 L. ed. 104.

[b] **Counterfeiting and Passing Counterfeits Distinguished.**—Though counterfeiting was a felony at common law as being a species of treason, passing counterfeit money was only a misdemeanor. The statute not defining it as a felony, and the passing being provided with the same punishment, peremptories should be given as for a misdemeanor. *United States v. Copper-Smith*, 4 Fed. 128, 2 Filipp. 546.

70. *Tyler v. United States*, 106 Fed. 117, 45 C. C. A. 247; *Jowett v. United States*, 100 Fed. 832, 41 C. C. A. 88, 51 L. R. A. 108, contention was that penalty made the crime a felony.

[a] **Though Statutory Forfeiture Involved.**—Since smuggling is only a misdemeanor, the receiving and concealing of smuggled goods cannot be of a higher grade, and hence the accused is only entitled to peremptories as for a misdemeanor. Nor does the fact that smuggled goods are forfeited to the government change the rule. This forfeiture is not in the nature of the common-law forfeitures denoting felonies. *Reagan v. United States*, 157 U. S. 301, 15 Sup. Ct. 610, 39 L. ed. 709.

[b] **Defendant Indicted and Tried for Offense so Classified.**—A defendant who has been indicted for a crime, then charged as a misdemeanor, and who is tried for a misdemeanor, is only entitled to the number of challenges prescribed for misdemeanors. *Kharas v. United States*, 102 Fed. 503, 113 C. C. A. 109.

71. See generally the statutes, and *State v. Stevenson*, 93 Mo. 91, 8 S. W. 2d.

Generally as to the right to per-

emptory challenge based on nature of punishment, see *supra*, VII, E, 5, a, (1).

72. *Conn.*—*State v. McGee*, 80 Conn. 614, 69 Atl. 1059; *State v. Neuner*, 49 Conn. 232. *N. Y.*—*People v. Keating*, 61 Hun 260, 16 N. Y. Supp. 748, 10 N. Y. Crim. 43, 40 N. Y. St. 828. *Tenn.* *Allen v. State*, 7 Coldw. 357.

[a] **Applied to Second Offenders.** Where the defendant was indicted under the statute as a second offender and under the circumstances he might as such second offender be given a life sentence he is entitled to the number of peremptory challenges allowed where the punishment is imprisonment for life, though as a first offender if found guilty his punishment would have been for an indefinite number of years not less than three. *State v. Yandell*, 201 Mo. 646, 100 S. W. 466.

[b] Where the indictment charged a "second offense" and under the statute second offenses are punishable with imprisonment in the penitentiary defendant is entitled to ten peremptory challenges. *State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682.

[c] One put on trial under an information so framed as to permit the jury or court to fix his punishment at a greater term of years because of a former conviction, is entitled to the number based upon the greater punishment. *State v. Collins* (Mont.), 163 Pac. 102.

[d] **Applied to First Offense Where Second Punishable Capitally.**—Where one is on trial for a first offense the punishment for the second of which is death he is entitled to the same number as if being tried for the second offense since a conviction may affect his life. *State v. Humphreys*, 1 Overt. (Tenn.) 366, To same effect, see *Hooper v. State*, 5 Yerg. (Tenn.) 422.

titled to the maximum number,⁷³ and that if the statute fails to prescribe a maximum punishment,⁷⁴ or if the situation merely is that the court might impose the maximum punishment,⁷⁵ defendant is entitled to the lesser number only. Where capital punishment has been abolished, the right to the same number has sometimes been preserved by statute;⁷⁶ but where it has not been, the same number cannot be given.⁷⁷

(V.) **Statutes Fix for Specific Crimes.**—Some statutes name specific crimes and fix the number of challenges to be allowed in the trial thereof;⁷⁸ for crimes not specifically named the lesser number is allowed.⁷⁹

(VI.) **Determined by Indictment.**—Primarily the number depends upon the crime charged in the indictment;⁸⁰ but if the prosecution

73. *People v. Clough*, 59 Cal. 438, followed in *People v. Riley*, 65 Cal. 107, 3 Pac. 413.

74. *People v. Clough*, 59 Cal. 438, followed in *People v. Riley*, 65 Cal. 107, 3 Pac. 413.

75. *People v. Sullivan*, 132 Cal. 93, 64 Pac. 99; *People v. Logan*, 123 Cal. 414, 56 Pac. 56; *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040; *People v. Scott*, 24 Cal. App. 449, 141 Pac. 945.

[a] **Justice of the Rule Doubted.** The latter of these cases intimate that except for the fact that it has become settled law a different rule might be laid down. *People v. Sullivan*, 132 Cal. 93, 64 Pac. 99, followed in *People v. Scott*, 24 Cal. App. 449, 141 Pac. 945.

[b] **Rule Applied to Second Offenders.**—(1) The crime charged being burglary the accused is only entitled to the challenges for that offense, though the indictment also charges a prior offense making defendant liable for life imprisonment, which was the sentence in the case. *People v. Sullivan*, 132 Cal. 93, 64 Pac. 99. (2) Where on the conviction of a person for a second offense the only punishment which could be inflicted is life imprisonment, and the party is charged in the indictment with a second offense he should be given the full number of peremptories as for a life offense. *People v. O'Neil*, 61 Cal. 446; *People v. Harris*, 61 Cal. 136.

76. See generally the statutes, and *Schumaker v. State*, 5 Wis. 324.

77. *State v. Smith*, 67 Me. 328, the statute regulated the number by the grade of the offense.

[a] **Other Position Inconsistent.**—It being suggested that the statute abolishing capital punishment, having been passed subsequent to the crime of

which defendant was charged and that hence the number of challenges given for capital offenses should be allowed, the supreme court says that unless defendant was insisting that the death penalty be inflicted his position was inconsistent. He cannot repudiate one result and claim the other. *State v. Johnston*, 83 Wash. 1, 144 Pac. 944.

78. See generally the statutes, and *State v. Anderson*, 59 S. C. 229, 37 S. E. 820.

79. *State v. Workman*, 15 S. C. 540.

[a] **Though the Crime Be a Felony.** Larceny of live stock of a value which does not constitute grand larceny calls for the number of challenges allowed in "other cases," though the punishment prescribed for larcenies of live stock is imprisonment in the penitentiary. *State v. Anderson*, 59 S. C. 229, 37 S. E. 820.

[b] The offense of maliciously burning and destroying, in the nighttime, stacks of hay, grain, etc., is not "arson" within the statute though punishable by imprisonment in the penitentiary for life or for a period not less than ten years. *State v. Pope*, 9 S. C. 273.

80. *State v. Foley*, 144 Mo. 600, 46 S. W. 733; *State v. Talmage*, 107 Mo. 543, 17 S. W. 990.

[a] **Indictment Defective.**—The indictment though not in the most approved form was held to allow peremptories only as for manslaughter and not murder. Defendant was tried and convicted of manslaughter. *State v. Smith*, 78 Minn. 302, 81 N. W. 17.

[b] **Based on Indictment Not Conviction.**—Where indictment is for felony, rule is applied thereto though the conviction was of a misdemeanor only. *Smith v. State*, 57 Miss. 822.

elects to prosecute for a lower degree, the peremptories are those prescribed for that degree.⁸¹ On new trial after conviction of a lesser degree than charged in the indictment one is only entitled to peremptories as for that lesser degree where the rule forbids his trial for the higher;⁸² but the indictment still governs where the rule is that the new trial operates as if no former trial had been had.⁸³ Where the crime charged is a felony, the defendant is entitled to the number provided for felonies although the prisoner's status was such that he could not be confined in the penitentiary;⁸⁴ and where it cannot be told until after trial whether one will avail himself of his status, to lessen his punishment, his peremptories should be given him as for the greater punishment.⁸⁵

That there is more than one count in an indictment or more than one offense described therein, does not give defendant any additional⁸⁶

[c] **Verdict Does Not Cure Error in Giving Less Than Entitled.**—The challenges are determined by the indictment and not by the result of the trial. So the verdict of the jury commuting the punishment to life imprisonment does not cure the error of the court in not giving the prisoner the full number he was entitled to as being indicted for a capital offense. *Fowler v. State*, 8 Baxt. (Tenn.) 573.

81. *State v. Foley*, 144 Mo. 660, 46 S. W. 733; *State v. Talmage*, 107 Mo. 313, 17 S. W. 299.

[a] The solicitor having given notice beforehand that he would not ask for a capital verdict, and the court having instructed the jury that they could not return a verdict for murder in the first degree, the defendant was not "on trial for his life" within the statute and so was entitled to but four peremptories. *State v. Hunt*, 128 N. C. 281, 18 S. E. 473.

[b] **Though Jury Was Called To Try Higher Degree.**—One indicted for a capital offense is allowed only the lesser number where the prosecution, by leave of court, enters a nolle prosequi and tries for a lesser degree, although the jury which tries is selected from the panel summoned to try the higher offense. *Goins v. State*, 46 Ohio St. 457, 31 N. E. 476.

82. *Cal.*—*People v. Smith*, 124 Cal. 473, 66 Pac. 669, information for murder, on new trial after conviction of manslaughter has number for that crime only. *Id.*—*State v. Smith*, 122 Iowa 645, 109 N. W. 115, construing the words "the offense charged in the indictment" to mean no more than the

offense included in the indictment for the commission of which only the defendant could be put to trial. *Tenn.* *Featch v. State*, 100 Tenn. 334, 45 S. W. 678. *Tex.*—*Cheek v. State*, 4 Tex. App. 444.

83. *State v. Kessler*, 15 Utah 142, 49 Pac. 293, 62 Am. St. Rep. 911.

84. *State v. Davidson*, 71 Kan. 494, 80 Pac. 945, boy who could not be put in penitentiary entitled to same number of challenges as an adult charged with same crime.

85. *State v. Cadwell*, 46 N. C. 289.

[a] Where one was indicted for a "clergyable felony," since it cannot be told until asked what he has to say why sentence of death should not be pronounced against him, that he will plead his "benefit of clergy" he is "on trial for his life" within the meaning of the statute and entitled to the full number of challenges. *State v. Cadwell*, 46 N. C. 289.

86. *Cal.*—*People v. Howard*, 31 Cal. App. 378, 100 Pac. 697. *Conn.*—*State v. McGee*, 80 Conn. 614, 69 Atl. 1059. *D. C.*—*Miller v. United States*, 38 App. Cas. 331. *Kan.*—*State v. Skinner*, 54 Kan. 256, 8 Pac. 420. *Mass.*—*Com. v. Walsh*, 124 Mass. 32. *Tenn.*—*Smith v. State*, 8 Lea 380.

[a] **Purpose of Separate Counts as Showing Reason for Rule.**—The contention that defendant is entitled to additional peremptories because there are additional counts is "entirely without merit." The purpose of the separate counts is not to combine several trials for separate offenses in one trial but to prevent mistakes by so framing the pleading that, if the evidence justifies

challenges; but there is, however, some authority to the contrary.⁸⁷

(VII.) **Right Limited to Statutory Number.**—The defendant is not entitled to any more peremptories than the statute or rule specifically allows⁸⁸ and it is not error for the court to refuse to give any more.⁸⁹ Defendant is not entitled to the peremptory challenges which have been waived by the state.⁹⁰

(VIII.) **Duty of Court To Notify Party of Proper Number.**—It is not the duty of the court, without being asked, to notify the accused of the extent of his right to challenge peremptorily,⁹¹ nor is it proper procedure to move that defendant is entitled to a specified number, preliminary to drawing the names;⁹² but where the practice was in doubt the court should make a ruling on request.⁹³ An incorrect preliminary ruling by the court, is not reversible error where no objectionable juror is shown to have served.⁹⁴ It is the duty of the party and his

it, there may be a conviction of the precise crime committed. *People v. Howard*, 31 Cal. App. 358, 160 Pac. 697.

87. *People v. Sweeney*, 55 Mich. 586, 22 N. W. 50. The court suggests, among other reasons, that defendant cannot object to the joining in one information of counts charging assault with intent to kill and murder, and charging assault with intent to do great bodily harm less than the crime of murder, because "By the joinder of the counts he became entitled to the greatest number of challenges allowed by law, and a greater number than he would have been, had the information contained a single count for the crime of which he was convicted." He was convicted under the second count. Both offenses were felonies.

88. N. C.—*State v. Gayner*, 1 N. C. 470, 3 N. E. 143. R. I.—*Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. Tex.—*Waggoner v. Dodson*, 96 Tex. 6, 68 S. W. 813, 69 S. W. 933.

[a] The Word "Entitled," Is One of Limitation.—*Detroit, M. & T. S. L. R. Co. v. Kimball*, 211 Fed. 633, 128 C. C. A. 535.

[b] "Our statute provides no method of challenging jurors peremptorily in excess of the number provided by the section." *Thurman v. State*, 27 Neb. 625, 43 N. W. 494.

89. N. J.—*State v. Cannon*, 72 N. J. L. 43, 60 Atl. 177. N. C.—*State v. Hargrave*, 160 N. C. 384, 6 S. E. 185. Ohio.—*Martin v. State*, 16 Ohio 364. Pa.—*Pugh v. Ely*, 45 Pa. 444. Tenn.

Crider v. Lifsey, 10 Heisk. 456. Tex. *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468. Vt.—*State v. Shaw*, 73 Vt. 149, 50 Atl. 863.

90. *Epps v. State*, 2 Ga. App. 153, 58 S. E. 381, the contention is "utterly without merit."

91. *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 132.

Generally as to announcing right to prisoner, see *supra*, VII, E, 5, c, (I).

Generally as to duty to define order of interposing, see *supra*, VII, E, 5, b, (II).

92. *Clarke v. State*, 87 Ala. 71, 6 So. 368.

93. *Cumming v. State*, 99 Ga. 662, 27 S. E. 177; *Cruce v. State*, 59 Ga. 83. See *Miller v. United States*, 38 App. Cas. (D. C.) 361, wherein the court refused to determine whether it was reversible error to decline to rule, and reversed on other grounds.

94. *Pearce v. United States*, 192 Fed. 561, 113 C. C. A. 33.

[a] Court ruled defendant was entitled to more, but only gave correct number. So no juror sat whom defendant might have challenged peremptorily. The mere fact that defendant might have exercised his peremptories in a different manner had he not been misled by the court's erroneous ruling, gives him no cause to complain. The rule that challenge is a right to reject, not select, applies. *State v. Jacob*, 26 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

Waiver of right to particular number by failing to object to court's ruling thereon, see *supra*, VII, E, 5, d.

counsel, and not of the clerk, to keep track of the peremptories.⁹⁵

h. *Consolidation of Civil Actions.*—Where civil cases have been consolidated and tried together to save the court's time, the causes being distinct and requiring separate verdicts, the peremptories should be allowed as in separate trials.⁹⁶ But where the consolidation was under a statute which contemplated that it should proceed as the trial of one action, only one set of challenges is allowed to each party.⁹⁷ In statutory proceedings brought conjunctively against a number of persons they are to be treated as one defendant;⁹⁸ but where proceedings are carried on virtually as a separate suit against each they are each entitled to the statutory number.⁹⁹ Where a joinder has worked no change in a statutory liability, but it remains several and not joint, each party is entitled to the full number.¹

i. *Consolidation of Indictments.*²—Where indictments are consolidated, they become in effect separate counts in the same indictment and only one set of challenges is given,³ and this rule applies where consolidation is of indictments against several defendants, as well as of

95. *Miller v. State*, 36 Tex. Crim. 47, 35 S. W. 391, reversal cannot be had on the ground that the clerk misled them as to the number of challenges. It further appeared that the clerk's mistake was corrected by the judge, some time before defendant's challenges were exhausted.

96. *Connecticut Mut. Life Ins. Co. v. Hillman*, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446; *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 709; *Butler v. News & Courier Co.*, 148 Fed. 821, 78 C. C. A. 511; *Times Pub. Co. v. Carlisle*, 94 Fed. 762, 36 C. C. A. 475.

[a] *No Prejudice Where Judgment Arrested.*—Where two joint actions were consolidated by order of the trial court, the defendant in one of them having had the benefit of his peremptory challenges cannot complain of the court's refusal to permit a challenge in the other case in which judgment was arrested and verdict set aside. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 177.

97. *Fidelity-Phoenix Fire Ins. Co. v. Friedman*, 117 Ark. 71, 174 S. W. 215, construing Act May 11, 1905, and Kirby's Dig. § 4328.

98. *Gordon v. Chicago*, 201 Ill. 623, 60 N. E. 823, applied in appeal from confirmation of a special assessment.

[a] *Rule in Condemnation Proceedings.*—The statute giving "every party interested in the ascertaining of compensation," the same right of chal-

lenge as in other civil actions, does not entitle each party to the full number of peremptory challenges. *Illinois, I & M. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444.

99. *Illinois, I. & M. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444, distinguishing the case at bar from *Fitzpatrick v. Joliet*, 87 Ill. 58. See also *Gordon v. Chicago*, 201 Ill. 623, 66 N. E. 823.

1. *Cornell-Andrews Smelting Co. v. Boston & P. R. Corp.*, 202 Mass. 385, 89 N. E. 118, wherein two petitioners had commenced separate suits against two defendants for damages for abolition of a grade crossing; the suits were tried together for convenience.

2. *Separate counts in indictment as affecting number generally*, see *supra*, VII, B. 5, g. (VI).

3. *Kettenbach v. United States*, 202 Fed. 377, 120 C. C. A. 505; *Kharas v. United States*, 192 Fed. 600, 118 C. C. A. 109; *Krause v. United States*, 147 Fed. 442, 78 C. C. A. 642. But see *State v. McNeill*, 93 N. C. 552, when the defendant's right was not questioned.

[a] *Distinguishing Cases Where Could Not Have Been Separate Counts.*

The rule that on the consolidation for trial of several indictments the defendant is entitled to the full number of peremptories for each indictment, does not apply where the indictments might have been separate counts of one indictment. *Miller v. United States*,

several against one.⁴ Where there was no consolidation and the trial though before one jury was in effect a separate trial of each indictment with separate verdicts and cumulative sentences the full number should be given for each indictment.⁵

j. Joint Parties in Civil Suits. — (I.) In General. — Under some statutes only one set of challenges is given to each side though there are several parties on either side.⁶ Such statutes make no exceptions.⁷ If the court, in its discretion, has ordered trials to proceed without separation, plaintiffs are only entitled to one set of peremptories,⁸ as

38 App. Cas. (D. C.) 361, *distinguishing* Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706, and Betts v. United States, 132 Fed. 228, 65 C. C. A. 452.

[b] Defendant's Chances of Satisfactory Jury Are the Same. — It is suggested that the only effect of combining is to give one trial instead of two and that the defendant is as likely to get a satisfactory juror in one trial with only one set of challenges as he is two satisfactory juries in two trials with two sets. United State v. Groesbeck, 4 Utah 487, 11 Pac. 542. See also United States v. Bromley, 4 Utah 498, 11 Pac. 619.

[c] Where Made at Defendant's Request for Purpose of Trial. — The consolidation having been made at defendant's request he cannot complain. Nor does the fact that his motion for consolidation was "for the purpose of trial" change the rule. The impaneling of the jury, including the peremptory challenges, is only an incident of the trial. Kharas v. United States, 192 Fed. 508, 113 C. C. A. 109.

4. Emanuel v. United States, 196 Fed. 317, 116 C. C. A. 137.

5. Betts v. United States, 132 Fed. 228, 65 C. C. A. 452, *explaining* Mutual Life Co. v. Hillmon, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. ed. 706, as not laying down a different rule and distinguishing what is said apparently to the contrary in Connecticut Mut. Life Ins. Co. v. Hillmon, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446, as being only an admission for the sake of the argument.

6. See generally the statutes, and Ia. — Chealand v. Atkinson, 94 Iowa 621, 63 N. W. 465. Minn. — R. L., 1905, §4170. Mo. — Rev. St., 1909, §17281, 7507; Clark v. St. Louis, etc. Co., 234 Mo. 326, 137 S. W. 588; Rees v. Chicago, B. & Q. Ry. Co., 156

Mo. App. 52, 135 S. W. 981; Hunt v. Missouri R. Co., 14 Mo. App. 160. N. M. — St., 1915, §4194, "Three jurors and no more, whether the plaintiffs or defendants shall be single or joined. Wash. — Rem. & Bal. Code, §324.

[a] The Statute Is Not Unconstitutional as Denying Persons Equal Protection of the Laws. — The same rule applies to all the parties when united with others, either as plaintiffs or defendants. Muller v. Hale, 138 Cal. 163, 71 Pac. 81.

7. Waters-Pierce Oil Co. v. Burrows, 77 Ark. 74, 96 S. W. 336, applies to joint tort feasons.

[a] Even Where There Were Thousands of Defendants. — In a special proceeding for the condemnation of land and assessment of benefits where there were thirteen thousand persons named as defendants, no complaint can be made of the ruling of the court that all must join. The statute under which the proceedings were had contained no provisions as to peremptories. Hence if defendants were entitled to any it was under the general statute which is absolute as to the provisions that the defendants must join. Newell v. Loeb, 77 Wash. 182, 137 Pac. 811. See also Manhattan Building Co. v. Seattle, 52 Wash. 226, 100 Pac. 330.

[b] Not Error To Permit Three Sets Where Practically Three Parties. — In a will contest where part of the contestants joined with the petitioners in attacking the legitimacy of one claiming to be an heir, there is no error in permitting the petitioners, the contestants and the claimant each to strike three. Flowers v. Flowers, 74 Ark. 212, 85 S. W. 242.

8. San Luis Obispo v. Simas, 1 Cal. App. 115, 81 Pac. 972, *followed* in Hodges v. Southern Pac. Co., 3 Cal. App. 397, 86 Pac. 620.

are defendants whose interests are antagonistic.⁹ In some states, though the parties are ordinarily required to join in challenge, the court may permit a severance.¹⁰

(II.) Language of Statute as Determining Rights.—In civil cases, special and unequivocal language must be used to give parties the right to sever in their challenges.¹¹ In the absence of direct provision of the statute, the question turns largely upon the construction of the general provisions of the statutes conferring peremptories.¹² These statutes by the use of the word "party" do not intend "person,"¹³ but it is used in the sense of "side."¹⁴ So where several persons bring a joint action, it is held under most statutes that they have but one set of challenges;¹⁵ and where several defendants are sued together, the number allowed by the statute is not allowed to each defendant, but is to all the defendants collectively according to many authorities,¹⁶ it being distinctly

9. *Waters-Pierce Oil Co. v. Burrows*, 77 Ark. 74, 96 S. W. 326.

[a] The right to challenge peremptorily in civil cases being purely statutory the legislature may impose the condition that it be exercised jointly. *Crandall v. Puget Sound Traction, etc. Co.*, 77 Wash. 37, 137 Pac. 319; *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823.

10. See generally the statutes, and *Nev.—Rev. Laws*, 1910, §3205. *N. C. Rev.*, §1965. *Wyo.—Comp. Laws*, 1910, §4405.

11. *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.

[a] The mere fact that the legislature could have easily indicated whether the challenges were to be exercised jointly or severally does not affect the question when the statute is in fact equivocal. *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.

[b] "Joining Clause" Omitted Does Not Confer Right To Sever.—In view of the actual law before that time, that the use of the term "each party" did not give each person who was a party the full number of peremptory challenges, the mere fact that the legislature has omitted a clause compelling defendants to join in their challenges does not indicate a legislative intent that they need not join. *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.

12. *Downey v. Flavanne*, 205 N. Y. 311, 80 N. E. 391, affirming 130 N. Y. Supp. 555, cases from other jurisdictions are only relevant where statutes cited similar in phraseology to our own, that

is to say, where a given number of peremptory challenges is allowed to each party.

13. *Hargrave v. Vaughn*, 82 Tex. 347, 18 S. W. 695.

14. *N. H.—State v. Reed*, 47 N. H. 466. *Ohio.—Moore & Co. v. Bricklayers' Union*, 10 Ohio Dec. (Reprint) 665, 23 Cine. L. Bul. 48; *Gram v. Sampson*, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666. *E. I.—State v. Sutton*, 10 R. I. 159. *Tenn.—Bruce v. Beall*, 100 Tenn. 573, 47 S. W. 204.

[a] Where the statute reads "each party," this means plaintiff or defendant without regard to number. *Blackburn v. Hays*, 4 Coldw. (Tenn.) 227.

[b] Under a statute reading "each party plaintiff and defendant shall be entitled to six . . . and no more," each side is entitled to six peremptory challenges irrespective of the number of parties. *Schwing v. Dunlap*, 130 La. 198, 58 So. 160.

15. *Ind.—Snodgrass v. Hunt*, 15 Ind. 274, statute read "each party." *Ky. Molodsky v. McGee*, 4 J. J. Marsh. 267, followed in *Cumberland Tel. & Tel. Co. v. Ware's Admx.*, 115 Ky. 581, 74 S. W. 289. *N. C.—Bryan v. Harrison*, 76 N. C. 260. *Ohio.—Moore & Co. v. Bricklayers' Union*, 10 Ohio Dec. (Reprint) 665, 23 Cine. L. Bul. 48; *Gram v. Sampson*, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666.

[a] Though defendants may be entitled to more, the plaintiffs having elected to bring their action against joint defendants, are limited to one set. *Hundhausen v. Atkins*, 30 Wis. 518.

16. *Ala.—Babb v. Reid*, 3 Ala. 88.

held that the rule to be applied to defendants in civil cases is not analogous to that applied to defendants jointly indicted,¹⁷ and that the rule requiring the statute to be so construed as to give the full number unless a contrary intent appears does not apply in civil suits.¹⁸ On the other hand, the words "each party may challenge" has been construed to give each of joint defendants the full number of challenges,¹⁹ and it is held that to deny defendants whose interests are adverse in civil actions, the full number as is allowed to joint defendants in criminal cases, merely on the distinction between the word "party" and "person" is too narrow.²⁰

(III.) Nature of Defense as Determining Rights. — Where the defenses are essentially different,²¹ and especially where they are hostile²² to each

Ill.—North American Restaurant & O. House v. McElligott, 227 Ill. 317, 81 N. E. 188; Illinois, L. & M. R. Co. v. Freeman, 219 Ill. 279, 71 N. E. 444; Gordon v. Chicago, 291 Ill. 623, 66 N. E. 829. Ind.—Sandigraas v. Hunt, 15 Ind. 274. Ky.—Sodousky v. McGee, 4 J. J. Marsh. 297. N. C.—Bryan v. Harrison, 76 N. C. 360. Ohio.—Moores & Co. v. Bricklayers' Union, 10 Ohio Dec. Reprint 663, 23 Ohio L. Bul. 48; Gram v. Sampson, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666.

[a] The purpose of the statute is to guard against prejudice relating to the subject-matter of the suit rather than against personal dislike or hatred of individuals. Stone v. Segur, 11 Allen (Mass.) 568.

[b] Even Where Defenses Are Conflicting.—Under a statute providing that "each party litigant in civil actions" shall have three peremptories, and another statute providing that eighteen names shall be drawn from the box, "from which plaintiff and defendant may each strike three;" where there are three defendants one of them is not entitled to three peremptory challenges notwithstanding his defense is "in conflict with and unfriendly to," that of his co-defendants. Cumberland Tel. & Tel. Co. v. Ware's Admx., 115 Ky. 581, 74 S. W. 289.

[c] In an action under the statute for damages through the sale of liquor to one who became intoxicated, the defendants though numerous, who are sued in a joint action are but one party and are entitled to no more peremptories than any single defendant. Mulley v. Warrall, 15 Neb. 44, 24 N. W. 429.

17. Wiggins v. State, 1 Lea (Tenn.)

738; Blackburn v. Hays, 4 Coldw. (Tenn.) 227.

[a] The Language of the Two Statutes Is Different.—In civil suits it is "each party," but in criminal prosecutions it reads "the state and the defendant shall each be entitled." Blackburn v. Hays, 4 Coldw. (Tenn.) 227.

[b] "Party" and "Every Party Arraigned" Distinguished.—Schmidt v. Chicago & N. W. Ry. Co., 83 Ill. 405.

18. Gram v. Sampson, 4 Ohio Cir. Ct. 490, 2 Ohio Cir. Dec. 666. See also Bixbee v. State, 6 Ohio 86, the rule is based on the rule that the common law is not to be altered. But there were no peremptories in civil cases at common law.

19. Stroh v. Hinchman, 37 Mich. 490.

20. Hundhausen v. Atkins, 36 Wis. 518.

21. Hundhausen v. Atkins, 36 Wis. 518.

[a] Where the interests of defendants are several they must be considered separately as parties to the suit, and are each entitled to the full number of challenges. Levyn v. Koppin, 183 Mich. 232, 149 N. W. 993.

22. Stroh v. Hinchman, 37 Mich. 490 (any other rule would lead to absurd results); Hundhausen v. Atkins, 36 Wis. 518.

[a] If parties defendant are only nominally so and are in fact hostile to each other they are entitled to the full number of challenges each, being "parties litigant" within the meaning of the statute. Mullery v. Great Northern Ry. Co., 50 Mont. 408, 148 Pac. 323, followed in Chenoweth v. Great Northern Ry. Co., 50 Mont. 481, 148 Pac. 330.

[b] Where there is no identity of interest between the defendants, and

other, and plead unrelated and independent defenses.²³ defendants are each entitled to the same number of challenges, though they may have a common ground of defense against plaintiff.²⁴ If the parties are not hostile to each other, they must join in their challenges, however.²⁵ So if defendants make no adverse claim, the one against the

the issues are not the same between them and plaintiff, or if the defendants claim adversely to each other, and their interests would be affected by the finding of the jury, each defendant is entitled to the full number. *Rogers v. Armstrong Co.* (Tex. Civ. App.), 30 S. W. 848.

[c] Where several carriers were jointly sued for damages on contract of carriage and each claimed that it was free from negligence and that the loss if any was chargeable to the other, their interests would become antagonistic, should plaintiff establish loss and hence each was entitled to the full number of peremptories. *Missouri Pac. Ry. Co. v. Cheek* (Tex. Civ. App.), 159 S. W. 427.

[d] Where under a contract of carriage, each of two carriers was liable only for damage to the goods carried which occurred on its line, there are in reality two causes of action, and it is to the interest of each defendant to make it appear so far as possible that the damage was done on the line of the other. Hence they are not one party and each is entitled to the full number. *Texas, etc. R. Co. v. Staff* (Tex. Civ. App.), 61 S. W. 980.

23. *Healer v. Luskman*, 94 Kan. 594, 149 Pac. 1172, they are not strictly "united in interest" though they are sued for a joint tort. See also *State v. Durein*, 29 Kan. 688.

[e] Each defendant who pleads separately by different counsel is entitled to the full number of challenges. *Stroh v. Hinckman*, 37 Mich. 400.

[h] General Issue Plead by Each Defendant.—Where all the defendants are not liable to the same extent, or for the same reason, or in the same manner, the plea of the general issue obviously means, or may mean, something different and those having appeared by different counsel and put in a separate plea are each entitled to the full number of peremptories. *Yonson v. May*, 186 Mich. 201, 152 N. W. 1031.

24. *First Nat. Bank v. San Antonio*, 40 R. Co., 27 Tex. 201, 77 S. W. 410.

Hogsett v. Northern Texas Traction Co., 55 Tex. Civ. App. 72, 118 S. W. 807.

[a] Where one defendant impleaded his co-defendant upon his warranty of title and prayed judgment against him and the co-defendant denied liability on the ground that he had recovered no consideration for the land, and, in the main issue the defendants were both interested in defeating plaintiff and it was to their interest to make common cause, while the plaintiff had no direct concern with the controversy between defendants, if he should be successful, that controversy would have to be decided, and the defendants were entitled each to the full number of challenges. *Waggoner v. Dodson*, 96 Tex. 6, 168 S. W. 813, 69 S. W. 993.

[b] Though there may not have been any real contest between two defendants as to the liability of one on his warranty of title to the other, such other having plead such warranty, and he having plead the general issue, there was an adverse issue entitling each to his full number of peremptories. *Hannay v. Harmon* (Tex. Civ. App.), 137 S. W. 406.

25. *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 431, 148 Pac. 330; *Mullery v. Great Northern Ry. Co.*, 50 Mont. 408, 148 Pac. 323.

[a] Intervener and a defendant were held to constitute but one party and so entitled only to joint challenge where their interests were not adverse. *Bruce v. First Nat. Bank*, 25 Tex. Civ. App. 295, 60 S. W. 1006; *Baum v. Sanger* (Tex. Civ. App.), 49 S. W. 659.

[b] Interveners and plaintiff were making a common fight against defendant, and there was no controversy between them, the intervener is not entitled to separate challenges. *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 237, 28 S. W. 1027.

[c] Attaching creditors, in a trial of the right of property, are identified with each other, and together form but

other,²⁴ or if their liability depends upon the same facts,²⁵ and they join in their defense,²⁶ or could set up their defense in one answer,²⁶ they cannot each have the full number.

one party with no antagonism of interest between them and so must join in challenge. *Raby v. Frank*, 12 Tex. Civ. App. 123, 34 S. W. 777.

26. *Mullery v. Great Northern Ry. Co.*, 30 Mont. 408, 148 Pac. 323; *Galveston, etc. Ry. Co. v. Saunders* (Tex. Civ. App.), 141 S. W. 829; *St. Louis, etc. R. Co. v. Barnes* (Tex. Civ. App.), 72 S. W. 1041.

[a] **Plea in Abatement by One.—No Issue Thereon by Others.**—That one defendant made a plea in abatement which if sustained would throw the whole burden on the other defendants does not entitle each to the full number where the other defendants did not deny the plea in abatement nor raise any issue with him. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772.

[b] **Though Extent of Liability Not the Same.**—So where a druggist and his clerk were jointly sued for injuries growing out of a mistake in putting up a prescription, and the fact to be proved is the same, but there is no adverse claim made by either defendant against the other, though the extent of liability of one may be greater than the other, they must join in challenges. *Hargrave v. Vaughn*, 82 Tex. 347, 18 S. W. 605.

[c] **Success of Either Would Benefit Other.**—Where neither defendant sought to obtain judgment against the other, nor to assist plaintiff in his recovery against the other, and the success of either would inure in some degree to the benefit of the other, their interests are so nearly identical as to constitute them but one party in the sense of the jury law. *Jones v. Ford*, 60 Tex. 127.

27. *Hargrave v. Vaughn*, 82 Tex. 347, 18 S. W. 605; *Rogers v. Armstrong* (Tex. Civ. App.), 20 S. W. 848.

28. *Hall v. Hargadine-McKittrick Dry-Goods Co.*, 23 Tex. Civ. App. 149, 55 S. W. 747.

[a] **Either by One Answer or by Several Settling Up One Defense.** When several defendants in a civil action join in their defense, or, severing in their answers, set out but one defense, common to them all, they constitute one party limited to the statu-

tory number given to a "party." *Hundhausen v. Atkins*, 36 Wis. 518.

[b] Where defendants are making common cause against plaintiff as is shown by the pleadings and facts they are to all intents and purposes one party and only entitled to joint challenge. *Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

[c] Where defendants had a common interest, their answers were substantially identical, and the defense was conducted in the common interest of all, they were entitled only to peremptory challenges collectively, "whatever might be the rule if different defenses, possibly antagonistic to one another, had been interposed." *Downey v. Finucane*, 205 N. Y. 251, 98 N. E. 391, affirming 139 N. Y. Supp. 988. See also *Lane v. Fenn*, 120 N. Y. Supp. 237.

[d] **Making Common Fight by One Counsel.**—Where parties are jointly sued, are making a common fight against plaintiff, being represented by the same counsel, and their interests are in no respect antagonistic to each other they constitute but one party and are entitled only to exercise their challenges jointly. *St. Louis, etc. R. Co. v. Barnes* (Tex. Civ. App.), 72 S. W. 1041. See also, *Galveston, etc. Ry. Co. v. Saunders* (Tex. Civ. App.), 141 S. W. 829.

[e] Where two street railway companies and a city were joined as defendants in an action for personal injuries growing out of an alleged nuisance maintained by the manner in which the track was kept, and it appeared one company having sold the track to the other, had ceased any control over it before the accident, and neither company pleaded over as against each other, or the city, but joined in a common answer, the two companies were not each entitled to the full number of peremptories. *Citizens Ry. & Light Co. v. Johns*, 52 Tex. Civ. App. 489, 116 S. W. 62.

29. *Hundhausen v. Atkins*, 36 Wis. 518, they should not be permitted to gain any advantage by separate pleadings.

(IV.) **Waiver of Right To Sever.**—Claim of right to sever challenges must be made when the peremptories are first called for or the right is waived;³⁰ and it is waived by a defendant who permits his co-defendant to exhaust the challenges without offering to challenge in his turn.³¹

(V.) **Exercise of Challenge.**—Where parties are entitled to sever in their challenges the court may permit them to consult and act together;³² but whether they will be permitted to do so is a matter of the trial court's discretion,³³ and is not reviewable in the absence of abuse.³⁴ It has been suggested that in case of disagreement as to the exercise of joint challenges, the court should apportion them between the defendants on request;³⁵ but where the statute requires them to join, the proper practice is to overrule the peremptory if they refuse to join.³⁶

k. *Defendants Tried or Indicted Jointly.*—(1.) **In Absence of Direct Statute.**—(A.) **IN GENERAL.**—At the common law each defendant tried jointly with others was personally entitled to the full number of peremptory challenges,³⁷ and this is clearly the rule in the absence of stat-

30. *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 481, 148 Pac. 330.

31. *Chenoweth v. Great Northern Ry. Co.*, 50 Mont. 481, 148 Pac. 330, plaintiff and codefendant alternated.

32. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 97 Tex. 291, 77 S. W. 410.

[a] There is no statute forbidding the parties and their counsel from consulting together as to how they will exercise their challenges. *City of San Antonio v. Reed* (Tex. Civ. App.), 192 S. W. 549; *First Nat. Bank v. San Antonio, etc. R. Co.*, 97 Tex. 291, 77 S. W. 410.

33. *Citizens' Ry. & Light Co. v. Johns*, 52 Tex. Civ. App. 489, 116 S. W. 62.

34. *Citizens' Ry. & Light Co. v. Johns*, 52 Tex. Civ. App. 489, 116 S. W. 62.

[a] Assuming that the trial court committed error in ruling that appellant's attorneys could not consult with attorneys of a codefendant, no reversible error is presented by the assignments, where the bill of exceptions fails to show that any juror sat on the jury who was in any wise objectionable to appellant. It must appear that some juror who sat would have been stricken off if the attorneys had been permitted to consult. *Citizens' Ry. & Light Co. v. Johns*, 52 Tex. Civ. App. 489, 116 S. W. 62.

35. *Kelly-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1927.

[a] **Not Reversible Error To Refuse, No Prejudice Appearing.**—Whether joint defendants are entitled each to a proportionate share of the challenges, but must settle how the challenges are to be exercised between them is a matter upon which the court said it was "unable to reach a satisfactory conclusion," but suggested it was the best rule to divide them, though in the case at bar substantial justice having been done, and the bill not clearly showing any prejudice, the court refused to reverse merely because the trial court had refused to so divide them. *Bruce v. First Nat. Bank*, 25 Tex. Civ. App. 295, 60 S. W. 1006.

36. *Muller v. Hale*, 138 Cal. 163, 71 Pac. 81; *People v. McCalla*, 8 Cal. 301; *Colfax Nat. Bank v. Davis*, 50 Wash. 92, 96 Pac. 823.

37. **U. S.**—*United States v. Marchant*, 12 Wheat. 480, 6 L. ed. 700; *United States v. Hall*, 44 Fed. 883, 10 L. R. A. 323; *United States v. White*, 4 Mason 158, 28 Fed. Cas. No. 16,682. **Ariz.**—*Booth v. Territory*, 9 Ariz. 204, 80 Pac. 334. **Ga.**—*Cruce v. State*, 39 Ga. 83, citing 2 Hale's Pl. 268; *Bacon's Abr. Juries* 9, and other common law authorities. **Kan.**—*State v. Durcin*, 29 Kan. 688. **Mich.**—*People v. Carmo*, 170 Mich. 137, 135 N. W. 968, Ann. Cas. 1914A, 857. **Miss.**—*Smith v. State*, 57 Miss. 822. **R. I.**—*Contra, State v. Sutton*, 10 R. I. 150, citing *Charwick's Case*, 3 Salk. 81, 91 Eng. Reprint 704. **Vt.**—*State v. Stoughton*, 51 Vt. 3

utory regulation,"³⁸ and the statutes conferring peremptories have frequently been construed as contemplating that joint defendants will each have the full number of challenges.³⁹ Aside from the strict wording of the statute it has been said that it is necessary in order to give full scope and effect to the reasons for peremptory challenge, that it be regarded and enforced as the personal right of each defendant,⁴⁰ and that since the judgments may be different each defendant should have the full number.⁴¹ Some statutes have been construed to give only the

38. U. S.—United States v. Marchant, 12 Wheat. 480, 6 L. ed. 700; United States v. Hall, 44 Fed. 883, 10 L. R. A. 223; United States v. White, 4 Mason 478, 28 Fed. Cas. No. 16,682. Ia.—State v. Wolf, 112 Iowa 458, 84 N. W. 110. Ky.—Sodousky v. McGee, 4 J. J. Marsh. 267.

[a] It is "ill practice" to permit severance of challenges. Reg. v. Fisher, 3 Cox C. C. (Eng.) 68.

[b] Criminal Cases Follow a Rule the Exact Opposite of Civil.—Defendants are presumed to be entitled each to the full number of challenges. An explicit provision that they must join is necessary. Mullery v. Great Northern R. Co., 50 Mont. 408, 148 Pac. 323.

39. See the following: Ala.—Brister v. State, 26 Ala. 107; Hawkins v. State, 9 Ala. 137, 44 Am. Dec. 431. Colo.—Carpenter v. People, 31 Colo. 284, 72 Pac. 1072. Fla.—Savage v. State, 18 Fla. 909. Ga.—Cummings v. State, 99 Ga. 662, 27 S. E. 177; Butler v. State, 92 Ga. 601, 19 S. E. 51; Cruce v. State, 59 Ga. 83; Nobles v. State, 12 Ga. App. 355, 77 S. E. 184. Ill.—Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Schmidt v. Chicago & N. W. Ry. Co., 83 Ill. 497; Maton v. People, 15 Ill. 536. Kan.—State v. Stokley, 88 Kan. 381, 128 Pac. 189; State v. Dreany, 65 Kan. 292, 69 Pac. 162; State v. Durein, 29 Kan. 688. La.—State v. Gauthreaux, 134 La. 620, 61 So. 680; State v. West, 120 La. 747, 45 So. 794; State v. Caron, 118 La. 349, 42 So. 960; State v. Earle, 24 La. Ann. 28, 13 Am. St. Rep. 109; State v. McLean, 21 La. Ann. 546; State v. Cazeau, 8 La. Ann. 109. Mich.—People v. Caruso, 170 Mich. 137, 135 N. W. 968, Ann. Cas. 1914A, 857; People v. Welmer, 110 Mich. 248, 68 N. W. 141. Miss.—Smith v. State, 57 Miss. 822. Ohio.—Hixbee v. State, 6 Ohio 86. Vt.—State v. Noyes, 50 Vt. 247, 40 Atl. 249;

State v. Fournier, 68 Vt. 262, 35 Atl. 178; State v. Stoughton, 51 Vt. 362. Wis.—Washington v. State, 17 Wis. 147, use of words "every person" so shows.

[a] Under a statute reading "the prosecuting officer and the defendant shall each be entitled," etc., defendants prosecuted jointly are each entitled to the full number of challenges. Shoedler v. State, 3 Wis. 823.

[b] Right Absolute on Joint Trial in Absence of Waiver.—After a review of various authorities the court reversed for failure to allow the full number to each defendant, saying "In our opinion the great weight of authority, both English and American, is to the effect that in criminal cases each defendant is entitled to his separate peremptory challenges, and, in the absence of any express waiver, that right is in no way abridged or affected by a joint trial." People v. Caruso, 170 Mich. 137, 135 N. W. 968, Ann. Cas. 1914A, 857.

[c] Conversely Defendants Are Not Entitled To Sever.—It has never been the rule that because the prisoners were compelled to, or desired to, challenge separately, they were entitled to a separate trial. United States v. Marchant, 12 Wheat. (U. S.) 480, 6 L. ed. 700.

40. State v. Durein, 29 Kan. 688, recognizing theory that right is based on personal dislike or prejudice of defendant.

[a] The theory of those cases which uphold separate challenges is "that no man ought to sit as a juror, upon a joint trial, who was not in the estimation of all the prisoners indifferent as to all." Hawkins v. State, 9 Ala. 137, 44 Am. Dec. 431.

41. Wiggins v. State, 1 Lea (Tenn.) 738; Hill v. State, 2 Yerg. (Tenn.) 246, statute reading "the state and the defendant shall each be entitled."

full number to the defendants jointly.⁴² Where the right to the challenge itself depends upon a statute, some cases hold that unless the statute expressly, or by reasonable construction, permits it, defendants jointly indicted are not permitted more than the full number of challenges jointly.⁴³

(B.) JOINT OR SEVERAL OFFENSE. — If the offense be such that one might be convicted and the other might be acquitted, each of joint defendants is entitled to the full number.⁴⁴ On the other hand if the acquittal of one must work the acquittal of all they are entitled only to the number jointly.⁴⁵

(C.) SEVERANCE IN TRIAL, OR RIGHT THEREOF. — By some authorities the question turns upon whether the defendants have an absolute right to sever, in which case one line of authorities considers the right to separate challenges absolute,⁴⁶ while other courts hold that though the parties could not have a separate trial they are each entitled to the full number.⁴⁷ In other jurisdictions, if the court desires to avoid the inconvenience of separate challenges, it must order separate trials,⁴⁸ and it is merely an added reason for giving each the full number of challenges that the defendants were refused a severance on demand,⁴⁹ and their election to be sued jointly does not affect their right to each have the full number.⁵⁰ But other authorities hold that unless defendants exercise their right to sever they consent to the joint trial and hence

42. See the following: *Me.*—*State v. Cady*, 80 Me. 413, 14 Atl. 940. *N. J.* *State v. Rachman*, 68 N. J. L. 420, 53 Atl. 1036. See *State v. Moore*, 75 N. J. L. 619, 68 Atl. 165; *State v. MacQueen*, 69 N. J. L. 522, 55 Atl. 1006; *Montell v. State*, 53 N. J. L. 498, 22 Atl. 50. *B. I.*—*State v. Ballou*, 20 R. I. 607, 40 Atl. 861; *State v. Sutton*, 10 R. I. 179. *Utah.*—*People v. O'Loughlin*, 3 Utah 173, 1 Pac. 673.

43. *State v. Cady*, 80 Me. 413, 14 Atl. 940; *Nobles v. State*, 12 Ga. App. 355, 77 S. E. 184, discussing the right to misdemeanor cases.

44. *Distinction Made Between Capital Cases and Others.*—"Where two or more are jointly indicted for a capital offense, each one is entitled to the full number of challenges allowed by law." *State v. Doolittle*, 58 N. H. 92. See also *State v. Hunt*, 47 N. H. 466, which turns upon the fact that the statute reads "Every person arraigned and put on trial for any offense," etc.

45. In all cases not capital the defendants however numerous are only allowed the number collectively since the statute reads "the respondent" and not "a respondent," nor "every respondent," nor "every person." *State v. Hunt*, 47 N. H. 466.

44. *Nobles v. State*, 12 Ga. App. 355, 77 S. E. 184 (says this has always been the rule in this state), citing *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1; *Cumming v. State*, 99 Ga. 663, 27 S. E. 177; *Cruce v. State*, 59 Ga. 83, and distinguishing *Hawkins v. State*, 13 Ga. 322, 58 Am. Dec. 517, as having been a prosecution for an affray where the acquittal of one would be the acquittal of all.

45. *Cruce v. State*, 59 Ga. 83, indictment for affray.

46. *Nobles v. State*, 12 Ga. App. 355, 77 S. E. 184, the court draws attention to the rule that persons indicted for misdemeanors as well as for felonies may sever without permission.

47. *People v. Welmar*, 110 Mich. 248, 68 N. W. 141, trial for misdemeanor.

48. *Solouchy v. McGee*, 4 J. J. Marsh. (Ky.) 267.

49. *State v. Stokley*, 88 Kan. 381, 128 Pac. 183, following *State v. Durbin*, 39 Kan. 428.

50. *Hill v. State*, 2 Yerg. (Tenn.) 246, the effect of their election was only to prevent one from excepting to the exclusion of a juror by the other.

have but one set of challenges;⁵¹ and that if the court in his discretion orders a joint trial the presumption is that the defendants' interests are alike and joint challenges sufficient.⁵² Other courts hold that where defendants might sever on demand they are not entitled to each have the full number.⁵³ On separation after trial commenced it is proper to charge against the remaining defendant the peremptories already used in selecting the jury.⁵⁴

(D) **PROSECUTION'S RIGHTS.**—The general rule is that the state having elected to prosecute the defendants jointly is not entitled to any additional peremptories.⁵⁵ But it has also been held that the state's power to require a joint trial does not affect its right to have the same number of challenges as the defendants together,⁵⁶ and that the state may compel the defendants to join in their challenges by demanding a severance if they will not stipulate to do so.⁵⁷ The prosecution is sometimes allowed the same number as all the defendants together,⁵⁸ or its

51. Ia.—*State v. Wolf*, 112 Iowa 478, 84 N. W. 546. Me.—*State v. Cady*, 80 Me. 413, 14 Atl. 940. Utah.—*People v. O'Loughlin*, 3 Utah 133, 1 Pac. 651.

[a] **Cannot Complain Because Forced To Take Juror.**—Joint defendants having failed to demand separate trials cannot complain if the effect of the statute is to compel one to take a juror, to whom he objects, when his co-defendant will not join in the challenge. *People v. McCalla*, 8 Cal. 301.

52. *State v. Cady*, 80 Me. 413, 14 Atl. 940.

[a] **The Trial Court Will Protect Interests.**—The defendants claimed that to compel them to be tried jointly instead of severally would interfere with their right to challenge, but the court says all the law designs is to secure "unexceptionable jurors, and this it would secure to him, whether tried apart or together with the others jointly accused." *State v. Smith*, 24 N. C. 402.

[b] That the prisoner is not prejudiced by the court in its discretion in refusing to grant a separate trial, in that he was deprived of his statutory right to a separate challenge, see *State v. Ballou*, 20 R. I. 607, 40 Atl. 861.

53. *Booth v. Territory*, 9 Ariz. 204, 86 Pac. 224.

[a] **Sufficient Reason To Change Common Law, But Statute Controls.** At common law, joint defendants could not, as a matter of right, demand separate trials while under our statutes they can. This is of itself a sufficient reason for holding a different rule as

to the exercise of the peremptory challenges, from that of the common law. But the court places its ruling that defendants must join upon a construction of the statutes. *Booth v. Territory*, 9 Ariz. 204, 80 Pac. 224.

54. *Glass v. Com.*, 16 Ky. L. Rep. 108, 26 S. W. 811, separation was granted on other party's request.

55. Kan.—*State v. Dreany*, 65 Kan. 292, 69 Pac. 182. Mo.—*State v. Chadbourne*, 74 Mo. 506. N. J.—*State v. Rachman*, 68 N. J. L. 120, 53 Atl. 1046. Wis.—*Shoeffler v. State*, 3 Wis. 823.

[a] **The state is not multiplied with the defendants**, and having elected to indict and try the parties together, the state cannot claim beyond the fair meaning of the language. *Wiggins v. State*, 1 Lea (Tenn.) 738.

[b] **Prosecutor Cannot Gain Right by Increasing Defendants.**—It is reversible error to permit the prosecution to have the same number as joint defendants. The prosecutor "cannot be permitted to multiply his challenges ad libitum, by increasing the number of defendants." *Shoeffler v. State*, 3 Wis. 823.

56. *State v. Noakes*, 70 Vt. 247, 40 Atl. 249.

57. *State v. Stoughton*, 51 Vt. 362.

58. Colo.—*Carpenter v. People*, 31 Colo. 284, 72 Pac. 1072. Ill.—*Spies v. People*, 102 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320, construing a statute reading "The attorney prosecuting on behalf of the people shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to."

allowance proportionately increased where it is not given the same number in the first instance,⁵⁹ while under other statutes the prosecution's number is not increased.⁶⁰

(II.) **Direct Statutory Provisions.**—The statutes in some states specifically provide for additional challenges or the division of the peremptories between joint defendants.⁶¹ Where the statute by its terms only gives the full number to each defendant, the state is not entitled to an equal number;⁶² but some statutes give additional peremptories proportionate to the number given defendant.⁶³ The statutes in many states specifically provide that joint defendants tried together must join in their challenges.⁶⁴ These statutes are not unconstitutional as depriving prisoners of an impartial jury,⁶⁵ and though broad enough in terms to require joint challenge for cause, in practice apply only to peremptories;⁶⁶

Vt.—*State v. Noakes*, 70 Vt. 247, 40 Atl. 249, *followed* in *State v. Marsh*, 70 Vt. 288, 40 Atl. 836.

[a] Where the statute gave the state one-third the number allowed to the respondent, it was properly permitted to challenge up to one-third the number given to all the respondents. *State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

59. *State v. Gauthreaux*, 134 La. 690, 64 So. 680, construing Act No. 135 of 1898, §114, as not repealing former statutes, under which the state is entitled to six peremptories for each defendant on trial who is given twelve peremptories, *following* *State v. Caron*, 118 La. 349, 42 So. 960; *State v. West*, 120 La. 747, 45 So. 594. That rule was same under former statute, see *State v. Whigmore*, 10 La. Ann. 919, 3 So. 119; *State v. Green*, 33 La. Ann. 1408.

60. See the following: Fla.—*Savage v. State*, 18 Fla. 909. Kan.—*State v. Deane*, 65 Kan. 292, 60 Pac. 182, approved in *State v. Stokley*, 88 Kan. 261, 109 Pac. 189. La.—*State v. Earle*, 24 La. Ann. 38, 13 Am. St. Rep. 109.

61. See generally the statutes, and *Haw*—Rev. Laws, §1702. Neb.—Rev. St., 1907, §2113. Ohio.—Gen. Code, 1906, §14,955. Tenn.—Shannon's Code, 1898, §14,955. Wyo.—Comp. Laws, 1910, §3065.

[b] **Counting Fraction.**—Where the statute gives each of two defendants half the number allowed to one, a fractional number should be counted as a whole number. *Gregg v. State*, 109 Ala. 44, 17 So. 321. So where one defendant was entitled to twenty-one, each defendant should be given eleven, not ten.

[b] After defendants have jointly

availed themselves of the provisions of the act of congress, one of them cannot then make individual challenges under the statute of the territory. *People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653.

62. *Mahan v. State*, 10 Ohio 232.

63. See generally the statutes, and *Tenn.*—Shannon's Code, §5826. *Tex.* Code Crim. Proc., art. 672. *Wis.*—St., 1898, §4690. *Wyo.*—Comp. Laws, 1910, §6205.

64. See generally the statutes, and *U. S.*—*Wilcox v. United States*, 161 Fed. 109, 88 C. C. A. 273; *United States v. Hall*, 44 Fed. 883, 10 L. R. A. 323. *Idaho.*—*United States v. Alexander*, 2 Idaho 386, 17 Pac. 746. *Mo.*—Rev. St., 1909, §5224; *State v. Diple*, 242 Mo. 461, 147 S. W. 111. *N. Y.*—*People v. Thayer*, 1 Park. Crim. 595. *Okla.*—*Cochran v. United States*, 14 Okla. 108, 76 Pac. 672.

[a] **Repealing Statute and Civil Statute Construed Together.**—A statute clearly requiring defendants to join in their challenges having been repealed; Code, §5364, providing that the right should be exercised in the same manner in criminal as in civil cases, and §5678, providing that where no separate trial is allowed the several parties in civil suits must join in the challenge, must be read together and indicate an intention that in joint criminal trials the challenges are limited to the number which a single defendant might exercise. *State v. Wolf*, 112 Iowa 448, 84 N. W. 536.

65. *United States v. Hall*, 41 Fed. 883, 10 L. R. A. 323.

66. *Booth v. Territory*, 9 Ariz. 204,

they apply to trials of misdemeanors and felonies alike.⁶⁷

(III) *Exercise of Right.* — Where defendants are entitled to separate challenges, the challenge of counsel will be considered a joint challenge unless it be announced for which defendant it is made.⁶⁸ The order of procedure is fixed by the court under some statutes, if the defendants cannot agree.⁶⁹ Defendants entitled to the full number of challenges each, are not compelled to raise the question in a preliminary form, in order to preserve their rights.⁷⁰ Where joint defendants do not waive their right, the state is allowed its number based upon the assumption that they intend to take their full number.⁷¹

1. *Restoration of Challenges, Etc.* — If the challenge to the array be sustained, the peremptory challenges used in discharging jurors from the improperly summoned panel are restored,⁷² as are they upon the discharge of the jury because of a mistrial arising through the excusing of one of the jurors,⁷³ provided the privilege is demanded.⁷⁴ But where the court under the statute simply excuses a single juror and retains the others, the peremptories are not restored.⁷⁵ Nor has the de-

60. Pac. 354; *People v. McCalla*, 8 Cal. 301.

67. *Lorenz v. United States*, 24 App. Cas. (D. C.) 337, the clause though part of a sentence referring to misdemeanors, and separated from the rest of that sentence by a semi-colon, is not intended to apply the rule only to misdemeanor cases.

68. *Rex v. Tin Ah Chin*, 3 Hawaii 90. But see *Washington v. State*, 17 Wis. 147.

69. See generally the statutes.

70. *People v. Caruso*, 170 Mich. 137, 135 N. W. 968, Ann. Cas. 1914A, 857, they need not intimate that they intend to challenge separately. Only an express waiver will affect their rights.

71. *Butler v. State*, 92 Ga. 601, 19 S. E. 51, statute gave state one-half number allowed prisoner.

72. *McDonald v. People*, 25 Ill. App. 259.

Curing error in overruling challenge to panel by allowing jurors to remain and accepting restoration of peremptories, see *supra*, VII, E, 3, d. (IV).

73. See the cases cited *infra*, this note.

[a] Where a juror is excused for cause arising before the taking of evidence has commenced, but after the jury were sworn in chief, while the remaining jurymen may be re-tendered, the defendant is entitled to all his peremptory challenges, the same as if there had been no prior empanelment. *West v. State*, 42 Fla. 244, 28 So. 430.

[b] *Where Juror Discharged Because Ill.*—Under the English practice where a juror becomes sick, the entire jury is discharged and a new one impaneled. All peremptories are thereupon restored. And the same rule applies under the statute where the trial court orders the whole jury discharged. *State v. Hasledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150.

[c] *On Continuance After Regular Panel Exhausted.*—Where a regular panel was exhausted without a juror being chosen and the court instead of summoning talesmen continued the case for a week and then presented the regular panel for that week, it was error to take from defendant the challenges used on the former panel. It was in effect a trial de novo. *State v. Briggs*, 27 S. C. 80, 2 S. E. 854.

Discharge of jury, see *infra*, X.

74. *Dennis v. State*, 96 Miss. 50, 50 So. 499, 25 L. R. A. (N. S.) 36, distinguishing *Jefferson v. State*, 52 Miss. 767, where defendant did not make the demand.

75. See the cases cited *infra*, this note.

[a] Under the statute providing for the discharge of a sick juror the court having the option either to retain the eleven or to discharge all and impanel a new jury, if it chooses the former method, the defendants' peremptories remain the same as they were after eleven jurors were accepted in the first instance. That is if he had any

defendant any right to an additional peremptory thereupon, where his peremptories were exhausted.⁷⁶ Where the court changed its ruling on a challenge for cause it properly restores peremptories which the party was obliged to use in excluding those particular jurors,⁷⁷ and by so doing cures the error in overruling the challenge for cause,⁷⁸ though the contrary has been held on the theory that the defendant might have used his peremptories to greater advantage.⁷⁹ The court need not give an additional peremptory merely because an accepted juror failed to appear.⁸⁰ The practice of giving an additional peremptory where the court in its discretion has excused a juror after acceptance, has been approved.⁸¹

m. *Examination.*—(I.) *Right or Necessity of Examination.*—No examination is necessary on which to base the right to challenge peremptorily;⁸² and the right to examine the jurors solely for the purpose of determining whether to challenge peremptorily has been denied in some jurisdictions.⁸³ One may have the benefit of information elicited upon

peremptories remaining he is entitled to use them during the selection of a juror to take the discharged juror's place. But he is not entitled to any more. *State v. Hasledahl*, 2 N. D. 511, 52 N. W. 315, 16 L. R. A. 150.

[b] Where a juror was excused for illness immediately after the jury had been sworn, but before the information had been read, and on defendant's motion the remaining jurors were not discharged, but another juror was drawn, the court properly overruled, as being premature, that part of the motion which requested the restoration of the entire number of peremptories. And especially was there no error where both parties had peremptories remaining yet neither exercised one on the two juror. *People v. Weber*, 149 Cal. 705, 86 Pac. 671.

76. *Brace v. Beall*, 100 Tenn. 573, 47 S. W. 204, statute provided for substitution and a *trial de novo*.

77. *State v. Bonar*, 84 Kan. 800, 81 Pac. 484; *State v. Kent*, 5 N. D. 510, 97 N. W. 1052, 35 L. R. A. 518, proper to give such.

[a] Through juror's failure to tell the truth, and defendants' failure to waive the challenge for cause, though knowing of the deceit, plaintiff was obliged to use a peremptory. Plaintiff discovered the deception before jury completed, and should have been permitted to prove same, and have been given another peremptory. *Burke v. McDonald*, 1 Idaho 296, 29 Pac. 98.

78. *Blawie v. State*, 29 Tex. App. 134, 15 S. W. 597.

[a] **Especially Where Peremptory Is Accepted.**—When the court has erroneously overruled a challenge for cause and the juror has been peremptorily challenged, the error is cured by the court's granting and the defendants' accepting, an additional challenge. *Brewer v. State*, 72 Ark. 145, 78 S. W. 773. See also *State v. Bonar*, 84 Kan. 800, 81 Pac. 484.

[b] **Cannot Gain Advantage by Failing To Accept.**—Where the court gave one challenge to defendant and one to the state, defendant could not refuse to use his and so take advantage of failure of court to excuse juror for cause. *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988.

79. *Iverson v. State*, 52 Ala. 170.

80. *State v. Powell*, 94 N. C. 965.

81. *State v. Fielding*, 135 Iowa 255, 112 N. W. 539.

[a] **But failure so to do cannot be complained of**, where it was not demanded. *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665.

82. *Com. v. Evans*, 25 Pa. Super. 239.

83. Cal.—*People v. Edwards*, 100 Cal. 752, 127 Pac. 58; *People v. Trask*, 7 Cal. App. 103, 93 Pac. 891. Md.—*Handy v. State*, 101 Md. 39, 60 Atl. 452, 109 Am. St. Rep. 558, better rule is to forbid practice, though cases are conflicting. Minn.—*State v. Roseland*, 59 Minn. 281, 61 N. W. 478. N. J.—*Clifford v. State*, 61 N. J. L. 917, 39 Atl. 721. See also *State v. Zellers*, 7 N. J. L. 309.

[a] **Tends to Immaterial Inquiry.**

the examination for cause, however.⁸⁴ But the trial court need not permit the examination to be unduly protracted for the sole purpose of enabling one to decide as to his peremptories.⁸⁵ By other courts it is held a matter of favor by the court, rather than of strict right, to permit the examination,⁸⁶ and in some jurisdictions one is allowed to examine as a matter of right,⁸⁷ and may ask questions for the sole purpose of disclosing facts from which he may determine whether to challenge peremptorily.⁸⁸

(II.) **Time To Examine.**—The practice in some states is to compel the party to finish his examination on his challenge for cause, and upon that being overruled, he may then ask questions proper to aid his de-

“There is no statutory authority for the examination of jurors solely for the purpose of a peremptory challenge, or for the allowance of questions which do not tend to prove some fact material to a challenge for cause. There is no real necessity for giving either party this privilege. It tends to encourage inquiries into matters wholly collateral to the case in hand. The field of inquiry upon subjects properly involved in the endeavor to ascertain whether the juror is free from actual or implied bias is so broad that it will give each party ample opportunity to obtain information concerning the admissibility of making peremptory challenges” (People v. Edwards, 163 Cal. 752, 127 Pac. 58, following People v. Hamilton, 62 Cal. 377, 382; People v. Brittan, 118 Cal. 409, 412, 50 Pac. 664; People v. Plyler, 126 Cal. 379, 58 Pac. 904; People v. Trask, 7 Cal. App. 105, 93 Pac. 891), and overruling as dicta so much of the following cases as seems to the contrary. People v. Helm, 152 Cal. 182, 93 Pac. 99; People v. Car Soy, 57 Cal. 102; Watson v. Whitney, 23 Cal. 375.

84. People v. Edwards, 163 Cal. 752, 127 Pac. 58; People v. Hamilton, 62 Cal. 377; State v. Bresland, 59 Minn. 281, 61 N. W. 450; Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891; Spoonink v. Backus-Brooks Co., 89 Minn. 254, 94 N. W. 1079.

Examination upon challenge for cause, see *supra*, VII, E, 4, i.

85. People v. Hill, 20 Cal. App. 407, 139 Pac. 475.

86. Lundy v. State, 91 Ala. 100, 9 So. 189; Hawes v. State, 88 Ala. 37, 7 So. 302.

[a] “There is no duty resting upon the court to go into an inquiry, the sole purpose of which is to aid the de-

fendant in determining whether he will challenge a juror peremptorily.” Dimmack v. Wheeling Traction Co., 58 W. Va. 226, 52 S. E. 101.

[b] **Reason for Rule.**—Aside from the question of taking up the court’s time, there is nothing for the court to decide. Hence there could be nothing to take exception to when the court overrules the questions or refuses to ask further questions after finding juror competent. Lundy v. State, 91 Ala. 100, 9 So. 189.

87. Donovan v. People, 139 Ill. 412, 28 N. E. 964; State v. Steeves, 29 Ore. 85, 43 Pac. 947.

[a] **Reason for Rule.**—In upholding the right the court says in Hale v. State, 72 Miss. 140, 16 So. 387, “The office of the peremptory challenge is to protect the defendant against those legally competent, but morally, or otherwise, unfit or unsuitable to try the particular case, and to deny a full and fair examination of a juror, in order to wisely exercise the peremptory challenge, would be, practically, to nullify the right. For of what avail would a peremptory challenge be if exercised at random or blindly, and without reason?”

88. **U. S.**—Goodwin v. United States, 200 Fed. 121, 118 C. C. A. 295. **Colo.** Cripple Creek Min. Co. v. Brabant, 37 Colo. 423, 87 Pac. 794; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313; Jones v. People, 23 Colo. 276, 47 Pac. 275; Union Pac. Ry. Co. v. Jones, 21 Colo. 340, 40 Pac. 891. **Conn.**—State v. Cross, 72 Conn. 722, 46 Atl. 148. **Fla.**—Savage v. State, 18 Fla. 909. **Ill.**—O’Hare v. Chicago, M. & N. R. Co., 139 Ill. 151, 28 N. E. 923; Lavin v. People, 69 Ill. 303; Chicago & A. R. Co. v. Battelf, 66 Ill. 347; Chicago City Ry. Co. v. Fetzer, 113 Ill.

termination as to exercising his peremptory challenges.⁸⁰ In other states the examination takes place at the time the full jury is presented for acceptance.⁸¹ Re-examination after acceptance has been recognized as proper to bring out matters first touched upon by the opposite party's examination, and which may disclose reasons for exercising a peremptory.⁸²

(III.) **Extent of Examination Generally.** — The examination must be within the general limits of pertinency and propriety;⁸³ but a reasonable

App. 289; American Bridge Works v. Peedra, 79 Ill. App. 90; Vandalia v. Seibert, 47 Ill. App. 477. **Ind.**—Pearce v. Michigan Mut. Life Ins. Co., 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; Stoots v. State, 108 Ind. 415, 9 N. E. 584. **Ia.**—State v. Heft, 155 Iowa 21, 144 N. W. 950; Ruby v. Chicago, M. & St. P. Ry. Co., 150 Iowa 128, 129 N. W. 817; Simons v. Mason City & Ft. D. R. Co., 128 Iowa 139, 103 N. W. 129; Foley v. Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284; *In re Goldthorpe's Estate*, 115 Iowa 430, 88 N. W. 944; State v. Dooley, 89 Iowa 584, 57 N. W. 414. **Ky.**—Stone v. Monticello Const. Co., 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978; Lowe v. Webster, 19 Ky. L. Rep. 1208, 43 S. W. 397. **Mich.**—Towl v. Bradley, 198 Mich. 282, 66 N. W. 347; Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 767. **Mo.**—State v. Mann, 82 Mo. 689; Meyer v. Gundlach-Nelson Mfg. Co., 67 Mo. App. 389. **Mont.**—State v. Tighe, 27 Mont. 327, 71 Pac. 3; Territory v. Campbell, 9 Mont. 16, 23 Pac. 121. **Neb.**—Blakely v. Omaha & N. B. R. Co., 94 Neb. 119, 142 N. W. 506; Bayne v. State, 45 Neb. 381, 63 N. W. 811. **N. M.**—Territory v. Leach, 18 N. M. 15, 123 Pac. 405. **Pa.**—Comfort v. Mueser, 121 Pa. 455, 16 Atl. 619; Com. v. Grauman, 52 Pa. Super. 215; Com. v. Brown, 23 Pa. Super. 479. **S. D.**—State v. Carrington, 11 S. D. 178, 78 N. W. 326. "In both civil and criminal trials." **Tex.**—Mims v. K. & T. Ry. Co. v. Rogers (Tex. Civ. App.), 141 S. W. 1611; Yardley v. State, 50 Tex. Crim. 444, 109 S. W. 486; Houston & T. C. R. Co. v. Terrell, 69 Tex. 658, 7 S. W. 470. **Utah.**—State v. Thomas, 41 Utah 414, 126 Pac. 286. **Ans. Cas.** 1914D, 99; Tarpey v. Madison, 26 Utah 104, 73 Pac. 411. **Vt.**—Fowler's Adm' v. McDonald, Catler & Co., 85 Vt. 438, 82 Atl. 977; State v. Godfrey Brayt (Vt.) 170. **Wash.**

Hoyt v. Independent Asphalt Pav. Co., 52 Wash. 672, 101 Pac. 367; State v. Marfaudille, 48 Wash. 117, 92 Pac. 933, 14 L. R. A. (N. S.) 346. **Wis.**—Davey v. Janesville, 111 Wis. 628, 87 N. W. 813; Gatzow v. Buening, 106 Wis. 1, 81 N. W. 1003, 49 L. R. A. 475.

Questions which may be asked, see *infra*, VII, E, 5, m, (IV).

89. State v. Cleary, 97 Iowa 413, 66 N. W. 724; State v. Foster, 91 Iowa 164, 59 N. W. 8.

Time to challenge, see *supra*, VII, E, 5, e.

90. Hale v. State, 72 Miss. 140, 16 So. 387.

91. Com. v. Marion, 232 Pa. 413, 81 Atl. 423.

92. **Colo.**—Cripple Creek Min. Co. v. Brabant, 37 Colo. 423, 87 Pac. 794; Vindicator Consol. Gold Min. Co. v. Firstbrook, 36 Colo. 498, 86 Pac. 313. **Conn.**—State v. Cross, 72 Conn. 722, 46 Atl. 148. **Ill.**—American Bridge Works v. Seibert, 47 Ill. App. 477. **Ia.**—Foley v. Cudahy Packing Co., 119 Iowa 246, 93 N. W. 284; State v. Cleary, 97 Iowa 413, 66 N. W. 724.

[a] **Party Cannot Investigate as to Comparative Mentality.**—The litigant is not entitled to take up the time of the court "in an investigation of the comparative mentality of the jurors composing the panel" for the purpose of determining as to peremptory challenges. San Antonio, etc. R. Co. v. Bolt, 34 Tex. Civ. App. 281, 59 S. W. 607.

[b] **Knowledge as to feuds existing between certain parties, into which defendant had been drawn, and whether jurors had taken sides therein are proper subject of inquiry.** Territory v. Campbell, 9 Mont. 16, 23 Pac. 121.

Pertinency and relevancy of questions as applied to particular objections. see *infra*, VII, F.

latitude should be allowed,⁹³ the range of inquiry being largely within the discretion of the examining counsel, supervised by the court.⁹⁴ This discretion of the court is reviewable;⁹⁵ but a reversal can only be had for abuse of discretion of the court,⁹⁶ or want of good faith on the part of counsel.⁹⁷

(IV.) Questions Which May Be Asked.—The juror may be asked questions the answer to which would not affect his competency.⁹⁸ He may be asked as to the relative weight he will give to certain evidence,⁹⁹

93. *Ariz.*—*Eytinge v. Territory*, 12 *Ariz.* 131, 100 *Pac.* 443. *N. M.*—*Territory v. Lynch*, 18 *N. M.* 15, 133 *Pac.* 405. *Utah.*—*State v. Thorne*, 41 *Utah* 414, 126 *Pac.* 286, *Ann. Cas.* 1915D, 291.

[a] A wide range of inquiry is generally permissible, with the court exercising a sound legal discretion as to the pertinency of questions, and limitation to which the examination shall be extended. *Basye v. State*, 45 *Neb.* 261, 63 *N. W.* 811.

[b] Better To Allow Doubtful Question.—Considerable latitude should be permitted and whenever there is a fair doubt as to the propriety of a question it is better to allow it. *State v. Tighe*, 27 *Mont.* 327, 71 *Pac.* 3; *Territory v. Campbell*, 9 *Mont.* 16, 22 *Pac.* 121.

94. *Colo.*—*Vindicator C. G. M. Co. v. Firstbrook*, 36 *Colo.* 498, 86 *Pac.* 313; *Union Pac. R. Co. v. Jones*, 21 *Colo.* 340, 40 *Pac.* 891. *Conn.*—*State v. Cross*, 72 *Conn.* 722, 46 *Atl.* 148. *Ill.*—*Vandalia v. Seibert*, 47 *Ill.* App. 477. *Ia.*—*Simons v. Mason City & Ft. D. R. Co.*, 128 *Iowa* 139, 103 *N. W.* 129; *Foley v. Cudahy Packing Co.*, 119 *Iowa* 246, 93 *N. W.* 284; *State v. Dooley*, 89 *Iowa* 584, 57 *N. W.* 414; *State v. Wilson*, 8 *Iowa* 407. *Tex.*—*Missouri, K. & T. Ry. Co. v. Rogers* (*Tex. Civ. App.*), 141 *S. W.* 1011.

[a] Prevents Needless Delay.—The extent must be left largely to the court's discretion in order to prevent needless delay and waste of time. *Eytinge v. Territory*, 12 *Ariz.* 131, 100 *Pac.* 443.

95. *Missouri, K. & T. Ry. Co. v. Rogers* (*Tex. Civ. App.*), 141 *S. W.* 1011.

96. *Simons v. Mason City & Ft. Dodge R. Co.*, 128 *Iowa* 139, 103 *N. W.* 129; *Foley v. Cudahy Packing Co.*, 119 *Iowa* 246, 93 *N. W.* 284; *State v. Dooley*, 89 *Iowa* 584, 57 *N. W.* 414;

Basye v. State, 45 *Neb.* 261, 63 *N. W.* 811.

97. *Simons v. Mason City & Ft. D. R. Co.*, 128 *Iowa* 139, 103 *N. W.* 129.

98. *Ariz.*—*Eytinge v. Territory*, 12 *Ariz.* 131, 100 *Pac.* 443. *Ia.*—*State v. Heft*, 155 *Iowa* 21, 134 *N. W.* 950; *Foley v. Cudahy Packing Co.*, 119 *Iowa* 246, 93 *N. W.* 284; *State v. Dooley*, 89 *Iowa* 584, 57 *N. W.* 414. *Ky.*—*Stone v. Monticello Const. Co.*, 135 *Ky.* 659, 117 *S. W.* 369, 40 *L. R. A.* (N. S.) 978; *Dow Wire Works Co. v. Morgan*, 29 *Ky. L. Rep.* 854, 96 *S. W.* 530; *Lowe v. Webster*, 19 *Ky. L. Rep.* 1208, 43 *S. W.* 217. *Mo.*—*State v. King*, 174 *Mo.* 647, 74 *S. W.* 627. *Vt.*—*State v. Turley*, 87 *Vt.* 163, 88 *Atl.* 562; *Fowler's Admx. v. McDonald, Cutler & Co.*, 85 *Vt.* 438, 82 *Atl.* 677. *Wash.*—*Hoyt v. Independent Asphalt Pav. Co.*, 52 *Wash.* 672, 101 *Pac.* 367; *State v. Malfauidille*, 48 *Wash.* 117, 92 *Pac.* 939, 14 *L. R. A.* (N. S.) 346.

[a] Question Held Proper.—“Have any of you gentlemen any objection to a girl being employed in a factory?” while somewhat crude should have been permitted for the purpose of ascertaining the minds of jurymen in a negligence case where it was claimed the injured girl was under the statutory age at which she could be employed. *Dresch v. Elliott*, 137 *App. Div.* 252, 122 *N. Y. Supp.* 14.

[b] May Be Asked as to Insurance in Same Company as Deceased.—While it would not disqualify a juror to be insured in the same life insurance company with deceased, the question was proper to enable defendant to exercise his peremptories intelligently. *Jahnke v. State*, 68 *Neb.* 154, 94 *N. W.* 158, 104 *N. W.* 154.

Right to ask specific questions directed at particular disqualifications, see *infra*, VII, F.

99. *Chicago City Ry. Co. v. Fetzer*, 113 *Ill. App.* 280.

and whether his verdict will be influenced by a particular fact,¹ and what his attitude will be if the evidence be balanced.² But it is not proper to ask him regarding his attitude toward particular witnesses,³ nor how he would decide upon an assumed state of facts.⁴ He may be asked how far if at all he will be influenced by findings of other tribunals passing upon the same question,⁵ or what he has heard about a

[a] Question Held Proper.—“Would evidence in behalf of a street car company receive less favor with you, are you in that mental state where it would receive less favor than evidence coming in in behalf of a woman here?” *Chicago City Ry. Co. v. Fetzner*, 113 Ill. App. 180.

[b] As to Evidence of Innocence in View of Relationship.—In a prosecution for incest juror might be asked as to whether he would require more evidence to establish innocence because of the close relationship between accused and prosecutrix. *State v. Heft*, 156 Iowa 21, 134 N. W. 360.

[c] Whether he would give the same weight to defendant's testimony should he take the stand, as he would to another's testimony is a proper question. *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

1. *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227, whether he would consider a certain act negligent. See also *Jacksonville S. E. Ry. Co. v. Southworth*, 22 Ill. App. 207.

[a] That Railroad Should Pay.—It is reversible error to refuse to permit defendant's counsel to ask jurymen whether they felt that because there has been an accident at a railroad crossing, the railroad company ought to pay for it. *Ruby v. Chicago, M & St. P. R. Co.*, 150 Iowa 125, 120 N. W. 217.

[b] Proper in will contest case to ask whether juror would be influenced by fact that testatrix had made no provision for her children. *In re Goldthrop*, 115 Iowa 430, 88 N. W. 944.

2. *People v. Wheeler*, 185 Mich. 164, 111 N. W. 710.

[a] Questions Held Proper.—(1) “Suppose, in this case, after the evidence is all introduced, you should be here that it was evenly balanced, so that there was as much for the plaintiff as for the defendant, which way would you be inclined to lean, against or in favor of the company?” is a proper question, for the exclusion

whereof reversal will lie. *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797. (2) Similar questions were upheld in *People v. Peck*, 139 Mich. 680, 103 N. W. 178; *People v. Keefer*, 97 Mich. 15, 56 N. W. 105; *Otsego Lake Tp. v. Kirsten*, 72 Mich. 1, 40 N. W. 26, 16 Am. St. Rep. 524. (3) But in *People v. Caldwell*, 107 Mich. 374, 65 N. W. 213, the court said that the question: “Which way would you desire to give your verdict if the evidence was all in, and you found that it was just even, as much one way as the other? Which way would you want to give your verdict, desire to give it? Which way would you lean, for the people or for the defendant?” was properly required to be reframed so as not to suggest to the juror that he would desire to lean one way or the other. And in *People v. Wheeler*, 185 Mich. 164, 151 N. W. 710, the question being “Supposing that the evidence in this case were equally balanced in your mind, which way would you be inclined to lean, for the people or for the defendant?” it was held not reversible error for the court to require the addition of the words “if either way.” The condition of the juror's mind is as well shown by the question with the amendment, as without. (4) See also *People v. Wright*, 170 Mich. 154, 135 N. W. 912, where the court says they “are content with the rule in *People v. Peck*, but are not inclined to extend it.”

3. *People v. Wright*, 170 Mich. 154, 135 N. W. 912.

4. *State v. Bank*, 21 N. D. 417, 131 N. W. 262.

5. *Simons v. Mason City & P. D. R. Co.*, 128 Iowa 129, 103 N. W. 179.

[a] On Appeal Whether Influenced by Verdict Appealed From.—In an appeal from a sheriff's jury in condemnation proceedings it is proper to ask if the finding of value by that jury or by any member thereof would have any weight, or would in any manner stand

case against a defendant jointly indicted and separately tried,⁶ or his attitude toward the other defendant.⁷

n. Effect of Errors.⁸ — In Criminal Cases. — (A.) ERRORS IN EXAMINATION. — The improper sustaining of an objection to questions, properly propounded to aid in determining whether one shall challenge peremptorily is ground for reversal.⁹ But one is not prejudiced by the failure of the court to permit questions to determine whether he will challenge peremptorily, where he knows the facts his questions would bring out,¹⁰ or where the jurors were sufficiently examined to bring the matter out.¹¹

(B.) DENIAL OF PROPER NUMBER TO DEFENDANT. — Where the defendant is denied his proper number of challenges, reversal follows.¹² It is also ground for reversal that joint defendants were not permitted the proper number.¹³

(C.) GIVING DEFENDANT TOO MANY CHALLENGES. — Defendant cannot be harmed by being given too many challenges.¹⁴ Clearly permitting joint

in his way in finding the value of the land under the evidence. *Simons v. Mason City & Ft. D. R. Co.*, 128 Iowa 129, 108 N. W. 129.

6. *Hale v. State*, 72 Miss. 140, 16 So. 387, state claimed a conspiracy and defendant was relying on self-defense.

7. *Hale v. State*, 72 Miss. 140, 16 So. 387, conspiracy being claimed the juror's attitude toward defendant's claimed co-conspirator is as important as his attitude toward defendant.

8. As affected by exhaustion of peremptory challenges, see *infra*, VII, E, 6.

Failure to make right party challenge first, see *supra*, VII, E, 5, b, (III).

Excusing by court on own motion as amounting to the giving of additional peremptories, see *supra*, VII, D.

9. *Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *Lavin v. People*, 69 Ill. 303; *Com. v. Grauman*, 52 Pa. Super. 215.

Examination for purpose of determining peremptory challenges, see *supra*, VII, E, 5, m.

10. *Leach v. State*, 177 Ind. 234, 97 N. E. 792.

11. *Eytinge v. Territory*, 12 Ariz. 131, 100 Pac. 443.

12. *Ala.*—*Smith v. State*, 155 Ala. 76, 46 So. 236. Cal.—*People v. Zeigler*, 135 Cal. 462, 67 Pac. 754, 56 L. R. A. 882; *People v. O'Neil*, 61 Cal. 435; *People v. Harris*, 61 Cal. 136. Colo.—*Carpenter v. People*, 31 Colo. 281, 72 Pac. 1072. Ia.—*State v. Hon-*

ter, 118 Iowa 686, 92 N. W. 872, error is conclusively presumed. Mo.—*City of Milan v. Allen*, 175 S. W. 933; *State v. Yandell*, 201 Mo. 646, 100 S. W. 466. N. Y.—*People v. Keating*, 61 Hun 260, 16 N. Y. Supp. 748, 10 N. Y. Crim. 48, 40 N. Y. St. 828; *Dull v. People*, 4 Denio 91. N. C.—*State v. Cadwell*, 46 N. C. 289. N. D.—*State v. Bloomdale*, 21 N. D. 77, 128 N. W. 682, where defendant duly excepts to the court's ruling, refusing him the full number. Ohio.—*Koch v. State*, 32 Ohio St. 352. Okla.—*Harris v. United States*, 4 Okla. Crim. 317, 111 Pac. 982. S. C.—*State v. Cardoza*, 11 S. C. 195. Tenn.—*Allen v. State*, 7 Coldw. 357. W. Va.—*State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

[a] The statute forbidding exception to challenges for cause and to panel does not apply to decision on peremptory challenges. *Shelby v. Com.*, 91 Ky. 563, 16 S. W. 461; *Smith v. Com.*, 20 Ky. L. Rep. 1848, 50 S. W. 241, construing Code Crim. Proc., §281.

Number of challenges, see *supra*, VII, E, 5, g, h, i, j, and k.

13. *State v. Fournier*, 68 Vt. 262, 35 Atl. 178; *State v. Stoughton*, 51 Vt. 362; *Washington v. State*, 17 Wis. 147.

14. *Grogg v. State*, 106 Ala. 44, 17 So. 321.

[a] Acceptance Cured Error.—Under a statute giving to each of two defendants jointly tried half the number of peremptories given to one, a defendant cannot complain if he be given a number greater than exactly

defendants more than they are entitled to, is a matter of which neither can complain.¹⁸

(D.) GIVING PROSECUTION TOO MANY CHALLENGES. — It is clearly prejudicial error to allow the prosecution more than the statutory number of challenges,¹⁹ or to give the prosecution one where none was provided by statute;²⁰ and reversal may be had where the prosecution is allowed too many as against joint defendants.²¹ However, so long as the total number allowed the prosecution did not exceed that prescribed by statute an error in the method of computing was harmless.¹⁹

(E.) ERRORS AS TO TIME TO EXERCISE. — It is reversible error to deny defendant his right to challenge at a time when he is entitled to do so;²⁰ but merely permitting the defendant to exercise peremptory challenges out of their strict statutory order could not have prejudiced him.²¹ Permitting the prosecution a peremptory challenge at a time when the court was not bound to allow it, is harmless error, according to some authorities;²² and reversal will not lie for a mere irregularity in permitting the prosecution to exercise a peremptory out of turn where defendant is not deprived of any substantial right;²³ but other courts hold that permitting the prosecution to challenge peremptorily after the proper time is a fatal error where defendant objected.²⁴

or-half. His acceptance of the peremptory would cure the error if it was one. *Gregg v. State*, 106 Ala. 44, 17 So. 321.

15. *State v. Cady*, 80 Me. 413, 14 Atl. 939; *State v. Moore*, 75 N. J. L. 416, 68 Atl. 165.

[a] Permitting a co-defendant to challenge without requiring defendant to join therein is harmless. *State v. Moore*, 75 N. J. L. 419, 68 Atl. 165.

Number of challenges where defendants tried or indicted jointly, see *supra*, VII, E, 5, c.

16. Fla.—*Savage v. State*, 18 Fla. 504. Kan.—*State v. Dreany*, 65 Kan. 392, 69 Pac. 182. La.—*State v. Gay*, 25 La. Ann. 472. Ohio.—*Mahan v. State*, 10 Ohio St. S. C.—*State v. Anderson*, 59 S. C. 229, 17 S. L. 810. Tenn.—*Foutch v. State*, 100 Tenn. 234, 15 S. W. 678; *Wiggins v. State*, 1 Lea 738; *Allen v. State*, 7 Coldw. 437. Vt.—*State v. Fournier*, 68 Vt. 262, 45 Atl. 178.

17. *State v. Drake*, 39 N. H. 21.

[a] May Be Reviewed on Writ of Error.—The unauthorized act of a judge in permitting a peremptory challenge where the statute did not provide for one, is subject to review on a statutory writ of error. *People v. Hamilton*, 39 N. Y. 107.

18. *Mahan v. State*, 10 Ohio 232; *Schoeller v. State*, 3 Wis. 523.

[a] Error is harmless where state did not challenge beyond proper number and the defendants did not exhaust the number allowed to them. *State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

19. *State v. Chadbourne*, 74 Me. 506, wherein state was entitled to five. The court proceeded upon the theory that two was proper but increased number to four because there were two defendants.

20. *People v. Jenks*, 24 Cal. 11; *State v. Pritchard*, 15 Nev. 74.

Time to challenge, see *supra*, VII, E, 5, c.

21. *State v. Bonar*, 71 Kan. 800, 81 Pac. 484.

22. *State v. Deliso*, 75 N. J. L. 808, 69 Atl. 218, under the rule that the right to challenge is one of rejection not selection. In this sense defendant "the denial of a right that is legally non-existent cannot inflict a legal injury."

Generally as to discretion to permit challenges after time has expired, see *supra*, VII, E, 5, c.

23. *People v. Majors*, 65 Cal. 138, 3 Pac. 507, 52 Am. Rep. 295.

24. *People v. Dolan*, 51 Mich. 610, 17 N. W. 78, the party is put in jeopardy and will be discharged where allowed after jury sworn.

[a] Amounts to Giving an Addi-

(I.) **JUROR SERVING AFTER BEING CHALLENGED.**—Where defendant peremptorily challenged a juror, but he has nevertheless served without fault of the defendant or of his counsel, a new trial must be had.²⁶

(II.) **In Civil Cases.**—(A.) **ERRORS IN EXAMINATION.**—The improper sustaining of an objection to a question put upon examination has been held reversible error;²⁷ but some courts say that prejudicial error must be shown.²⁷

(B.) **DENYING OR PERMITTING TO ONE PARTY OR OTHER.**—In civil cases it has been held that to deny a party his proper number of peremptory challenges is reversible error;²⁸ but the failure is harmless where there should have been a directed verdict against appellant.²⁹ Where the court permitted one party more challenges than the statute prescribed, no reversal can be had in the absence of prejudice to the other party;³⁰

tional Challenge After Tender.—Under a statute which especially provided that the prosecution should not challenge after tender to prisoner, the court had no more authority to extend the time for making peremptory challenges beyond the limit fixed by the statute than he had to increase the number allowed to the state. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797.

[b] **Error Cured by Withdrawal of Challenge.**—Where the state has been permitted to challenge after a juror was accepted but before he was sworn, and upon defendant's objection the state at once withdrew its challenge and the juror was returned to the jury and served thereon, no error has been committed, especially where the court offered to let the juror serve or not as defendant wished. *Leonard v. State*, 66 Ala. 461.

25. *Stripling v. State*, 77 Ga. 108, 3 S. E. 277 (where neither defendant nor his counsel knew the jurors who served); *Sherman v. State*, 2 Ga. App. 148, 38 S. E. 893.

[a] **Disallowed Where Counsel Ought To Have Discovered.**—Where a juror was well known to defendant's counsel and through mistake, arising out of a similarity in names, he served on the jury though his name had been stricken off the list by defendant's peremptory, and that the wrong man had served was not brought to the attention of the court, or prosecuting attorney, until the jury was polled after verdict, a new trial was refused since the defendant's counsel ought to have observed the jury and discovered the mistake before trial. *Cooper v. State*, 65 Tex. Crim. 423, 144 S. W. 937.

26. *Vandalia v. Seibert*, 47 Ill. App. 477.

[a] **Where Evidence Equally Balanced.**—The court reversed where the evidence was so equally balanced that a verdict for the opposite party would not have been disturbed. *American Bridge Works v. Pereira*, 79 Ill. App. 90.

27. *Lowe v. Webster*, 19 Ky. L. Rep. 1208, 43 S. W. 217.

28. *Swanson v. Mendenhall*, 80 Minn. 56, 82 N. W. 1093.

[a] **Must Be an Absolute Adverse Ruling.**—The court during a colloquy between it and counsel stated it was inclined to hold that the right to challenge did not exist under the circumstances. Counsel excepted but did not interpose any challenge. The supreme court refused any relief saying, "For all that appears in the record the plaintiffs might have admitted the challenge if it had been made." *Fink v. United American Fire Ins. Co.*, 114 Minn. 177, 130 N. W. 944.

29. *Poncein v. Furth*, 15 Wash. 201, 46 Pac. 241.

30. *Miss.*—*State v. Dalton*, 69 Miss. 611, 10 So. 578. **N. Y.**—*Lane v. Fenn*, 120 N. Y. Supp. 237. **Tex.**—*Waggoner v. Dodson*, 96 Tex. 6, 68 S. W. 813, 69 S. W. 923; *Watts v. Dubois* (Tex. Civ. App.), 66 S. W. 698.

[a] **No Prejudice Where Party Satisfied With Jury.**—Assuming that under the circumstances plaintiff was allowed more challenges than she was entitled to, defendant is not harmed where the only effect was to put additional men upon the jury and defendant did not exhaust its challenges, thereby showing that it was satisfied with the jury.

but the contrary has been held.³¹ Permitting peremptories as to a struck jury where the statute did not allow them has been held ground for reversal though the other party was also allowed an equal number.³²

(C.) ERRORS AS TO TIME TO EXERCISE. — Permitting a challenge at a time not contemplated by the statute has been held reversible error,³³ but merely permitting a challenge out of order is harmless where no prejudice appears.³⁴ To compel one to exercise his challenge at a time when he is not obliged to do so is reversible error.³⁵

(D.) ERRORS AS TO JOINT PARTIES AND ON CONSOLIDATION. — One of joint defendants who was denied the right to exercise his proper number of challenges, is entitled to a reversal;³⁶ but it must appear that some juror remained on the jury whom appellant desired to challenge.³⁷

Connecticut Mut. Life Ins. Co. v. Hillman, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446.

[b] Harmless Where Jury Was Fair. After an elaborate review of the English and American cases the court concludes the better rule to be that the mere giving of a peremptory challenge beyond what the statute prescribes is harmless even where the jury as finally selected was fair. *Stevens v. Union R. Co.*, 26 R. I. 90, 58 Atl. 492, 66 L. R. A. 465. See also *Adams v. Olive*, 48 Ala. 551; *Reid v. Reid*, 3 Ala. 88.

[c] Substituted Juror Passed for Cause. — No reversal can be had unless it appears that the jury was rendered partial by the mistake. And that was clearly not the effect where the juror who was substituted was passed for cause. *Creech v. Aberdeen*, 44 Wash. 52, 87 Pac. 44.

[d] Must Appear Additional Were Used. — The bill of exceptions based on the allowance by the court of more than the statutory number of challenges to the adverse party must show that more than the full number allowed by statute were actually used. *Hansley v. Harmon* (Tex. Civ. App.), 137 S. W. 406.

Rejection of juror so erroneous as to amount to giving an additional peremptory not ground for reversal where the jury was fair, see *supra*, VII, E, 4, c, (IV).

31. *Blackburn v. Hays*, 4 Coldw. (Tenn.) 227.

32. *May v. Hoover*, 119 Ind. 455, 14 N. E. 472, the appellant was not estopped by using the offered peremptories. He had made his objection and as it being overruled had a right to meet his antagonist upon the ground chosen by him.

As to special or struck jury, see *infra*, VII, G.

33. *Ayres v. Hubbard*, 88 Mich. 155, 50 N. W. 111.

[a] Amounts to Giving an Additional Challenge. — It was giving plaintiff an undue advantage to permit him to challenge peremptorily after having passed the juror to defendant who accepted him and whose peremptories were exhausted. *Dunn v. Wilmington & W. R. Co.*, 131 N. C. 446, 42 S. E. 802.

Time to challenge, see generally *supra*, VII, E, 5, e.

34. *Jones v. Van Zandt*, 2 McLean 611, 13 Fed. Cas. No. 7,502.

[a] Harmless Where Verdict Just. The court refused to reverse, "because another trial, properly conducted, could only result in a judgment for the appellees." *State v. Dalton*, 69 Miss. 611, 10 So. 578.

[b] Error Harmless Where Party Refused To Object to Jury. — Assuming that it was not a proper exercise of the court's discretion to permit a peremptory after both sides had accepted the jury, the error is harmless where the court announced the opposite party might make any further objections to the substituted juror and none was made. *Curnaw v. Phoenix Ins. Co.*, 46 S. C. 79, 24 S. E. 71.

Generally as to discretion to permit after time has expired, see *supra*, VII, E, 5, e.

35. *Taylor v. Western Pacific R. R. Co.*, 45 Cal. 323, jury not full as statute required.

36. *Rogers v. Armstrong Co.* (Tex. Civ. App.), 30 S. W. 848; *Hundhausen v. Atkins*, 36 W. Va. 518.

37. *Wolf v. Perryman*, 82 Tex. 112, 17 S. W. 772; *Snow v. Starr*, 15 Tex.

Plaintiff waives any irregularity in giving joint defendants too many peremptories where he fails to object at the time.⁴² To allow defendants too many is harmless to plaintiff where defendants do not use beyond the number entitled.⁴³ The same is true where it does not appear that plaintiff was deprived of a fair trial by defendants' use of the excess challenges.⁴⁴ On a consolidation of cases it is reversible error to confine plaintiff to the number given on a single suit, while giving each defendant his full number.⁴⁵

6. Using or Retaining Peremptories as Affecting Error.⁴² — a. Overruling Challenge for Cause Harmless Where Juror Excluded. The general rule is that the mere overruling of a challenge for cause is harmless where the juror was excluded on peremptory challenge.⁴³ It is harmless error even in jurisdictions where defendant is not obliged

411, 12 S. W. 673; *St. Louis, etc. R. Co. v. Barnes* (Tex. Civ. App.), 72 S. W. 1041; *Galveston, etc. Ry. Co. v. Saunders* (Tex. Civ. App.), 141 S. W. 829; *Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co.*, 8 Tex. Civ. App. 227, 28 S. W. 1027.

38. *Rees v. Chicago, B. & Q. Ry. Co.*, 156 Mo. App. 52, 135 S. W. 981.

[a] **Defendants Gained Peremptories by Manipulating Lists.**—Assuming that defendants by their action in erasing three names from the head of the list, and re-uniting them at the foot thereof, and then striking off three other names, in effect secured six peremptory challenges when they were entitled to but three, plaintiff cannot complain where he permitted the jury to be then made up from the list and went on with the trial, making no objection till after verdict. *Rees v. Chicago, B. & Q. Ry. Co.*, 156 Mo. App. 52, 135 S. W. 981.

39. *Hannay v. Harmon* (Tex. Civ. App.), 137 S. W. 400.

40. *Lane v. Penn*, 120 N. Y. Supp. 237.

41. *Butler v. Evening Post Pub. Co.*, 148 Fed. 821, 78 C. C. A. 541.

42. Waiver of objection to panel by using peremptories, see *supra*, VII, E, 3, d, (IV).

As affecting errors in excusing jurors, see *supra*, VII, D, d.

43. *U. S. v. Hapt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708. **Ark.** *Stewart v. State*, 13 Ark. 720. **Cal.** *People v. Kromphold*, 51 Cal. Dec. 537; *People v. Durrant*, 116 Cal. 179, 48 Pac. 55; *People v. McGungill*, 41 Cal. 439; *Paige v. O'Neal*, 12 Cal. 483. **Haw.** *Republic v. Kapua*, 11 Hawaii 293. **Ill.**

Robinson v. Randall, 82 Ill. 521; *Maier v. Chicago City Ry.*, 166 Ill. App. 500. **Ia.**—*State v. Wright*, 112 Iowa 436, 84 N. W. 541. **La.**—*State v. Ford*, 42 La. Ann. 255, 7 So. 696; *State v. Ford*, 37 La. Ann. 443; *State v. Melton*, 37 La. Ann. 77; *State v. Caulfield*, 23 La. Ann. 148. **Mich.**—*People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. **Miss.**—*Ferriday v. Selser*, 4 How. 506. **Neb.**—*Kadner v. Omaha & C. B. St. R. Co.*, 97 Neb. 678, 151 N. W. 169. **Nev.**—*State v. Raymond*, 11 Nev. 98; *Fleeson v. Savage Silv. Min. Co.*, 3 Nev. 157. **N. J.**—*Drake v. State*, 53 N. J. L. 23, 20 Atl. 747. **Okla.** *Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558; *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988. **Ore.**—*Twitshell v. Thompson*, 78 Ore. 285, 153 Pac. 45; *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824; *Ford v. Umatilla*, 15 Ore. 313, 16 Pac. 53. **Tex.**—*Ellis v. State*, 69 Tex. Crim. 468, 154 S. W. 1010; *Johnson v. State*, 27 Tex. 758. **Utah.**—*People v. Thiede*, 11 Utah 241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237; *People v. Hopt*, 4 Utah 247, 9 Pac. 407 (judgment affirmed, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708); *Conway v. Clinton*, 1 Utah 215. **Wash.**—*State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216. **Wis.**—*Carthaus v. State*, 78 Wis. 560, 47 N. W. 629; *Heucke v. Milwaukee, etc. R. Co.*, 69 Wis. 401, 34 N. W. 243; *Shoeffler v. State*, 3 Wis. 823.

[a] Though there can be no review of challenges for cause, the fact that defendant was obliged to use a peremptory after the overruling of his

to challenge an incompetent juror if he still has peremptories,⁴⁴ and it is clearly non-prejudicial where the party must show that he has exhausted his peremptories,⁴⁵ or must show that because of the previous exhaustion of challenges he was obliged to take an objectionable juror.⁴⁶ Especially does the rule apply where the other party challenged and the juror was excused without the first party having been obliged to use a peremptory;⁴⁷ and it was mere error without prejudice where the court changed its ruling and excluded the challenged juror before the challenger used any peremptory.⁴⁸ There is authority for holding that

challenge for cause does not entitle him to any relief on the theory that he has unnecessarily been deprived of a peremptory challenge. *Moore v. Com.*, 7 Bush (Ky.) 191.

[b] Where defendant was given two more peremptories than the statute allowed, and he was thus enabled to get rid of two jurors who should have been excluded for cause he could not possibly have been prejudiced. *State v. Reppert*, 11 Nev. 98.

[c] Applied Where Court Refused To Strike.—It is not error for the court to refuse to strike deaf juror from panel where defendant struck him off, and no damage is shown. *Anderson v. Green*, 46 Ga. 361.

44. *People v. Larubia*, 140 N. Y. 87, 1 N. E. 412; *People v. Carpenter*, 102 N. Y. 248, 6 N. E. 584; *People v. Carey*, 96 N. Y. 115, 2 N. Y. Crim. 194; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *People v. Knickerbocker*, 1 Park. Crim. (N. Y.) 32; *People v. Price*, 53 Hun 185, 6 N. Y. Supp. 836, 24 N. Y. St. 934; *Finkelstein v. Barnett*, 17 Misc. 561, 40 N. Y. Supp. 694, 75 N. Y. St. 99.

45. Fla.—*Green v. State*, 43 Fla. 191, 12 So. 871. Haw.—*Republic v. Kapon*, 11 Haw. 105. La.—*State v. Caulfield*, 22 La. Ann. 148. Minn.—*State v. Law*, 25, 28 Misc. 112, 9 N. W. 608. Neb.—*Barnett v. Burlington & M. R. R. Co.*, 18 Neb. 319, 20 N. W. 280. Vt.—*State v. Duffee*, 16 Vt. 431. Wash.—*State v. McMan*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 219; *State v. Moody*, 7 Wash. 302, 12 Pac. 102.

46. *Silvery v. State*, 140 Ind. 684, 39 N. E. 390, 47 N. E. 478; *Voght v. State*, 140 Ind. 17, 43 N. E. 1049.

[d] Rule Applies in Civil Cases as Well as Criminal Cases.—*Indianapolis, etc. Ry. Co. v. Hedges-Kicker*, 12 Ind. App. 188, 10 N. E. 509; *Tape Harts Electric Co. v. Watson*, 53 Ind. App.

124, 70 N. E. 993. So far as *Fletcher v. Crist*, 139 Ind. 121, 38 N. E. 472, may recognize a different rule, it has been modified by *Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458, which expressly overrules *Brown v. State*, 70 Ind. 576, 588.

[b] The prisoner is not prejudiced where the juror is not forced on him and the peremptory used to exclude him was not needed for any other purpose. *State v. Eder*, 85 N. C. 585.

[c] No Error in Civil Case Where Challenger Not Prejudiced.—Where juror is challenged peremptorily and it does not appear that the challenger's rights were in any way prejudiced by the erroneous overruling of his challenge for cause, no reversal follows. *Blevins v. Erwin Cotton Mills*, 150 N. C. 493, 64 S. E. 428.

47. Conn.—*State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89. Utah.—*People v. Hoyt*, 4 Utah 247, 9 Pac. 407, judgment affirmed, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 798. Wash.—*State v. Carey*, 15 Wash. 549, 46 Pac. 1050. Wis.—*Shoeffler v. State*, 3 Wis. 823.

[a] No Prejudice Possible.—It "would not be seriously argued" that if the juror was afterwards excused by the state, defendant was prejudiced. *Jahnke v. State*, 68 Neb. 154, 94 N. W. 168, 104 N. W. 164.

[b] Striking Off Incompetent Juror as Curing Error.—That juror who was incompetent to serve was stricken by the state is not ground for a new trial. *Daniel v. State*, 11 Ga. App. 729, 76 S. E. 162, following *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849.

Curing error in excluding evidence by recalling juror and challenging him peremptorily before other side's challenges are exhausted, see *supra*, VII, E, 4, m, (11).

48. *State v. Drake*, 23 Kan. 151, 5 Pac. 753.

the erroneous overruling of a challenge for cause in a criminal case is reversible, though the juror was excused on peremptory challenge.⁴⁹

b. *Waiver of Peremptory as Waiving Error.*⁵⁰ — After waiver of a peremptory challenge, one cannot complain of the overruling of his challenge for cause;⁵¹ nor can he complain of the manner in which he was obliged to challenge.⁵²

c. *Failure To Exhaust as Curing Errors.*⁵³ — (I.) In General. Though there is authority to the effect that the mere refusal to challenge peremptorily does not preclude one from raising objections to the ruling on the challenge for cause, if the effect of that ruling is to leave incompetent persons on the jury,⁵⁴ the general rule is that if the challenger does not exhaust his peremptory challenges, and so is not compelled to take the juror objected to, he cannot complain of the overruling of his challenge for cause,⁵⁵ especially where it appears that the

the rule obtains where at least one of the jurors was properly excused for cause. *State v. Yetzer*, 97 Iowa 423, 66 N. W. 737.

52. *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

53. *Waiver of peremptory as waiving error*, see *supra*, VII, E, 6, b.

54. *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616; *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. 194; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

[a] In New York this has been the ruling ever since 1845. See *People v. Bodine*, 1 Denio 281; *People v. Larubia*, 140 N. Y. 87, 35 N. E. 412, and *Finkelstein v. Barnett*, 17 Misc. 564, 40 N. Y. Supp. 694, 75 N. Y. St. 99. See also *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, which reviews the cases at length and declares that so much of *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. 194, and *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584, as may seem so to do, did not intend to depart from the settled rule.

55. U. S.—*Hopt v. Utah*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708; *Hawkins v. United States*, 116 Fed. 569, 53 C. C. A. 663. Ala.—*Colley v. State*, 167 Ala. 109, 52 So. 832. Ariz.—*Territory v. Shankland*, 3 Ariz. 403, 77 Pac. 492. Ark.—*Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749; *St. Louis, I. M. & S. Ry. Co. v. Aiken*, 100 Ark. 437, 140 S. W. 698; *Holt v. State*, 91 Ark. 576, 121 S. W. 1072; *Caldwell v. State*, 69 Ark. 322, 63 S. W. 59; *Wright v. State*, 35 Ark. 639; *Benton v. State*, 30 Ark. 328.

49. *Iverson v. State*, 52 Ala. 170; *Birdsong v. State*, 47 Ala. 68.

[a] *Where Not Clear How Juror Excluded.*—Though juror did not sit, and it is not clear whether he was excluded by being stricken off by defendant, or was not chosen by lot on defendant's failure to strike to the extent permitted by law, reversal follows improper overruling of defendant's challenge of a juror for not having a statutory qualification. *Dowdy v. Com.*, 9 Gratt. (50 Va.) 727, 60 Am. Dec. 314.

[b] *Reason for Rule.*—A juror having been declared competent, the court says "The defendant was compelled to get rid of him by a peremptory challenge, so that, although the juror did not sit in the case, the question of his competency may be considered as fairly before this court, seeing that the circuit court deprived the accused of one peremptory challenge to which he was entitled if the juror be held incompetent." The peremptories do not seem to have been exhausted. *State v. Martin*, 28 Mo. 530.

50. *Failure to exhaust as curing errors*, see *infra*, VII, E, 6, c.

51. *State v. Mathews*, 133 Iowa 398, 109 N. W. 616; *State v. Pray*, 126 Iowa 249, 99 N. W. 1065; *State v. Tyler*, 122 Iowa 125, 97 N. W. 983. Neb.—*Johnson v. State*, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B, 965; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *Curran v. Percival*, 21 Neb. 434, 32 N. W. 213; *Palmer v. People*, 4 Neb. 68.

[a] Though two jurors were excused and but one peremptory was waived,

- Cal.—*People v. Durant*, 116 Cal. 179, 48 Pac. 75; *People v. McGungill*, 41 Cal. 429; *People v. Perry*, 25 Cal. App. 337, 143 Pac. 798; *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407. Conn.—*State v. Smith*, 49 Conn. 376; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89. Dak.—*Herbert v. Northern Pac. R. Co.*, 3 Dak. 38, 13 N. W. 349. D. C.—*Horton v. United States*, 15 App. Cas. 310; *United States v. Schneider*, 10 Mack. 381; *United States v. Neversson*, 1 Mack. 152. Haw.—*Queen v. Leong Man*, 8 Hawaii 339. Idaho.—*Knollin v. Jones*, 7 Idaho 466, 63 Pac. 638; *State v. Gorden*, 5 Idaho 297, 48 Pac. 1061; *Burke v. McDonald*, 3 Idaho 296, 29 Pac. 98. Ill.—*Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Robinson v. Randall*, 82 Ill. 521; *St. Louis, etc. R. Co. v. Lux*, 63 Ill. 523; *Cromer v. Borders Coal Co.*, 152 Ill. App. 555; *Rogers Grain Co. v. Tanton*, 136 Ill. App. 533. Ind.—*Shields v. State*, 149 Ind. 595, 49 N. E. 251; *Evansville & S. Traction Co. v. Johnson*, 54 Ind. App. 601, 97 N. E. 176. Ia.—*State v. Ralston*, 139 Iowa 44, 116 N. W. 1058; *State v. Fielding*, 135 Iowa 255, 112 N. W. 539; *Harris v. Moore*, 134 Iowa 704, 112 N. W. 163; *State v. Wright*, 112 Iowa 436, 84 N. W. 541; *State v. McIntosh*, 109 Iowa 209, 80 N. W. 349; *Haggard v. Petterson*, 107 Iowa 417, 78 N. W. 53; *State v. Elliott*, 45 Iowa 486; *State v. Davis*, 41 Iowa 311. Kan.—*State v. Vogan*, 56 Kan. 61, 42 Pac. 352; *Flurence, E. D. & W. V. R. Co. v. Ward*, 29 Kan. 354; *State v. Furbeck*, 29 Kan. 532; *State v. Stockman*, 9 Kan. App. 422, 58 Pac. 1032. La.—*State v. Rodriguez*, 115 La. 1004, 40 So. 438; *State v. Fourchy*, 51 La. Ann. 228, 25 So. 109; *State v. Le Duff*, 46 La. Ann. 546, 15 So. 397; *State v. Garig*, 43 La. Ann. 365, 8 So. 934; *State v. Ford*, 37 La. Ann. 443; *State v. Melton*, 37 La. Ann. 77; *State v. Caulfield*, 23 La. Ann. 148. Mich.—*Eberts v. Mt. Clemens Sugar Co.*, 182 Mich. 449, 148 N. W. 810; *Martin v. Farmers Mut. F. Ins. Co.*, 139 Mich. 148, 102 N. W. 656; *People v. Rush*, 113 Mich. 539, 71 N. W. 863; *People v. Aplin*, 86 Mich. 393, 49 N. W. 148; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. Miss.—*Lewis v. State*, 85 Miss. 35, 37 So. 497; *Schrader v. State*, 84 Miss. 593, 36 So. 385. Mo.—See *Williamson v. St. Louis Transit Co.*, 202 Mo. 345, 100 S. W. 1072. Compare *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354. Mont.—*Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *State v. Linebarger*, 12 Mont. 292, 30 Pac. 140; *Territory v. Campbell*, 9 Mont. 16, 22 Pac. 121; *Territory v. Hart*, 7 Mont. 42, 14 Pac. 768. Neb.—*Brinegar v. State*, 82 Neb. 558, 118 N. W. 475; *Olmsted v. Noll*, 82 Neb. 147, 117 N. W. 102; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Jenkins v. Mitchell*, 40 Neb. 664, 59 N. W. 90; *Nowotny v. Blair*, 32 Neb. 175, 49 N. W. 357. Nev.—*Burch v. Southern Pac. Co.*, 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166; *State v. Hartley*, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33; *State v. Raymond*, 11 Nev. 98; *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157. N. J.—*Drake v. State*, 53 N. J. L. 23, 20 Atl. 747. N. M.—*Territory v. Young*, 2 N. M. 93. N. C.—*State v. Vann*, 162 N. C. 534, 77 S. E. 295; *State v. Banner*, 149 N. C. 519, 63 S. E. 84; *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Potts*, 100 N. C. 457, 6 S. E. 657; *State v. Cockman*, 60 N. C. 484. N. D.—*State v. Goetz*, 21 N. D. 569, 131 N. W. 514; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003. Ohio.—*Hartnett v. State*, 42 Ohio St. 568; *Erwin v. State*, 29 Ohio St. 186; *Mimms v. State*, 16 Ohio St. 221. Okla.—*Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851. Ore.—*State v. Humphrey*, 63 Ore. 540, 128 Pac. 824. S. C.—*State v. Bethune*, 86 S. C. 143, 67 S. E. 466; *State v. Hayes*, 69 S. C. 295, 43 S. E. 251; *State v. Anderson*, 26 S. C. 599, 2 S. E. 699; *State v. McQuaige*, 5 S. C. 429. See *State v. Weaver*, 58 S. C. 106, 36 S. E. 499. Tenn.—*Wooten v. State*, 99 Tenn. 189, 41 S. W. 813; *Taylor v. State*, 11 Lea 708; *Carroll v. State*, 3 Humph. 315; *McGowan v. State*, 9 Yerg. 184; *Preswood v. State*, 3 Heisk. 468. Tex.—*Houston, etc. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Grant v. State*, 67 Tex. Crim. 155, 148 S. W. 760; *Chapman v. State*, 66 Tex. Crim. 489, 147 S. W. 580; *Bice v. State*, 55 Tex. Crim. 529, 117 S. W. 163; *Taylor v. State*, 44 Tex. Crim. 547, 72 S. W. 396; *Williams v. State*, 30 Tex. App. 354, 17 S. W. 408; *Powers v. State*, 23 Tex.

juror did not sit, though the means by which he was excused is not clear.⁵⁶ So also one who has not exhausted his peremptory challenges cannot complain of the exclusion of a juror on the other party's challenge;⁵⁷ but the erroneous allowance of a challenge for cause by the state has been held prejudicial to defendant though his challenges were not exhausted.⁵⁸ Where the party who challenged for cause did not exhaust his peremptories, error cannot be assigned upon the allowance of the challenge for cause.⁵⁹ One who still has peremptories cannot raise the question that the other party did not make his challenge for

App. 42, 5 S. W. 153; *Lum v. State*, 11 Tex. App. 483; *McKinney v. State*, 8 Tex. App. 626. **Utah.**—*State v. White*, 40 Utah 342, 121 Pac. 579; *United States v. Bromley*, 4 Utah 498, 11 Pac. 619; *United States v. Groesbeck*, 4 Utah 487, 11 Pac. 542; *People v. Hopt*, 4 Utah 247, 9 Pac. 407, *affirmed*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708. **Wash.**—*State v. Champoux*, 33 Wash. 339, 74 Pac. 557; *State v. Moody*, 7 Wash. 395, 35 Pac. 132. **Wis.**—*Shoeffler v. State*, 3 Wis. 823. **Wyo.**—*Jenkins v. State*, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749; *Bryant v. State*, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596; *Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

[a] That a party only used one of his peremptories shows conclusively that he was satisfied with the jury. *Guthrie v. Shaffer*, 7 Okla. 459, 54 Pac. 698. See also *Stowell v. Standard Oil Co.*, 139 Mich. 18, 102 N. W. 227.

[b] **Additional Peremptory Offered and Refused.**—Where the court offered to give both defendant and the state an additional peremptory challenge which the defendant refused to avail himself of ostensibly because the state was given one also, but the state waived its, the defendant's peremptories affirmatively appear by the record not to have been waived. *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988.

[c] **Failure To Strike Waives Incompetency.**—Accepting juror "before his strikes were exhausted" waives his incompetency. *Taylor v. State*, 13 Cal. App. 715, 79 S. E. 924.

[d] Where the number of objectionable jurors exceed the number of peremptories, the rule is otherwise. *Ind. Woods v. State*, 134 Ind. 35, 33 N. E. 901. **Mich.**—*Martin v. Farmers' Mut. Fire Ins. Co.*, 139 Mich. 148, 102 N. W. 656. **Tex.**—*Barnes v. State* (Tex.

Crim.), 88 S. W. 805. **Utah.**—*Conway v. Clinton*, 1 Utah 215.

56. **U. S.**—*Richards v. United States*, 175 Fed. 911, 99 C. C. A. 401. See also *Burt v. Panjaud*, 99 U. S. 180, 25 L. ed. 451. **Fla.**—*Lambright v. State*, 34 Fla. 564, 16 So. 582; *Savage v. State*, 18 Fla. 909; *Montague v. State*, 17 Fla. 662. **Mich.**—*People v. Rush*, 113 Mich. 539, 71 N. W. 863. **Okla.**—*Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558. **Wis.**—*Shoeffler v. State*, 3 Wis. 823.

57. **La.**—*State v. West*, 46 La. Ann. 1009, 15 So. 418; *State v. Creech*, 38 La. Ann. 480. **Mich.**—*Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41; *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955. **N. C.**—*Nedlin v. Simpson*, 144 N. C. 397, 57 S. E. 24; *State v. Hensley*, 94 N. C. 1021.

[a] **Shows Jury Was Unobjectionable.**—Party cannot complain of the ruling of the court sustaining an objection to a juror where it appears he had peremptories remaining when the jury was finally accepted. For his not using the peremptories he has shown the jury was unobjectionable to him. *Ives v. Atlantic*, etc. R. Co., 142 N. C. 131, 55 S. E. 74, 115 Am. St. Rep. 732. See also *Henry v. State*, 4 Humph. (Tenn.) 270.

58. *Monk v. State*, 27 Tex. App. 450, 11 S. W. 460; *Wade v. State*, 12 Tex. App. 358, the theory is that the exhausting of the challenges would not restore the competent juror.

59. *State v. Mercer*, 67 N. C. 266. [a] **Reason for Rule.**—The state's challenge for cause, even if erroneously granted would not be ground for reversal, because if disallowed the state could have removed the juror by peremptory challenge and the presumption is that it would have done so. *State v. Jackson*, 42 La. Ann. 1170, 8 So. 297.

cause in a manner technically correct,⁶⁰ nor question the ruling of the court as to the order in which peremptories were to be interposed,⁶¹ or the ruling of the court in giving the other party too many challenges in a civil suit,⁶² or withholding permission to withdraw a peremptory,⁶³ nor the action of the court in refusing to examine the juror as *trior*.⁶⁴ The fact that one has peremptories remaining may be considered on review of a motion denying a change of venue.⁶⁵

(II.) **Rulings Respecting Drawing and Selection of Jurors.**⁶⁶ — Where peremptory challenges are not exhausted, one is not prejudiced by a failure to call a special venire in the regular manner.⁶⁷ Nor can the defendant complain of errors in summoning, selecting, or drawing persons to serve as jurors,⁶⁸ nor of discrepancies between the special venire and the copy thereof served,⁶⁹ nor of the manner in which names are selected from the lists to serve on the trial jury.⁷⁰ If a jury is in

60. *State v. Gorden*, 5 Idaho 297, 48 Pac. 1061.

Form and sufficiency of challenge for cause, see *supra*, VII, E, 4, d.

61. *State v. Flint*, 60 Vt. 304, 14 Atl. 178.

[a] **Error Waived.**—The error in compelling a defendant to exercise his peremptories in a manner not warranted by the statute is waived, where it appears defendant had unused peremptories at the time the jury was sworn. *Territory v. Padilla*, 12 N. M. 1, 71 Pac. 1084.

Order of interposing peremptories, see *supra*, VII, E, 5, b.

62. *Connecticut Mut. Life Ins. Co. v. Hillmon*, 188 U. S. 208, 23 Sup. Ct. 294, 47 L. ed. 446, having peremptories shows he was satisfied with jury.

63. *State v. Price*, 10 Rich. (S. C.) 351.

64. *Cabaniss v. State*, 8 Ga. App. 129, 63 S. E. 849, defendant's strikes were not exhausted and juror did not serve.

65. *Territory v. Shankland*, 3 Ariz. 403, 77 Pac. 492, while not conclusive, it tends to show that a jury unobjectionable to defendant, was obtained in the county in which he was objecting to being tried.

66. **Drawing, selecting and summoning jurors**, see generally 16 STANDARD PROC. 953, 984.

67. *People v. Gray*, 251 Ill. 431, 96 N. E. 268; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431; *People v. Peterson*, 153 Ill. App. 480.

[a] **Irregularity in making an order for a special venire**, where his peremptory challenges were not exhausted, and he was not in any way harmed,

cannot be complained of by defendant. *Colson v. State*, 51 Fla. 19, 40 So. 183.

As to calling special venire, see generally 16 STANDARD PROC. 978, 1002.

68. *Idaho*.—*Knollin v. Jones*, 7 Idaho 466, 63 Pac. 638. *Mich.*—*Eberts v. Mt. Clements Sugar Co.*, 182 Mich. 449, 148 N. W. 810. *Minn.*—*State v. Quirk*, 101 Minn. 334, 112 N. W. 409.

[a] **That a special venire was improperly summoned** in that certain persons were arbitrarily omitted from the list by the court, if amounting to error, would be harmless where defendant did not exhaust his peremptories. *State v. Register*, 133 N. C. 746, 46 S. E. 21.

[b] **Unwarranted interference of the trial judge** in ordering the sheriff to summon colored men on a special venire, cannot be complained of. *Capehart v. Stewart*, 80 N. C. 101.

[c] **That women were called on the panel** is no ground for setting aside the verdict where the record shows no woman served on the jury, and appellants did not exhaust peremptories. *Knollin v. Jones*, 7 Idaho 466, 63 Pac. 638.

[d] **That regular panel was not filled** where jury selected from those present cannot be complained of. *State v. Clyburn*, 16 S. C. 375.

[e] **That jury drawn from the regular and a reduced special venire** cannot be objected to. *State v. Brogden*, 111 N. C. 656, 16 S. E. 170.

69. *Scott v. State*, 29 Tex. App. 217, 15 S. W. 814, no juror objectionable to him was forced upon him.

70. *State v. Jackson*, 32 S. C. 27, 10 S. E. 769; *Galveston, H. & S. A. R.*

fact an unlawful jury the exercise, or failure to exercise, peremptories would not cure the error.⁷¹ One's challenge to the array is not waived by his having peremptories remaining,⁷² but on review of a ruling on motion to quash a special venire, the court may consider the fact that the defendant had peremptories remaining.⁷³

(III.) **Excusing on Own Motion or Out of Regular Order.**⁷⁴ — That the court excused jurors who were not challenged cannot be complained of by a defendant who still had peremptory challenges left when he accepted the jury,⁷⁵ or that jurors were improperly stood aside,⁷⁶ or that he arbitrarily excused qualified jurors from the regular panel and substituted others,⁷⁷ or that the court excused a juror, after acceptance, on juror's request and for reasons which seemed proper to the court,⁷⁸ or failed to excuse a juror on his own motion on a claim of exemption,⁷⁹ or that the court exercised its discretion to discharge jurors on their re-examination after acceptance,⁸⁰ cannot be complained of where the party did not exhaust his peremptory challenges.

Co. v. Wessendorf (Tex. Civ. App.), 39 S. W. 132.

[a] **Where all the names were not in the hat in the first instance,** defendant cannot complain of their being put in later, he having peremptories remaining and having accepted the jury. *State v. Campbell*, 35 S. C. 28, 14 S. E. 292.

[b] **Names Put Back in Box Too Soon.**—An irregularity on the part of the clerk in putting names back into the box before the time when the statute so directed, is waived where the defendant had peremptories remaining as that shows he was satisfied with the jury he had. *State v. White*, 40 Utah 342, 121 Pac. 579.

71. *State v. Barber*, 13 Idaho 65, 88 Pac. 418.

72. *State v. McQuaige*, 5 S. C. 429.

73. *Ward v. State*, 70 Tex. Crim. 393, 159 S. W. 272, wherein the fact that defendant "secured a jury satisfactory to him without exhausting his challenges" is given as one reason for upholding the trial court's action refusing to quash the special venire.

74. **As to rejection of jurors on court's own motion,** see *supra*, VII, D.

75. Ark.—*York v. State*, 91 Ark. 582, 121 S. W. 1070. Fla.—*Ellis v. State*, 25 Fla. 702, 6 So. 768. Kan. *Acheson, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74; *Stout v. Hyatt*, 13 Kan. 232. La.—*State v. Hill*, 46 La. Ann. 736, 15 So. 145; *State v. Thomas*, 41 La. Ann. 1088, 6 So. 803. N. Y.—*Peo-*

ple v. Decker, 157 N. Y. 186, 51 N. E. 1018. S. C.—*State v. Gill*, 14 S. C. 410. Tenn.—*Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

76. *State v. Cunningham*, 72 N. C. 469, jurors stood aside after being passed by the state.

[a] **After Counsel Refused To Accept or Reject.**—Prisoner has nothing of which he can complain where the court having discharged part of an incomplete jury for misconduct also discharged the balance, ordered the trial to begin de novo and the same jurors, except those guilty of the misconduct and one who was challenged by the state, having been tendered again and prisoner's counsel having refused to either accept or reject them, the court stood them aside and a jury was completed without them, and without defendant having exhausted his peremptories. *Griffie v. State*, 1 Lea (Tenn.) 41.

77. *Cochran v. State*, 113 Ga. 736, 39 S. E. 337; *State v. Linebarger*, 12 Mont. 292, 30 Pac. 140.

78. *State v. Fielding*, 135 Iowa 255, 112 N. W. 539; *Brennan v. O'Brien*, 121 Mich. 491, 80 N. W. 249; *Commercial Bank v. Chatfield*, 121 Mich. 641, 80 N. W. 712.

79. *State v. Jackson*, 42 La. Ann. 1170, 8 So. 297.

80. *Ochs v. People*, 124 Ill. 399, 16 N. E. 662, *affirming* 25 Ill. App. 379.

[a] **Peremptory Challenge Allowed After Re-examination.**—Assuming it

(IV.) **Questions Improperly Overruled.**⁸¹ — Where one's peremptories have not been exhausted when the jury is completed, he cannot usually complain of the overruling of questions to a juror.⁸² Thus, refusing to permit a question which would have been proper to aid in the determination as to peremptorily challenging is not ground for reversal, where no peremptory challenges had as yet been interposed,⁸³ or where the questioned juror did not serve.⁸⁴ But where a proper question was not permitted and the party has not exhausted his peremptories it has been held that reversal will lie, because he might have discovered reasons for exercising his right had the question been permitted.⁸⁵ And even conceding that one has not the right to ask questions for the sole purpose of determining whether it is advisable to challenge peremptorily, if the question asked was proper to bring out grounds to challenge for cause, and was overruled, defendant is prejudiced notwithstanding he had peremptories remaining.⁸⁶

(V.) **Rules Applied to Joint Parties.**⁸⁷ — Where several defendants, tried together, joined in their challenges, it must appear that the challenges

was error to permit the prosecution to re-examine a juror and peremptorily challenge him after he had been accepted, the error is cured where the defendant had peremptories when the jury was completed. *Glenn v. State*, 71 Ark. 86, 71 S. W. 254.

81. **Examination generally**, see *supra*, VII, E, 4, i; VII, E, 5, m.

Waiver of error in overruling a proper question by failing to challenge generally, see *supra*, VII, E, 4, b, (III).

82. *Cal.*—*People v. Perry*, 25 Cal. App. 337, 143 Pac. 798. *Fla.*—*Mathis v. State*, 45 Fla. 46, 34 So. 287. *N. C.* *State v. Gooch*, 94 N. C. 987. *N. D.* *State v. Goetz*, 21 N. D. 569, 131 N. W. 514. *Ohio.*—*Mimms v. State*, 16 Ohio St. 221.

[a] **Refusing permission to repeat questions** could not have prejudiced defendant who had ten peremptories left after excusing the juror on peremptory. *State v. Hillstrom*, 46 Utah 341, 150 Pac. 935.

[b] **Presumption Is Juror Serving Was Acceptable.**—*People v. Perry*, 25 Cal. App. 337, 143 Pac. 798.

83. *Chicago City Ry. Co. v. Fetzer*, 113 Ill. App. 280; *State v. Furbeck*, 29 Kan. 532.

Right or necessity of examination on peremptory challenge, see *supra*, VII, E, 5, m, (I).

84. *Territory v. Campbell*, 9 Mont. 16, 22 Pac. 121.

85. *Mich.*—*People v. Peck*, 139 Mich. 680, 103 N. W. 178, *following*

Monaghan v. Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797. *Pa.*—*Com. v. Grauman*, 52 Pa. Super. 215. *Tex.* *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

[a] **Must Be Shown To Have Been Harmless.**—Failure to permit proper questions to be asked results in a reversal where it is not shown to be harmless error, notwithstanding the party has not exhausted his peremptories. *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312.

86. *State v. Bresland*, 59 Minn. 281, 61 N. W. 450.

[a] **Reason for Rule And Cases Distinguished.**—"The excuse is a sort of equity and is met with a sort of equity entitled to just as much consideration. The defendant had a right to a fair and impartial jury. The excuse is that she had a fair and impartial jury, and therefore was not prejudiced by the error of the court. The answer to this excuse is that she does not know whether she had or not." *State v. Bresland*, 59 Minn. 281, 61 N. W. 450, *distinguishing* *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698, and *State v. Kluseman*, 53 Minn. 541, 55 N. W. 741, as being cases where defendant could intelligently exercise his right of peremptory challenge—in the one case on the juror retained, and in the other on jurors objectionable to him subsequently drawn.

87. **Waiver of right to separate challenges by permitting co-defendant**

of all were exhausted, or they cannot complain of the overruling of a challenge for cause;⁸⁸ and the mere fact that one of the defendants has exhausted his peremptories does not show he had to accept a juror obnoxious to him.⁸⁹ Failure to give joint parties the proper number is harmless where the party complaining did not exhaust those given.⁹⁰

d. *Forcing Party To Exhaust Peremptories as Error.* — (I.) In General. — Where a party exhausts his peremptory challenges, using one of them on a juror who should have been excused or challenged for cause, reversal follows in some jurisdictions,⁹¹ the right thereto being

to exhaust challenges without offering to challenge in turn, see *supra*, VII, E, 5, j, (IV).

88. *State v. Ford*, 37 La. Ann. 443.

89. *State v. Breaux*, 104 La. 540, 29 So. 222.

[a] **A Juror Inimical to Him Must Be Shown.**—It must at least appear that some juror acceptable to his co-defendants was inimical to the complaining defendant. *State v. Garig*, 43 La. Ann. 365, 8 So. 934.

90. *State v. Fournier*, 68 Vt. 262, 35 Atl. 178.

[a] **No Juror Objectionable Appearing To Have Been Taken.**—Where the bill of exceptions does not show that appellant exhausted its peremptory challenges, nor that any juror was taken on the jury objectionable to appellant, the error of the court in failing to give each defendant the full number of peremptories is harmless. *Missouri Pac. Ry. Co. v. Cheek* (Tex. Civ. App.), 159 S. W. 427. See also *Oliver v. State*, 70 Tex. Crim. 140, 159 S. W. 235.

91. **Ark.**—*Dewain v. State*, 120 Ark. 302, 179 S. W. 346; *Collins v. State*, 102 Ark. 180, 143 S. W. 1075; *Langford v. State*, 98 Ark. 327, 135 S. W. 895; *Terrell v. State*, 69 Ark. 449, 64 S. W. 223; *Caldwell v. State*, 69 Ark. 322, 63 S. W. 59. **Colo.**—*Denver City Tramway Co. v. Kennedy*, 50 Colo. 418, 117 Pac. 167; *Grand Lodge A. O. U. W. v. Taylor*, 44 Colo. 373, 99 Pac. 570; *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680. **D. C.** *United States v. Schneider*, 10 Mack. 381. **Ia.**—*State v. Hassan*, 149 Iowa 518, 128 N. W. 960. **Kan.**—*State v. Vogan*, 56 Kan. 61, 42 Pac. 352; *State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750; *State v. Brown*, 15 Kan. 400. **La.** *State v. Rodriguez*, 115 La. 1004, 40 So. 438; *State v. Fourchy*, 51 La. Ann. 228, 25 So. 109. **Minn.**—*State v. Lawler*, 28 Minn. 216, 9 N. W. 698. **Miss.**

Gammons v. State, 85 Miss. 103, 37 So. 609; *Klyce v. State*, 79 Miss. 652, 31 So. 339; *Hubbard v. Rutledge*, 57 Miss. 7. **Mont.**—*Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958. **Neb.** *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *Thurman v. State*, 27 Neb. 628, 43 N. W. 404. **Nev.**—*Burch v. Southern Pac. Co.*, 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166. **Ohio.**—*Hartnett v. State*, 42 Ohio St. 568. **S. C.**—*State v. Tidwell*, 100 S. C. 248, 84 S. E. 778. **Wash.**—*State v. Gohl*, 46 Wash. 408, 90 Pac. 259; *State v. Stentz*, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30.

[a] **The theory** is that the effect is the same as if the court had erroneously denied one the right to his full number of peremptory challenges. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680; *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Thurman v. State*, 27 Neb. 628, 43 N. W. 404.

[b] So the court in Tennessee said, before the rule was changed by statute, "If we could say he could be tried with one less we could say two less and even without any." *Ward v. State*, 102 Tenn. 724, 52 S. W. 996.

[c] **The challenge might have been required by defendant to remove a juror objectionable to him**, though legally qualified in law. *State v. Lawlor*, 28 Minn. 216, 9 N. W. 698. To same effect see *Burch v. Southern Pac.*, 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166.

[d] **The Peremptory Does Not Cure the Error.**—Where a challenge for cause is erroneously overruled, the fact that the juror was peremptorily challenged thereafter by the defendant would not cure the error. *Jahnke v.*

absolute in such a case.⁹² It must appear, however, that the party was compelled to use one of his peremptories in excluding the juror who should have been excluded for cause,⁹³ though it has been held that where a juror was improperly presented, reversal follows the use of defendant's final peremptory in removing him though he and the juror substituted were legally qualified.⁹⁴ The premature use of a peremptory challenge does not deprive accused of the right to raise the question that he has been obliged to use the peremptory to exclude a juror who should have been excused for cause.⁹⁵ But one does not gain any additional right by having his peremptory overruled where the challenge for cause was properly decided.⁹⁶

(II.) **Objectionable Juror Forced on Party After Peremptories Exhausted.** If the jurors chosen after the peremptories are exhausted are admittedly acceptable, no prejudicial error appears.⁹⁷ But if an incompetent juror is forced on the party after the peremptories are exhausted, reversal follows.⁹⁸ In some jurisdictions it must appear not

State, 68 Neb. 154, 94 N. W. 153, 104 N. W. 154, following *Thurman v. State*, 27 Neb. 628, 43 N. W. 404.

92. **Ark.**—*Dewain v. State*, 120 Ark. 302, 179 S. W. 346; *Collins v. State*, 102 Ark. 180, 143 S. W. 1075; *Langford v. State*, 98 Ark. 327, 135 S. W. 895; *Terrell v. State*, 69 Ark. 449, 64 S. W. 223; *Caldwell v. State*, 69 Ark. 322, 63 S. W. 59. **Mont.**—*Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958. **Tenn.**—*Wilson v. State*, 109 Tenn. 167, 70 S. W. 57; *State v. Robinson*, 106 Tenn. 204, 61 S. W. 65, but compare rule under statute *infra*.

93. *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Hartnett v. State*, 42 Ohio St. 568.

[a] **If no incompetent juror in fact sat in the case**, no reversal follows where the verdict could not have been different under the undisputed facts. *Sullins v. State*, 79 Ark. 127, 95 S. W. 159.

94. *State v. Tidwell*, 100 S. C. 248, 84 S. E. 778.

95. *Gammons v. State*, 85 Miss. 103, 37 So. 609.

[a] **Defendant's Counsel Did Not Wait Until Jury Full.**—It appeared that defendant's counsel had exercised the right immediately upon the court's adverse ruling on the challenge for cause; and the state's contention was that this was done to deprive the court of its opportunity to reconsider its ruling, or the state of its opportunity to challenge the juror peremptorily; had the counsel waited until there was a full panel which is the orderly prac-

tice. The supreme court says that inasmuch as there was no intimation of any desire by the court to reconsider its ruling, they would not permit the zeal of counsel to secure a possible advantage to his client, to so operate as to deprive the accused of his right to object to the court's ruling. *Gammons v. State*, 85 Miss. 103, 37 So. 609.

96. *State v. Hargrave*, 100 N. C. 484, 6 S. E. 185, challenge for cause overruled.

[a] **Challenge for Conscientious Scruples Allowed.**—Although the prisoner protested and afterwards exhausted his peremptories and was obliged to take an objectionable juror, he cannot complain that the court excused a juror who was conscientiously opposed to capital punishment. *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

97. *McCarthy v. State*, 5 Ohio Cir. Ct. 627, 3 Ohio Cir. Dec. 306, defendant's counsel stated the juror was acceptable.

98. **Fla.**—*Walsingham v. State*, 61 Fla. 67, 56 So. 195. **Kan.**—*State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750. **La.**—*State v. Ramsey*, 50 La. Ann. 1339, 24 So. 302. **Mich.**—*People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871. **Okla.**—*Morehead v. State*, 151 Pac. 1183. **Tex.**—*Holt v. State*, 9 Tex. App. 571; *Stagner v. State*, 9 Tex. App. 440; *Rothschild v. State*, 7 Tex. App. 519.

[a] **Even Though Defendant Clearly Guilty.**—If an incompetent juror has

only that the party has exhausted his peremptories, but that he has been compelled to take an objectionable juror subsequent thereto.⁹⁹ The parties' rights can be fully preserved by exhausting the peremptories, and then again so challenging and submitting to the ruling of the court that the peremptories have been exhausted.¹ That an

been permitted to serve over defendant's challenge and when he could not have gotten rid of him by a peremptory challenge, reversal must follow even on the assumption that the evidence may show him to be "guilty beyond all peradventure of a doubt, and sufficient to support a verdict with the death penalty." *Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422.

99. Cal.—*People v. Kromphold*, 51 Cal. Dec. 537, following *People v. Schafer*, 161 Cal. 573, 119 Pac. 920. Ill. *Graff v. People*, 208 Ill. 312, 70 N. E. 299; *Chicago & A. R. Co. v. Fisher*, 141 Ill. 614, 31 N. E. 406; *Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Fitzsimmons-Kreider M. Co. v. Millers M. F. Ins. Co.*, 161 Ill. App. 542. N. M.—*Colbert v. Journal Pub. Co.*, 19 N. M. 156, 142 Pac. 146. Okla.—*Blankenship v. State*, 10 Okla. Crim. 551, 139 Pac. 840; *Colbert v. State*, 4 Okla. Crim. 500, 113 Pac. 558; *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988; *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059. Ore.—*State v. Megorden*, 49 Ore. 259, 88 Pac. 306; *Ford v. Umatilla*, 15 Ore. 513, 16 Pac. 33. Pa.—*Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724. Tenn.—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458; *Wooten v. State*, 99 Tenn. 189, 41 S. W. 813. Tex.—*Cotton v. State*, 32 Tex. 614; *Holland v. State*, 31 Tex. Crim. 345, 20 S. W. 750; *Loggins v. State*, 12 Tex. App. 65; *Holt v. State*, 9 Tex. App. 571; *Grisson v. State*, 8 Tex. App. 386. Wis.—*Pool v. Milwaukee, etc. Ins. Co.*, 94 Wis. 447, 69 N. W. 65; *Carthous v. State*, 78 Wis. 560, 47 N. W. 629; *Heucke v. Milwaukee, etc. Co.*, 69 Wis. 401, 34 N. W. 243.

[a] Reason for Rule.—After reviewing the cases at some length the court concludes that the whole question turns upon whether prejudice will be presumed from the mere fact that defendant was deprived of a peremptory. Adopting that rule loses sight of the principle that all defendant is entitled to is a fair and impartial jury. Since

the defendant may waive one or more of his peremptories, and does so whenever he is satisfied with the jurors in the box or is not certain that he can obtain others more favorable to him, no reason appears why he might not do so as to the twelfth juror, as well as earlier. Therefore, after he has exhausted his peremptories, no presumption arises that the subsequent jurors were in any way objectionable to him. *State v. Thorne*, 41 Utah 414, 126 Pac. 286, Ann. Cas. 1915D, 90.

[b] Must Show Had Occasion To Use Another, or Some Juror Objectionable.—It must appear that after having exhausted his peremptories he not only had used one on a juror who should have been excluded on his challenge for cause, but that subsequent to so exhausting, he had occasion or desire to use an additional peremptory or that some one or more of the jury were not satisfactory to him. *Seragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706, following *People v. Schafer*, 161 Cal. 573, 119 Pac. 920, which explains *People v. Durrant*, 116 Cal. 179, 48 Pac. 75, as intending to lay down that rule, though the peremptory challenges in that case were not exhausted and *distinguishing* *People v. Riggins*, 159 Cal. 113, 112 Pac. 862, as being a case where the circumstances took the case out of the operation of the rule.

[c] Applied in Civil Case Where Verdict by Part of Jury Sufficient. The overruling of a proper challenge for cause followed by the exhaustion of the party's peremptory challenges does not constitute prejudicial error in a civil cause, where it is not shown that any member of the jury was objectionable, nor any additional peremptory desired, and the verdict, though needing the concurrence of but three-fourths of the jury, was in fact unanimous. *City of Guthrie v. Snyder*, 43 Okla. 334, 143 Pac. 8.

1. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *Wooten v. State*, 99 Tenn. 182, 41 S. W. 813, compare rule under statute *infra*.

objectionable juror has served clearly appears when the party's subsequent challenge for cause has been overruled as to a juror who remained on the panel.² Some courts hold that there must be a specific objection or challenge to a juror after the challenges are exhausted;³ but others hold it is not necessary to actually challenge another juror and have the challenge overruled, in order to properly save the question;⁴ it is sufficient if it appears that the party was deprived of his right to challenge peremptorily because he had been obliged to use peremptories unnecessarily.⁵

Where peremptories have been exhausted, an erroneous excluding of a juror on the other party's challenge for cause is no ground for reversal unless it appears that some injury resulted through the selection of a juror obnoxious on legal grounds after the exhaustion;⁶ and the same rule has been applied where the court excluded a juror on its own motion.⁷

7. Review of Individual Challenge.⁸—Where no objection is taken to the admission or rejection of evidence or to any proceeding on the

[a] Where defendant has had a peremptory overruled after his peremptories are exhausted, and he has used one peremptory in excluding a juror who should have been excused on his challenge for cause there is clearly reversible error. *Carr v. State*, 104 Ala. 43, 16 So. 155.

[b] Proper to take exception based on the refusal of the last peremptory, for the purpose of showing how the prisoner might be or had been prejudiced. But there is no holding as to whether it is necessary to go so far. *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

2. *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *People v. Hill*, 20 Cal. App. 407, 129 Pac. 475.

3. *Wooten v. State*, 99 Tenn. 182, 41 S. W. 813; *Morrison v. State*, 40 Tex. Crim. 473, 51 S. W. 358.

[a] Presumed That After Accepted Juror Was Qualified.—Defendant having exhausted his peremptories before the twelfth juror was chosen, and the record being silent as to any objection made to him it will be presumed that there was no legal reason why he was not an acceptable juror. *Rash v. State*, 61 Ala. 89.

[b] Juror Accepted Without Question.—Where after exhausting his peremptories the defendant accepted a juror without question as to his qualification, it must be presumed that he was qualified. *State v. Megorden*, 49 Ore. 259, 88 Pac. 306.

4. *People v. Helm*, 152 Cal. 532, 93

Pac. 99; *Thurman v. State*, 27 Neb. 628, 43 N. W. 404.

[a] To Do So Might "Possibly Incur His Prejudice."—The matter was properly brought up on motion for new trial supported by affidavits of counsel. *Chicago, etc. R. Co. v. Downey*, 85 Ill. App. 175.

5. *Burke v. McDonald*, 3 Idaho 296, 29 Pac. 98; *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724.

[a] Objection To Panel Not Sufficient.—Where after peremptories were exhausted, a juror was taken who was neither challenged peremptorily nor for cause, there is no showing that he was objectionable simply because he had been objected to for a matter that went to the whole panel and not to the particular juror. *Johns v. State*, 55 Md. 350.

6. *State v. Harris*, 107 La. 196, 31 So. 646; *State v. Breaux*, 104 La. 540, 29 So. 222; *State v. Aarons*, 43 La. Ann. 406, 9 So. 114; *State v. Carries*, 39 La. Ann. 931, 3 So. 56.

7. *State v. Hamilton*, 35 La. Ann. 1043.

8. Generally as to methods of bringing questions up for review, see the titles "Appeals;" "Bills of Exceptions;" "Writ of Error;" and other titles dealing with review.

Effect of errors and right to review, see *supra*, VII, E, 4, m; VII, E, 5, n.

Effect of using or retaining peremptory challenges on right to review, see *supra*, VII, E, 6.

Waiver of objection by failure to

hearing of the challenge the decision is final on the question of fact,⁹ and the court properly refuses to incorporate in the bill of exceptions, the evidence of the jurors on their voir dire, if there be no exception to the ruling on the evidence.¹⁰ Save in those states wherein the statutes otherwise provide,¹¹ rulings on challenges for cause cannot be reviewed unless an exception be taken thereto.¹² The general rule is that the ruling must be spread on the record by a bill of exceptions,¹³ though in some jurisdictions the objection to the qualifications of the jurors must be preserved in the motion for a new trial.¹⁴ Mere general statements in the bill of exceptions that objectionable jurors served is not sufficient to raise the question,¹⁵ but the specific objection made must appear,¹⁶ and where there are exceptions in the statute

review after jury completed, see *supra*, VII, E, 4, b, (II).

9. *People v. Vasquez*, 49 Cal. 560; *People v. Cotta*, 49 Cal. 166, challenge for actual bias.

10. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

[a] **Though There Are Exceptions to Other Matters.**—Where one exception went only to the form of the question, a second was to the refusal of the court to hear argument after the trial of the challenge had been concluded, and a third was as to the allowance of a question by the district attorney after the juror had been passed by both sides, the court properly declined to incorporate the testimony of the jurors in the bill of exceptions. *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

11. See statutes of various states and the title "Objections and Exceptions."

12. Cal.—*People v. Cochran*, 61 Cal. 548. Haw.—*Queen v. Self*, 8 Hawaii 434. Mo.—*Tarkio v. Cook*, 120 Mo. 1, 25 S. W. 202, 41 Am. St. Rep. 678; *State v. Brownfield*, 83 Mo. 448. Neb. *Fillion v. State*, 5 Neb. 351. Pa.—*Funk v. Ely*, 45 Pa. 444. Tenn.—*Isham v. State*, 1 Sneed 111. Utah.—*People v. Hopt*, 3 Utah 393, 4 Pac. 250.

[a] **Though counsel's indication of his willingness that a challenge be considered would estop his client from objecting to the court's ruling thereon, it does not relieve from the necessity of taking proper exception to the court's refusal to consider the challenge, and bringing up the proper record thereon.** *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680.

13. *Ripley v. Coolidge*, Minor (Ala.)

11; *Ellington v. State*, 63 Tex. Crim. 427, 140 S. W. 1101.

[a] **It is not sufficient to raise the question on the motion for a new trial and then take an exception and bring the matter up in a bill, which embodies the whole motion.** *Black v. State*, 46 Tex. Crim. 590, 81 S. W. 302.

[b] **Not a Mere Irregularity To Be Presented by Affidavit.**—The impaneling of the jury is part of the trial and any ruling of the court, with respect thereto, if erroneous, is an error of law occurring at the trial and not a mere irregularity. *Silcox v. Lang*, 7th Cal. 118, 20 Pac. 297.

14. *State v. Fields*, 234 Mo. 615, 138 S. W. 518; *Everton v. Esgate*, 24 Neb. 235, 38 N. W. 794, the voir dire examination must be set out in the record so as to show whether a juror was interrogated upon a point which is made the basis of a motion for a new trial.

[a] **Fact That New Trial Not Allowed May Be Considered.**—Though the bill of exceptions contains a statement by the court that a certain question would have been allowed had its attention been specially called thereto, the supreme court will not reverse, but will assume that, had the trial court believed the question important, it would have granted a new trial. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033.

15. *Powers v. State*, 23 Tex. App. 42, 5 S. W. 153.

16. *Giles v. State*, 66 Tex. Crim. 638, 148 S. W. 317; *Campos v. State*, 50 Tex. Crim. 289, 97 S. W. 100.

[a] **Actual Attempt To Exercise Right Must Appear.**—Though the cap-

the bill must show that the case did not fall therein.¹⁷ The bill of exceptions must show what became of the jurors excepted to.¹⁸ The reviewing court can only consider the specific objection made.¹⁹ The record must show that the party did not receive his proper number of peremptories, or reversal cannot be had therefor,²⁰ and that the challenges were exhausted,²¹ or that defendant was compelled to exercise his peremptory at a wrong time.²² Where the record is con-

tion of the bill of exceptions recites that counsel requested the proper number of challenges, "which request was denied," no error appears where it is not shown that defendant exercised or offered to exercise any peremptory challenge, nor that he had exhausted his challenges when the jury was sworn. The reviewing court is merely left to conjecture as to what took place and as to whether defendant was actually denied his rights. *State v. Collins* (Mont.), 163 Pac. 102.

[b] **Insufficient Assignment.**—Where there is no reference to the record and nothing further in the brief than what appears in the assignment, the court may disregard an assignment that a juror was found incompetent. *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543, Ann. Cas. 1913D, 1262.

17. *King v. State* (Tex. Crim.), 100 S. W. 387, challenge based on failure to pay poll taxes.

[a] **Exclusion of a colored venireman who could not read or write** cannot be assigned as error where the bill of exceptions does not show that there were not a sufficient number of jurors who are able to read or write, to make the case fall within the exception to the statute, providing that challenge shall not be sustained when it appears to the court that there are not a sufficient number in the county who can read and write. *King v. State* (Tex. Crim.), 64 S. W. 245.

18. *Dodd v. State* (Tex. Crim.), 82 S. W. 510, no error is shown unless it is shown that the juror sat.

19. **Neb.**—*Russell v. State*, 62 Neb 512, 87 N. W. 344. **N. J.**—*State v. Barker*, 68 N. J. L. 19, 52 Atl. 284. **Tex.**—*Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670, after objection to question on ground that no such cause of challenge, failure to ask in time cannot be urged on appeal.

[a] **Disqualifying opinion of juror** will not be considered where this al-

leged ground of error was not contained in the specifications of error used on the motion for a new trial and is not contained in the assignments of error, the sole ground mentioned in either being that the juror had given an affidavit used on a motion for change of venue. *State v. Morse*, 35 S. D. 18, 150 N. W. 293.

[b] **Ruling Made on Admission of Counsel.**—Where court had no discretion to permit peremptory challenges after juror sworn, but did so upon the admission of defendant's counsel that the discretion existed, the reviewing court refused to reverse on the theory that the discretion was properly exercised, the only specific objection being that the court should not have exercised its discretion upon the prosecutor's bare statement. *People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105.

20. *Clarke v. State*, 87 Ala. 71, 6 So. 368, where there is no recital of the overruling of any challenge, but only a motion made that a certain number be allowed without any statement of what ruling the court made thereon, no error appears.

21. **Mont.**—*Davidson v. Bordeaux*, 15 Mont. 245, 38 Pac. 1075; *Territory v. Campbell*, 9 Mont. 16, 22 Pac. 121. **Nev.**—*Fleeson v. Savage* Silv. Min. Co., 3 Nev. 157. **Tex.**—*Johnson v. State*, 27 Tex. 758.

22. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181, nothing appeared but defendant's counsel's statement that he desired to reserve that right, but it was not plain what the court's ruling on the request was, nor that any right to challenge was denied to defendant.

[a] **Record Uncertain.**—It appearing that plaintiff had stricken off but two jurors when defendant has stricken three, but it not appearing whether this was because defendant had stricken out of turn or plaintiff had waived a challenge, the record does not show error. *Gilchrist v. Brande*, 58 Wis. 184, 15 N. W. 817.

tradictory as to what was done there is nothing to review.²³ But though the record does not state the facts in a manner wholly intelligible to the reviewing court the questions may be considered.²⁴ It may be assumed that a challenge was interposed though not recited in the record,²⁵ but where error is claimed in allowing the challenge it must appear that the challenge was for cause and not peremptory.²⁶ Where the record shows that challenge was not made in time it must also show why it was not seasonably made.²⁷ It must affirmatively appear by the record that jurors have been examined on voir dire.²⁸ In many jurisdictions error as to overruling challenges cannot be considered unless all the evidence on the voir dire is brought up,²⁹ but in other jurisdictions only so much need be brought up as dis-

23. *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445 (record showing both that juror was excused for cause, and peremptorily, cannot import verity); *State v. Roderigas*, 7 Nev. 328, where the judge in signing the bill of exceptions states that the facts were not as assumed by counsel there is no showing in the record of any irregularity.

[a] **Contradiction Between Assignment and Record.**—Where the bill of exceptions assigns as error the "refusal to sustain defendant's peremptory challenge" and it appears that the refusal was of a challenge for cause, technically the assignment may be overruled for not being sustained by the record. *Southern Kansas Ry. Co. v. Sage*, 43 Tex. Civ. App. 38, 94 S. W. 1074.

[b] **Where the records were imperfect,** and the parties were not in accord as to what had been done, the judgment will not be disturbed for the trial court's rulings on challenges. *Cleveland v. Atkinson*, 94 Iowa 621, 63 N. W. 465.

24. *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245, court assumed that the trial court understood its own record and had acted advisedly.

[a] **Court considered exclusion of questions** where it could see the point to which they were directed, though they were technically open to the criticism that they were stated in a confused manner with incorrect hypothesis, etc. *O'Rourke v. Yonkers R. Co.*, 32 App. Div. 8, 52 N. Y. Supp. 706.

25. *People v. Hosier*, 132 App. Div. 146, 116 N. Y. Supp. 911, where no objection appears on the record based on the want of a challenge and it appears

that counsel on both sides examined the jurors.

[a] **Record Sufficient Where Court Ordered Juror To "Stand by."**—There is nothing to show that the word "challenge" must necessarily be used, and the meaning obviously is that the juror was challenged by the crown and that consideration of the challenge was postponed till it could be seen whether a jury could be obtained without that juror. *Mansell v. Reg.*, *Dears & B.* 375, 8 El. & Bl. 54, 4 Jur. (N. S.) 432, 27 L. J. M. C. 4, 92 E. C. L. 52, 120 Eng. Reprint 20.

26. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, 29 L. ed. 755.

27. *Coil v. State*, 62 Neb. 15, 86 N. W. 925.

28. *Horton v. State*, 10 Okla. Crim. 294, 136 Pac. 177 (a mere statement that they were duly sworn and were thereupon interrogated is not sufficient); *People v. Hopt*, 3 Utah 396, 4 Pac. 250.

[a] **Mere recital in journal entry** that "the jury was impaneled, tried and sworn," is not sufficient to show that they were examined under oath as to their qualifications. *State v. Funck*, 17 Iowa 365.

29. **Ia.**—*Cleveland v. Atkinson*, 94 Iowa 621, 63 N. W. 465. **Neb.**—*Everton v. Esgate*, 24 Neb. 235, 38 N. W. 794. **N. D.**—*State v. Gordon*, 32 N. D. 31, 155 N. W. 59. **Ohio.**—*Cooper v. State*, 16 Ohio St. 328, the challenge was based on the juror's state of mind. **Okla.**—*Robinson v. Territory*, 16 Okla. 241, 85 Pac. 451. **R. I.**—*Sansouvier v. Glenlyon Dye Works*, 28 R. I. 539, 68 Atl. 545. **Utah.**—*United States v. Bromley*, 4 Utah 498, 11 Pac. 619; *United States v. Groesbeck*, 4 Utah 487,

closes that the defendant has not had a trial by a legally constituted jury.³⁰ The bill of exceptions should show not only an improper question, but the answer thereto.³¹ The action of the trial court in overruling a question cannot be reviewed unless sufficient evidence is presented to show error,³² and it should therefore appear what the party expected to show by the questions.³³ That improper questions

11 Pac. 542; *People v. Hopt*, 3 Utah 396, 4 Pac. 250.

[a] **Must be embraced in the terms of the judge's certificate settling the bill of exceptions.** *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445. See also *Coil v. State*, 62 Neb. 15, 86 N. W. 925, holding that it is not sufficient that certificate shows that all the testimony adduced or offered at the trial is in the bill of exceptions. And to same effect, *Durfee v. State*, 53 Neb. 214, 73 N. W. 676.

[b] **Transcript must be embraced in the bill of exceptions and identified by the certificate of the judge.** *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556.

[c] **Where the reporter's transcript was stricken for failure to comply with the statute, the court must assume that the juror answered fully and fairly all questions put to him.** *Vincent v. Smith*, 13 Ariz. 346, 114 Pac. 557.

30. *State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750.

[a] **When the bill of exceptions contains sufficient testimony taken at the examination of the juror challenged for actual bias, conclusively to show that he is disqualified, any evidence in excess thereof must necessarily be useless.** *State v. Miller*, 46 Ore. 485, 81 Pac. 363, *distinguishing* *State v. Tom*, 8 Ore. 177, wherein the court says that all the testimony must be incorporated in the bill, as being a case wherein on the face of the record the juror was not disqualified and the bill of exceptions did not purport to give any of the evidence tending to show what circumstances were considered by the trial court as the basis of its ruling that the juror was competent. See also *State v. Olberman*, 33 Ore. 556, 55 Pac. 866 (where the record showed that jurors had read newspapers purporting to give the testimony of witnesses before the coroner's inquest, but it did not appear who testified or what testimony was given. So the jurors could

not be held incompetent as a matter of law); *Hayden v. Long*, 8 Ore. 244.

31. *Fuller v. State*, 50 Tex. Crim. 14, 95 S. W. 541. See also *King v. State* (Tex. Crim.), 64 S. W. 245.

32. *Southern Pacific Co. v. Rauh*, 49 Fed. 696, 1 C. C. A. 416, mere question and ruling but no evidence or challenge shown.

[a] **This rule applies as well to questions propounded for the purpose of determining whether to challenge peremptorily as those propounded on a challenge for cause.** It will be assumed, in support of the court's action, that the desired information was obtained through other questions propounded, but not shown in the record. *Annadall v. Union Cement, etc. Co.*, 42 Ind. App. 264, 84 N. E. 359, *approved* in *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312.

33. *Woodroe v. State*, 50 Tex. Crim. 212, 96 S. W. 30, on inquiry as to juror's knowledge of former acquittal it should be shown that he proposed to show that the jurors sat in the other case, or some other fact making them disqualified.

[a] **Should Show What Juror Would Have Answered.**—Where the bill of exception did not recite or indicate what the jurors would have answered to questions improperly disallowed, and the answers to the court of other questions showed the jurors to be fair and included the answer to the questions in a general way, the court cannot revise the matter. *Caton v. State*, 66 Tex. Crim. 473, 147 S. W. 590.

[b] **Analogous To Rule on Examination of Witness.**—The same rule applies in examination of juror on voir dire, as in the examination of a witness, and hence the action of the trial court in overruling a question cannot be reviewed unless the bill of exceptions shows what the party expected to prove. In other words the materiality of the question must be made to appear. *Atlantic & D. R. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590.

were propounded cannot be raised for the first time in the reply brief.³⁴

F. QUALIFICATIONS AND GROUNDS FOR INDIVIDUAL CHALLENGE. — 1. In General. — The purpose of all statutes and rules in reference to juries is to secure to both sides a trial by an honest, impartial, intelligent jury of resident citizens.³⁵ At the common law the qualification of a juror was summed up in the expression "*liberos et legales homines de vicineto*," that is, free and lawful men from the neighborhood.³⁶ For lack of any of these qualifications, principal challenge would lie,³⁷ while the causes of challenges to the favor were said to be "infinite."³⁸ The common-law causes of challenge have survived,³⁹ and the statutory requirements are in substance those of the common law, with certain additional qualifications.⁴⁰

If the words of the statute are as consistent with the creation of an exemption, as a qualification, it will be construed as the one or the other accordingly as the subject-matter was one of exemption or qualification at common law,⁴¹ but where a statute says certain persons are "liable" to jury duty it means that those persons are qualified subject to the privilege of exemption set out in the statute.⁴² So far as a particular qualification may be required by the constitution, of course the legislature cannot abrogate it,⁴³ and the constitutional guaranty of an impartial jury will not be allowed to be destroyed by the legislature's omission of grounds that clearly render the juror incompetent.⁴⁴ But in so far as a statute aims to secure honest and

34. *People v. Gray*, 251 Ill. 431, 96 N. E. 268, should be in the original brief.

35. *Smith v. State*, 55 Ala. 1; *State v. Marshall*, 8 Ala. 302.

36. *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, *citing* 4 Bl. p. 350.

[a] **Common-Law Definitions.**—"By the common law jurors were to be *liberos et legales homines*. Liber homo was one who had not only freehold land, but freedom of mind, or not more inclined to one party than the other, and *legalis* was one not outlawed, and against whom no exception could be taken in that behalf. These qualifications were always held to exclude aliens, minors and villians." *Quinn v. Halbert*, 52 Vt. 353, *citing* *Bac. Abr. Juries*.

[b] By "good and lawful men" was meant liege subjects of the king, neither aliens nor persons outlawed; attainted of treason or felony or convicted of any crime rendering them infamous. Later statutes added property qualifications. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95.

37. See *supra*, VII, E, 1, e.

38. *People v. Bodine*, 1 Denio (N. Y.) 281, *quoting* Coke, 1 Inst. 157b. See also N. C.—*State v. McAfee*, 64 N. C. 339; *State v. Benton*, 19 N. C. 196. Pa.—*Harrisburg Bank v. Forster*, 8 Watts 304, which notes that Sir William Blackstone does not profess to enumerate the causes falling under this head but only gives illustrations. W. Va. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015, *quoting* Lord Coke and saying no enumeration ever was attempted nor possible.

39. *Williams v. Godfrey*, 1 Heisk. (Tenn.) 299.

40. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95.

41. *Booth v. Com.*, 16 Gratt. (57 Va.) 519.

42. *State v. Davis*, 12 R. I. 492, 34 Am. Rep. 704.

43. *Moses v. State*, 60 Ga. 138.

44. *Gaff v. State*, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235; *Block v. State*, 100 Ind. 357.

[a] Statute allowing biased or prejudiced juror to serve would be unconstitutional, see *infra*, VII, F, 13, a.

intelligent jurors it is in harmony with the provisions of the constitution requiring impartiality.⁴⁵ Therefore, so long as the rule requiring an impartial jury of the county is not infringed, the legislative body may prescribe practically any qualification it sees fit,⁴⁶ including additional qualifications beyond those required of a common-law jury at the time of the enactment of the constitutional provision guaranteeing such jury.⁴⁷ Also the legislature may, from motives of public policy, exclude certain persons from jury service.⁴⁸

Cases may arise which are not covered by any statute, or by any of the common-law writers and which must be determined by common-law principles,⁴⁹ but the right to challenge for cause does not spring from any especial provision of law, but rather from the general rule that the method of trial shall be according to the common law.⁵⁰ Moreover, the provisions of the codes and statutes are declaratory only,⁵¹ and the grounds of challenge enumerated in the statutes are not exclusive of all other grounds,⁵² the statutes themselves sometimes pro-

45. *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

46. *State v. Bolln*, 10 Wyo. 439, 70 Pac. 1.

[a] **Must Be Electors and From the Vicinage.**—The provisions that jurors be electors and reside in the vicinage are the only qualifications which the legislature could not change. The latter qualification has always been associated with the jury system in criminal cases in both England and America. And in America where no class distinctions are recognized an elector is in the eye of the law the peer of any man. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95.

47. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95; *State v. McDowell*, 61 Wash. 398, 112 Pac. 521, Ann. Cas. 1912C, 782, 32 L. R. A. (N. S.) 414; *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *Redford v. Spokane St. R. Co.*, 15 Wash. 419, 46 Pac. 650.

[a] **Contrary Held as to Territorial Legislature.**—In *Reece v. Knott*, 3 Utah 451, 24 Pac. 757, it is held that a territorial legislature could not affix any qualifications unknown at common law since the federal constitution guaranteeing trial by jury has reference to a common-law jury.

48. *Rawlins v. Georgia*, 201 U. S. 638, 26 Sup. Ct. 560, 50 L. ed. 899, the only limitation is that there be no discrimination against persons on account of race, etc. The law may exclude certain classes on the ground that the good of the community re-

quires that their regular occupation be not interfered with.

[a] **"Fourteenth Amendment" Is Only Limitation.**—"It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications." But the amendment prohibits discrimination as to race or color. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664.

Excluding certain persons as ground for challenge to the array, see *supra*, VII, E, 3, b, (X), (E).

[b] That a statute prescribes different qualifications for persons drawn on an open venire, from those on the regular panel, does not render it unconstitutional if it operates uniformly. *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419, 46 Pac. 650.

Different rule as to service on jury within a specified time, see *infra*, VII, 12.

49. *State v. McClear*, 11 Nev. 39.

50. *State v. Push*, 23 La. Ann. 14.

51. *Sherman v. Southern Pac. Co.*, 35 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287.

52. **Ala.**—*Citizens' Light, H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199; *Louisville & N. R. Co. v. Cook*, 168 Ala. 592, 53 So. 190; *Thomas v. State*, 133 Ala. 139, 32 So. 250; *State v. Marshall*, 8 Ala. 302. **Mo.**—*State v. Miller*, 156 Mo. 76, 56 S. W. 907; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *Coppersmith v. Mound City Ry. Co.*, 51 Mo. App. 357; *State v. Chatham Nat. Bank*, 10 Mo. App. 482. **Tenn.**—*Jen-*

viding that other causes may be considered,⁵³ and even the elimination of what was formerly a ground of challenge does not necessarily imply that the ground no longer exists.⁵⁴

A juror must have the requisite statutory qualifications.⁵⁵ The qualifications divide into two distinct classes; those which inherently render him incompetent and those which have been prescribed from reasons of policy.⁵⁶ The codes and statutes frequently provide in terms that any want of the qualifications prescribed by the statutes shall be ground of challenge for cause,⁵⁷ with the further provision

kins v. State, 99 Tenn. 569, 42 S. W. 263; *Williams v. Godfrey*, 1 Heisk. 299. **Tex.**—*McIntosh v. Atchison*, etc. Ry. Co. (Tex. Civ. App.), 192 S. W. 285; *Lester v. State*, 2 Tex. App. 432. **Utah.** *Conway v. Clinton*, 1 Utah 215. **W. Va.** *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015.

[a] **Rule Applied in District of Columbia.**—The provisions of District of Columbia, Code, §§215 and 217, prescribing qualifications of jurors and exemptions from jury service, do not include the whole subject of the qualifications of jurors in that district. The common law of Maryland in force Feb. 27, 1801, remains in force in the district. Jurors must at least have the qualifications mentioned in §215; but they also must have those common-law qualifications, which are not inconsistent with the qualifications required by the code. *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, reversing 30 App. Cas. (D. C.) 1.

[b] **Unfit Persons May Always Be Excluded.**—To hold that the court could not exclude unfit persons merely because their particular cause of unfitness is not mentioned in the statute "would be monstrous." *Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[c] **Excluding Members of Family Having Feud With Prisoner's Family.** In a murder trial the judge properly exercised his discretion in excluding on the state's challenge a juror, where deceased had been tried and acquitted of murdering the juror's brother, and the judge knew that there was a bitter feud between the families of the juror and the accused. *State v. Kellogg*, 104 La. 580, 29 So. 285.

[d] The statutes prescribing general qualifications do not mean that every person having those qualifications is competent to serve in each and

every trial. *Dixon v. State*, 74 Miss. 271, 20 So. 839; *Byrd v. State*, 1 How. (Miss.) 163; *State v. Vick*, 132 N. C. 995, 43 S. E. 626.

53. **Kan.**—Gen. St., §§5876, 6778. **La.**—Act 135, 1898, p. 216. **N. C.** Revisal, §1966. **Ohio.**—Gen. Code, §11,438. **Okla.**—Rev. Laws, §4997. **Tenn.**—Shannon's Code, §5818. **Wash.** Rem. & Bal. Code, §2141.

54. *Lester v. State*, 2 Tex. App. 432, examples cited by court are "mental defects" and "conscientious scruples against capital punishment."

55. **Ill.**—*Guykowski v. People*, 2 Ill. 476. **Ky.**—*Combs v. Com.*, 97 Ky. 24, 29 S. W. 734. **Mo.**—*Knight v. Kansas City*, 138 Mo. App. 183, 119 S. W. 990. **N. Y.**—*People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967. **Tenn.**—*Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263. **Utah.**—*Conway v. Clinton*, 1 Utah 215.

[a] In *Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958, the court says the statute "has prescribed the qualifications of jurors in order to insure to litigants as nearly exact justice as our form of government will permit; and it is not within the province of this court to modify or amend the statute."

[b] **So Provided by Statute.**—**Cal.** Code Civ. Proc., §199, subd. 1. **Haw.** Rev. Laws, §1771, subd. 1. **Mo.**—Rev. St., 1909, §7296. **Mont.**—Rev. Code, §6338. **Utah.**—Comp. Laws, §1298, subd. 1.

56. *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957.

57. **Ariz.**—Civ. Code, §3558, subd. 1; Pen. Code, §1023, subd. 2. **Cal.** Code Civ. Proc., §602, subd. 1. **Idaho.** Code Civ. Proc., §4380, subd. 1. **Ill.** Rev. St., ch. 78, §14. **Ind.**—Burns' Ann. St., §2101, subd. 12. **Ia.**—Code, §3688, subd. 2; §5360, subd. 2. **Kan.** Gen. St., §§4635, 4636, 5876. **La.**—Act 135, 1898, §15. **Mo.**—Rev. St., 1909,

in many states that it is a "general cause" for challenge.⁵⁸ Where an absolute right of challenge is given by statute, a party may exercise that right though it is not apparent how the juror could be biased against the challenger under the circumstances of the case at bar.⁵⁹

That two of the jurors are husband and wife does not in any manner affect the validity of the verdict.⁶⁰

2. Exemption and Grounds for Challenge Contrasted.—Exemption from jury service is a personal privilege, and is not a ground for challenge,⁶¹ and the statutes frequently provide that an exemption is no ground for challenge.⁶² Exemption does not disqualify a juror.⁶³ These rules are not changed by the fact that the statute makes it the duty of the selecting officers to omit the names of exempt persons,⁶⁴ even where the officials are punishable for wilfully putting such per-

§7297. **Mont.**—Rev. Code, §6741, subd. 1. **Neb.**—Rev. St., §§8144, 8158. **Nev.** Laws, §5206, subd. 1. **N. D.**—Rev. Code, §7017, subd. 1. **S. D.**—Code Civ. Proc., §252, subd. 1. **Tenn.**—Shannon's Code, §5820. **Tex.**—Vernon Sayles' Civ. St., art. 5194. **Utah.** Comp. Laws, §3144, subd. 1. **Wyo.** Comp. Laws, §4497, subd. 1.

58. **Ark.**—Kirby's Dig., §2360, subd. 1. **Cal.**—Penal Code, §1072, subd. 2. **Idaho.**—Rev. Codes, §7832, subd. 2. **Ky.**—Code Crim. Proc., §207, subd. 1. **Minn.**—Rev. Laws, 1905, §5389, subd. 2. **Mont.**—Rev. Code, §9260, subd. 2. **Nev.**—Rev. Laws, §7146, subd. 2. **N. Y.** Code Crim. Proc., §375, subd. 2. **N. D.** Rev. Code, §9971, subd. 2. **Okla.**—Rev. Laws, §5857, subd. 2. **Ore.**—Lord's Laws, §120, subd. 2. **S. D.**—Code Crim. Proc., §337, subd. 2. **Utah.**—Comp. Laws, §4832, subd. 2. **Wash.**—Rem. & Bal. Code, §327, subd. 2.

59. *Kansas City v. Kirkham*, 9 Kan. App. 236, 59 Pac. 675.

60. *State v. Miller*, 78 Wash. 268, 138 Pac. 896.

61. **Ala.**—Colley v. State, 167 Ala. 109, 52 So. 832; *Jackson v. State*, 74 Ala. 26; *Williams v. State*, 67 Ala. 183. **Cal.**—People v. Owens, 123 Cal. 482, 56 Pac. 251. **Fla.**—*Brown v. State*, 40 Fla. 459, 25 So. 63; *Lambright v. State*, 34 Fla. 564, 16 So. 582; *Blount v. State*, 30 Fla. 287, 11 So. 547. **La.** *State v. Petit*, 119 La. 1013, 44 So. 848; *State v. Forbes*, 111 La. 473, 35 So. 710. **Md.**—*Green v. State*, 59 Md. 123, 43 Am. Rep. 542. **N. J.**—*State v. Barker*, 68 N. J. L. 19, 52 Atl. 284; *Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449. **S. C.**—*State v. Toland*, 36 S. C. 515, 15 S. E. 599; *State v. Mer-*

rimam, 34 S. C. 16, 12 S. E. 619. **Wash.** *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

[a] Applied to "Minister of the Gospel."—*Smith v. State*, 11 Ga. App. 89, 74 S. E. 711; *State v. York*, 7 Kan. App. 291, 53 Pac. 838.

[b] This Rule Is Founded in Part on the Right of the Juror.—Though ordinarily the right is of little value there may be times when the juror would wish to exercise his right. *Greer v. Norvill*, 3 Hill (S. C.) 262.

62. **Ariz.**—Pen. Code, §1027. **Ark.** Kirby's Dig., §2366. **Cal.**—Pen. Code, §1075. **Ga.**—Pen. Code, §871. **Idaho.** Pen. Code, §7835. **Ky.**—Code Crim. Proc., §211. **La.**—Act 135, 1898, p. 216. **Minn.**—Rev. Laws, 1905, §5393. **Mont.** Rev. Code, §9263. **Nev.**—Rev. Laws, §7149. **N. Y.**—Code Crim. Proc., §379. **N. D.**—Rev. Code, §9974. **Okla.**—Rev. Laws, §5860. **Ore.**—Lord's Laws, §124. **S. D.**—Code Crim. Proc., §340. **Utah.** Comp. Laws, §4835. **Wash.**—Rem. & Bal. Code, §§98, 332; Supp., §94-2. **Wyo.** Comp. Laws, §§980, 982.

63. *Glassinger v. State*, 24 Ohio St. 206; *State v. Cosgrove*, 16 R. I. 411, 16 Atl. 900.

[a] Cannot Be Urged in Arrest of Judgment.—*Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

[b] It Is Not Error To Overrule Juror's Motion Claiming an Exemption. The juror may have some cause for complaint. But this is personal to the juror and the party cannot complain. *State v. Jackson*, 42 La. Ann. 1170, 8 So. 297.

64. *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

sons on the list.⁶⁵ But the statutes sometimes make certain exemptions ground for challenge.⁶⁶

3. Distinction Between Civil and Criminal Cases.—The statutes of some states specifically provide for the same qualifications in both civil and criminal cases,⁶⁷ and for the same challenges for cause,⁶⁸ and a general provision in the statute that the same challenges shall be allowed has been held to have reference only to challenges for cause.⁶⁹ While the statement that certain sections of the one shall not apply to the other, has been construed to mean that provisions existent at the time, save those expressly excluded, do apply to the other,⁷⁰ the separate statement of criminal and civil grounds has been held to show that the grounds for challenge are not the same.⁷¹ A general provision that the jury shall be "formed in the same manner" has been construed to refer to the manner of selecting rather than to the qualifications of the jurors,⁷² though the practical construction of a similar statute has been held to be that whatever disqualifications of the one which are not by their terms applicable to that one only, applies to jurors in the other.⁷³

4. What Law Governs.⁷⁴—**a. In General.**—The qualifications

65. *State v. Cosgrove*, 16 R. I. 411, 16 Atl. 900.

66. Kan. Gen. St., §4636; Mo. Rev. St., §§7297, 7342.

67. Fla.—Gen. St., §3905. N. Y. Code Civ. Proc., §3347, subd. 7. Wis. St., 1898, §4701.

68. Kan.—Gen. St., §6778. Me. Rev. St., ch. 135, §20. Minn.—Rev. Laws, 1905, §4170. Neb.—Rev. St., §9109, subd. 9. Wis.—St., 1898, §4701. Wyo.—Comp. Laws, §6207, subd. 8.

69. *Stevenson v. State*, 70 Ohio St. 11, 70 N. E. 510, *construing* Rev. St., §7278 (Gen. Code, §13,653), subd. 9, which reads: "Like challenges shall be allowed in criminal prosecutions as are allowed in civil."

70. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

71. *Hunter v. State*, 30 Tex. App. 314, 17 S. W. 414.

[a] **The Grounds of Challenge in Civil and Criminal Cases Are Different.** The legislature has shown its intent clearly since formerly the causes for challenge and disqualification were blended in one general statute. But on revision separate provisions were made. Some of the causes are the same, or practically the same, while others are clearly inapplicable to one or the other proceedings. But the mere fact that a cause of challenge stated in the statute applicable to one, seems equally applicable to the other is no

ground for making it a cause of challenge by judicial construction. *Hunter v. State*, 30 Tex. App. 314, 17 S. W. 414.

72. *People v. Slater*, 119 Cal. 620, 51 Pac. 957, *construing* Pen. Code, §1046, which reads: "Trial juries for criminal actions are formed in same manner as trial juries in civil actions."

[a] **Similar Provisions in Other States.**—Ariz. Pen. Code, §1008.

73. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459, *construing* Code, §4633, reading: "Jurors for the trial of civil cases are drawn, summoned, impaneled, and sworn as directed by the provisions of chapter 242 (166) of this code." (Referring to criminal prosecutions.)

[a] **Similar statutes, see:** Ga.—Civ. Code, §4997. Mich.—How. St., §15,114. Neb.—Rev. St., §9107.

[b] **A provision that challenges shall be allowed as in civil cases, gives the same challenges in civil and criminal cases.** *State v. Williams*, 30 Me. 484.

74. **Effect of attaining disqualifying age after examination but before verdict** see *infra*, VII, F, 5, d.

Emancipated minor attaining his majority before he was called, but during period necessary for residence, as affecting his legal residence, see *infra*, VII, F, 8, b.

Effect of change of county lines as affecting residence qualifications, see *infra*, VII, F, 8, b.

of jurors are determined by the law in force at the time they are presented.⁷⁶ So persons who had the necessary qualifications when selected, but lose some before being drawn on the case, are subject to challenge for cause;⁷⁷ and if persons are selected who do not possess statutory qualifications at the time of selection, challenge for cause should be sustained though they have attained the qualification subsequently, and before they are drawn on the case.⁷⁸ And if the law be changed so as to require an additional qualification, it does not affect jurors already chosen.⁷⁹ A change in the statute subsequent to the commission of the crime is not violative of the *ex post facto* rule,⁸⁰ and the statutes may provide in terms that they are applicable to pending cases.⁸¹

b. *Rule in Federal Court.*—By virtue of congressional action, the qualifications and exemptions of jurors in the federal courts are the same as those of jurors in the highest court of law in the state where summoned.⁸² The legislature may prescribe qualifications in addition to those prescribed by congress,⁸³ but if there is any conflict between acts of congress and the acts of the legislature respecting the qualification of jurors, the former controls in the federal courts.⁸⁴

5. *Mental or Physical Characteristics.*—a. *Physical or Mental Infirmary.*—The statutes frequently provide in terms that no one shall be a juror who is not “of sound mind,”⁸⁵ or who is an insane person,⁸⁶

One not entitled to vote on day of trial as not being an elector, see *infra*, VII, F, 8, d.

As between act of congress and legislature, see *infra*, VII, F, 4, b.

76. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

[a] *Applied to Persons Summoned on Open Venire.*—Where a statute provided that persons summoned on open venire must be qualified persons and the law then in force prescribing qualifications is amended, the jurors summoned on open venire must have the qualifications prescribed by the amended statute. *State v. Lattin*, 19 Wash. 57, 52 Pac. 314.

77. *Conway v. Clinton*, 1 Utah 215, taxable property qualification.

78. *People v. Shafer*, 1 Utah 260, citizenship.

79. *People v. Chalmers*, 5 Utah 201, 14 Pac. 131.

80. *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355, the qualifications necessary, and the grounds of challenge, are merely regulative in their nature and affect only the procedure under which the crime may be tried and not the crime itself.

[a] A distinction has been made as between changes which make the law harsher upon criminals than the law

in force when the crime was committed. *Bailey v. State*, 20 Ga. 742.

81. *Bailey v. State*, 20 Ga. 742; *Reid v. State*, 20 Ga. 681.

82. U. S. Rev. St., §800; *Pointer v. United States*, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. ed. 208; *United States v. Kilpatrick*, 16 Fed. 765; *United States v. Collins*, 1 Woods 499, 25 Fed. Cas. No. 14,837.

[a] *Formerly in Alaska* the qualifications of jurors were determined by the laws of the state of Oregon. *Kie v. United States*, 27 Fed. 351.

83. *Conway v. Clinton*, 1 Utah 215.

84. *Walker v. Collins*, 50 Fed. 737, 1 C. C. A. 642; *Conway v. Clinton*, 1 Utah 215.

85. Fla.—Gen. St., §1572, subd. 3. Neb.—Rev. St., §8135. N. M.—St., 1915, §3087. N. Y.—Judiciary Law, ch. 35, Laws, 1909, §§598, 686. N. D.—Rev. Code, §514. Okla.—Rev. Laws, §3698. S. D.—Pol. Code, §708. Tenn.—Shannon's Code, §5815. Utah.—Comp. Laws, §1297, subd. 5; §1298, subd. 1. Wash. Rem. & Bal. Code, Supp., §94-1.

[a] *Ground for Challenge for Cause.* Ala. Code, §7276, subd. 9; Ia. Code, §5360.

86. *Vernon Sayles' Civ. St. (Tex.)*, art. 5115, subd. 3; and by Code Crim.

or an idiot, or lunatic.⁸⁷ Even in the absence of a statute one is entitled to a jury composed of persons of sound mind,⁸⁸ but the mere fact that one may have been adjudged insane at one time, would not render him incompetent to serve.⁸⁹ Other statutes variously provide that the juror shall be "in possession of his natural faculties,"⁹⁰ and "not decrepit,"⁹¹ or "not infirm or decrepit,"⁹² and that he must not be "afflicted with a bodily infirmity amounting to a disability,"⁹³ or "so disabled in body as to be unable to serve,"⁹⁴ or "rendered incapable by reason of physical or mental infirmity,"⁹⁵ or have "such bodily or mental defect or disease as to render him unfit for jury service,"⁹⁶ or be "afflicted with a permanent disease."⁹⁷ Other statutes provide that jurors must be in the "full possession of the senses of hearing and seeing,"⁹⁸ or must not have such defect in the organs of seeing, feeling or hearing as to render them unfit for jury service.⁹⁹

In addition to the statutes making the lack of qualifications ground for challenge,¹ it is a "general cause of challenge" in many states that the juror has "unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as render him incapable² of per-

Proc., art. 673, subd. 5, it is ground for challenge, and by art. 676, the parties cannot consent to the service of one who is insane.

87. Ga.—Pen. Code, §999, subd. 3, ground for challenge for cause. S. C. Const., art. v, §22, requires juror to be an elector, and art. ii, §6, disqualifies as an elector persons who are idiots or insane. Va.—Code, 1904, §3139, qualification.

88. Block v. State, 100 Ind. 357.

89. State v. Howard, 118 Mo. 127, 24 S. W. 41.

[a] The presumption that his insanity continued is rebutted by the presumption that the authorities would not have permitted him to go at large unless he had recovered. And the evidence showed that he was not considered insane by his neighbors at the time of trial. Also the trial judge must have observed his demeanor at the trial and had refused a new trial based on the alleged incompetency. State v. Howard, 118 Mo. 127, 24 S. W. 41.

90. Cal.—Code Civ. Proc., §198, subd. 2. Haw.—Rev. Laws, §1770, subd. 2. Idaho.—Rev. Code, §3941, subd. 2, §3942. Ill.—Rev. St., ch. 78, §2, subd. 3. Mich.—How. St., §12877. Mont.—Rev. Code, §6337, subd. 2. Neb. Rev. St., §8149. N. Y.—"Judiciary Law," ch. 35, Laws, 1909, §502, subd. 4. Ore.—Lord's Laws, §990, subd. 4. Wash.—Rem. & Bal. Code, Supp., §94-1, "in full possession of his faculties."

Wis.—St., 1898, §2530. Wyo.—Comp. Laws, §978, subd. 2.

91. Cal.—Code Civ. Proc., §198, subd. 2. Haw.—Rev. Laws, §1770, subd. 2. Idaho.—Rev. Code, §3941, subd. 2, §3942. Mont.—Rev. Code, §6337, subd. 2. Wyo.—Comp. Laws, §978, subd. 2.

92. Ill.—Rev. St., ch. 78, §2, subd. 3. Mich.—How. St., §12877. N. Y. "Judiciary Law," ch. 35, Laws, 1909, §502, subd. 4. Wis.—St., 1898, §2530.

93. Neb. Rev. St., §8135; Okla. Rev. Laws, §3698.

94. Utah Comp. Laws, §1297, subd. 5, §1298 subd. 1.

95. Nev. Rev. Laws, §4929.

96. Tex. Code Crim. Proc., art. 673, subd. 5, is a ground for challenge, and by art. 676, he cannot serve even by consent of parties.

97. Ala. Code, §7241.

98. Ia. Code, §332; Shannon's Code (Tenn.), §5815.

99. Burns' Ann. St. (Ind.), §2101, subd. 13; Tex. Code Crim. Proc., art. 673.

1. See *supra*, VII, F, 1.

2. Ariz.—Pen. Code, §1023, subd. 3. Ark.—Kirby's Dig., §2360, subd. 3. Cal.—Pen. Code, §1072, subd. 3. Idaho. Rev. Codes, §7832, subd. 3. Ky.—Code Crim. Proc., §207, subd. 3. Minn.—Rev. Laws, 1905, §5389, subd. 3. Mont. Rev. Code, §9260, subd. 3. Nev.—Rev. Laws, §7146, subd. 3. N. D.—Rev. Code, §9971, subd. 3. Okla.—Rev.

forming the duties of a juror," while in others it is simply ground for challenge for cause.³

Whether or not the juror's physical infirmity is such as to render him incompetent is a question of fact,⁴ and as such will not be reviewed unless unsupported by the evidence and clearly wrong.⁵ A person who has defective hearing is properly excluded on challenge,⁶ but his retention is not ground for reversal where it is clear that he heard all the evidence.⁷ It is proper to exclude one who suffers such pain that he is obliged to use morphine.⁸

b. *Mental Caliber Generally.*—The statutes of many states provide that jurors shall be of "sound discretion,"⁹ or of "sound judgment,"¹⁰ and "discreet,"¹¹ or shall be "judicious and discreet persons."¹² Other statutes provide that jurors should be "intelligent,"¹³ or of "ordinary intelligence,"¹⁴ or "of sufficient intelligence,"¹⁵ and "well informed,"¹⁶ or possessed of "reasonable information."¹⁷ Even in the absence of a statute one would be entitled to a jury of persons of reasonable intelligence,¹⁸ and any construction of a statute which

Laws, §5857, subd. 3. **Ore.**—Lord's Laws, §120, subd. 2. **S. D.**—Code Crim. Proc., §337, subd. 3. **Wash.**—Rem. & Bal. Code, §327, subd. 3.

3. **Ia.** Code, §3688, subd. 3; §5360, subd. 3.

4. *Reed v. State*, 75 Neb. 509, 106 N. W. 649.

[a] **Facts Held To Show Blindness.** One whose eyesight is so defective that he cannot distinguish the faces of witnesses or defendant to observe their expression, deportment or demeanor on the stand is incompetent. *Rhodes v. State*, 128 Ind. 189, 27 N. E. 866, 25 Am. St. Rep. 429.

[b] **Blindness Not Shown.**—Juror was able to go about unattended, could distinguish persons at a considerable distance; could see an uplifted hand across an ordinary sized room and determine the number of fingers remaining open. *Reed v. State*, 75 Neb. 509, 106 N. W. 649.

5. *Reed v. State*, 75 Neb. 509, 106 N. W. 649.

Generally as to review of decision, see *supra*, VII, E, 4, m.

6. *Ickes v. State*, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442, judgment affirmed, 63 Ohio St. 549, 59 N. E. 233.

7. *State v. Lowe*, 56 Kan. 594, 44 Pac. 20, defendant not prejudiced.

8. *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

9. **Fla.**—Gen. St., §1572, subd. 3. **N. D.**—Rev. Code, §514. **Okla.**—Rev. Laws, §3698. **S. D.**—Pol. Code, §708. **Utah.**—Comp. Laws, §1297, subd. 5, §1298, subd. 1.

10. **Ark.**—Kirby's Dig., §§4506, 4508. **Fla.**—Gen. St., §1571. **Ill.**—Rev. St., ch. 78, §2 subd. 4. **Ia.**—Code, §332. **Me.**—Rev. St., ch. 108, §2. **Mich.**—How. St., §12877. **Neb.**—Rev. St., §8149. **N. Y.**—"Judiciary Law," ch. 35, Laws 1909, §502, subd. 5.

[a] They should be persons "esteemed in the community for their . . . sound judgment." **Ala.** Code, §7239. Similar statutes see **Conn.** Gen. St., §656; **Wis.** St., 1898, §2530.

11. **Ky.** St., §2253.

12. **Ohio** Gen. Code, §11423; **Md.** Gen. Laws, art. 51, §7, provides jurors are to be selected "with special reference to intelligence."

13. **Ariz.**—Civ. Code, §3516. **Fla.** Gen. St., §1571. **Mo.**—Rev. St., 1909, §7259. **N. Y.**—"Judiciary Law," ch. 35, Laws 1909, §§598, 686.

14. **Cal.**—Code Civ. Proc., 198, subd. 2. **Mont.**—Rev. Code, §6337, subd. 2. **Wyo.**—Comp. Laws, §978, subd. 2.

15. **N. C.** Rev. §1957.

16. **Ill.**—Rev. St., ch. 78, §2, subd. 4. **Me.**—Rev. St., ch. 108, §2. **Mich.**—How. St., §12877. **Neb.**—Rev. St., §8149. **N. Y.**—"Judiciary Law," ch. 35, Laws 1909, §502, subd. 5.

17. **Ark.** Kirby's Dig., §§4506, 4508.

18. *Block v. State*, 100 Ind. 357; *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967, that jurors shall be intelligent is one of the requirements that has "remained fixed and immovable" from the earliest days of the common law.

would lead to the conclusion that the jury is not to be intelligent is absurd.¹⁹

Where the statute provides that the juror shall be a "competent and intelligent person" with a proviso that the court shall decide the competency,²⁰ the challenge thereupon is one to the favor,²¹ and though bad memory is undoubtedly ground for challenge under the statute, the decision of the trial court thereon is not subject to review.²²

c. *Educational Requirements.*—(I.) *In General.*—Some statutes require that the jurors be persons of "fair education,"²³ and under a statute requiring that they be "well informed" it has been held that they must not be "illiterate."²⁴ Inability of a juror to calculate interest does not disqualify him,²⁵ but some statutes require a knowledge of arithmetic when that is necessary to enable the juror to understand the case.²⁶

(II.) *Knowledge of English.*—Even in the absence of a statute, by the weight of authority, jurors must be able to understand the English language,²⁷ but other courts have held that such lack of understanding does not necessarily disqualify the jurors,²⁸ and in at least one state it is provided by statute that a person who speaks Spanish or Mexican but not English cannot be discriminated against or challenged on that ground.²⁹ The statutes of many states, however, require that the

19. *People v. Warner*, 147 Cal. 546, *v. New Albany & S. R. Co.*, 13 Ind. 82 Pac. 196.

20. La. Act. 135, 1898, §1.

21. *State v. Porter*, 45 La. Ann. 661, 12 So. 832.

22. *State v. Eloi*, 34 La. Ann. 1195.

23. Conn. Gen. St., §656.

24. *West Chicago St. R. Co. v. Huhnke*, 82 Ill. App. 404.

25. *Stone v. Pettus*, 47 Tex. Civ. App. 14, 103 S. W. 413, it was within the discretion of the court to overrule a challenge based on that ground.

26. Fla. Gen. St., §1492, the necessity and requisite knowledge are determined by the judge.

[a] The question as to how far the juror possesses the requisite educational requirements, is one primarily for the trial court, and its decision will not be disturbed except in a strong case. *Jefferson County v. B. C. Lewis & Sons*, 20 Fla. 980.

27. Ind.—*Block v. State*, 100 Ind. 357. La.—*State v. Offutt*, 38 La. Ann. 264; *State v. Guidry*, 28 La. Ann. 630. Wis.—*Sutton v. Fox*, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[a] *Partial Knowledge of English.* One who can neither read nor write the English language, nor understand it except as to his particular business of farming, and then but imperfectly is incompetent. *Lafayette Plankroad Co.*

[b] It is violative of the constitutional right to trial by jury to permit a juror to sit who can neither speak nor understand the language in which the proceedings are had. *Lyles v. State*, 41 Tex. 172, 19 Am. Rep. 38.

28. *Town of Trinidad v. Simpson*, 5 Colo. 65.

[a] The theory is that the statute not including that disqualification, the case must be decided on common-law rules, and it being possible to employ an interpreter the court might permit such jurors to serve. It was assumed that the trial court had done whatever was necessary in that regard. The practice of permitting such jurors to serve should be avoided where a full panel of English speaking jurors can be secured. *Town of Trinidad v. Simpson*, 5 Colo. 65. See also *In re Allison*, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

[b] In a province where many citizens do not understand English and there is no statute requiring it, though the court may properly in the exercise of his discretion exclude a juror who does not understand English it is not a ground for challenge. *Reg. v. Earl*, 10 Manitoba 303.

29. See *In re Allison*, 13 Colo. 525,

jurors shall understand the English language,³⁰ and it is made a ground of challenge for cause that he does not understand,³¹ or has a "want of competent knowledge,"³² or does not understand the proceedings before the court.³³ Aside from the rule that lack of a qualification is a "general cause" for challenge,³⁴ some statutes make it a "general cause" that a juror has a "want of knowledge of English language as used in courts."³⁵

The statutes, in terms, sometimes give the trial court discretion to decide whether the ignorance of the juror of the English language is sufficient to make him incompetent.³⁶ Under such a statute the challenge clearly lies,³⁷ and may be exercised by the prosecution as well as by the prisoner.³⁸ A challenge on such ground is one to the favor,³⁹ and the decision is one for the court's sound discretion.⁴⁰

No fixed or workable criterion of the amount and kind of knowledge of English can be laid down other than the juror's general way of talking.⁴¹ Where the statute only requires him to understand

22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790.

30. See the statutes *infra*, this note.

[a] Jurors disqualified who have not "sufficient knowledge of the English language." Cal.—Code Civ. Proc., §198 subd. 3; §199 subd. 1. Idaho. Code Civ. Proc., §3941, subd. 3, §3942, of language in which proceedings are had. Mont.—Rev. Code, §6337, subd. 3. Nev.—Rev. Laws, §4929. Wyo.—Comp. Laws, §978, subd. 3.

[b] Persons Disqualified Who Do Not Understand.—Ariz.—Civ. Code, §3516. D. C.—Code, §215. Haw.—Rev. Laws, §1770, subd. 3, must "understandingly speak." Ill.—Rev. St. ch. 78, subd. 4. Ia.—Code §332, must be able to speak. Mich.—How. St., §12877, "must be conversant with." See *O'Neil v. Lake Superior Iron Co.*, 67 Mich. 560, 35 N. W. 162. Minn.—Rev. Laws, 1905, §5263, must be able to speak and understand. Mo.—Rev. St., 1909, §§7296, 7312, 7327, 7342, must "understand thoroughly the proceedings ordinarily had in courts of justice." Neb.—Rev. St., §8149.

31. N. D. Rev. Code, §7017 subd. 3; S. D. Code Civ. Proc., §252, subd. 8.

32. Ohio Gen. Code, §11438; Okla. Rev. Laws, §4997.

33. Ariz.—Pen. Code, §1023, subd. 15, does not understand "sufficiently well to comprehend the testimony offered." Ind.—Burns' Ann. St., §2101, subd. 13, "that from ignorance of the English language he is unable to comprehend the evidence and the instructions of the court." Kan.—Gen. St.,

§§4635, 4636, 5876, 6778. Mo.—Rev. St., 1909, §§7297, 7313, 7328, 7342, does not "understand thoroughly the proceedings ordinarily had in courts of justice."

34. See *supra*, VII, F, 1.

35. N. D.—Rev. Code, §9971, subd. 2. Okla.—Rev. Laws, §5857, subd. 2. S. D.—Code Crim. Proc., §337, subd. 2.

36. Fla. Gen. St., §1492; La. Act, 135, 1898, p. 216, §1; Marr's Rev. St. (La.) §3933.

[a] Proceedings Partly in Foreign Language.—A juror who does not understand English is properly excluded though the proceedings are mostly in a foreign language which he does understand. *State v. Gay*, 25 La. Ann. 472. Juror understood French; most of the witnesses used that language; an interpreter was employed; the judge and one counsel spoke French.

37. *State v. Anderson*, 52 La. Ann. 101, 26 So. 781.

38. *State v. Push*, 23 La. Ann. 14.

39. *State v. Porter*, 45 La. Ann. 661, 12 So. 832; *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087.

40. *State v. Crouch*, 130 Iowa 478, 107 N. W. 173; *State v. Casey*, 44 La. Ann. 969, 11 So. 583.

[a] Where the record discloses no deficiency of knowledge from the juror's answers to questions the ruling on challenge will not be disturbed. *People v. Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193.

41. *Territory v. Robello*, 20 Hawaii 7.

English, he is not incompetent because he cannot read and write it.⁴² In the absence of a statute inability to read or write English is not disqualifying.⁴³ It is, however, clearly within the legislative power to prescribe ability to read and write English as a qualification for jury service,⁴⁴ and some statutes so provide,⁴⁵ with the added provision in some states that he shall be able to do so "understandingly."⁴⁶ The statutes sometimes specifically provide that inability to read and write English shall be ground for challenge.⁴⁷ Some constitutions require that the juror be able to read and write any section of it,⁴⁸ but in the absence of some such statutory or constitutional provision, inability to read and understand the federal or state constitutions does not render the juror incompetent.⁴⁹

(III.) Knowledge of Law or Legal Terms.⁵⁰ — The general rule is that a juror is not to be tested, as to his competency, by his knowledge or belief as to the law,⁵¹ and even under the statutes and rules as to

[a] Juror who understands testimony and argument is sufficiently conversant with the English language. *State v. Casey*, 44 La. Ann. 969, 11 So. 583; *State v. Ford*, 42 La. Ann. 255, 7 So. 696; *State v. Dent*, 41 La. Ann. 1082, 7 So. 694.

[b] Juror qualified who took and read newspapers and understood "common language except hard words." *Territory v. Robello*, 20 Hawaii 7.

[c] A Mexican challenged for not understanding the English language having been examined at length, answering promptly in correct English, and reading a passage from the penal code in a manner plainly indicating that he understood it, and stating that he understood the language sufficiently to understand the testimony, argument of counsel, and charge of the court, was competent. *Essary v. State*, 53 Tex. Crim. 596, 111 S. W. 927.

Inability to understand legal terms see *infra*, VII, F, 5, c, (III).

42. *Cromer v. Borders Coal Co.*, 152 Ill. App. 555; *State v. Casey*, 44 La. Ann. 969, 11 So. 583.

[a] Discretionary with court to retain a juror who could speak and understand English but could only write "the common words." *Harris v. Moore*, 134 Iowa 704, 112 N. W. 163.

43. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

[a] Where statute does not prescribe any educational tests the mere fact that a juror cannot read is not ground for challenge. *State v. Stockman*, 9 Kan. App. 422, 58 Pac. 1032.

44. *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

[a] The statute does not violate the federal constitution as being a discrimination against a colored venireman who is excluded because he cannot read or write. *King v. State* (Tex. Crim.), 64 S. W. 245.

45. D. C.—Code, §215. Ia.—Code, §332. Miss.—Code, 1906, §2684. Mo. Rev. St., 1909, §§7296, 7312, 7327, 7342. Neb.—Rev. St., §8149. Utah.—Comp. Laws, §1297, subd. 2, §1298. Wash. Rem. & Bal. Code, Sup., §94-1.

46. Haw.—Rev. Laws, §1770, subd. 3. N. Y.—"Judiciary Law," ch. 35, Laws, 1909, §§598, 686. Wis.—St., 1898, §2530.

47. Fla.—Gen. St., §1492. Kan. Gen. St., §§4635, 4636, 5876, 6778. Mo.—Rev. St., 1909, §§7297, 7313, 7328, 7342. Tex.—Code Crim. Proc., art. 673, subd. 14, except where the requisite number so qualified cannot be found in the county.

[a] That the juror signed the verdict with his mark does not show conclusively that he was not qualified because unable to write. *Parman v. Kansas City*, 105 Mo. App. 691, 78 S. W. 1046.

48. *Mabry v. State*, 71 Miss. 716, 14 So. 267; S. C. Const., art. V, §22.

49. *State v. Casey*, 44 La. Ann. 969, 11 So. 583.

50. How far juror may be questioned as to his knowledge of law, see *supra*, VII, E, 4, i, (III), (E).

51. Fla.—*Brown v. State*, 40 Fla. 459, 25 So. 63; *Roberson v. State*, 40

understanding the English language the more usual holding is that he need not understand legal terms,⁵² but even where the statute does not specifically mention English, it has been held the court properly excluded a juror who did not understand such words.⁵³

d. *Age*.—Minors were disqualified to act as jurors at common law.⁵⁴ That a juror is a minor may disqualify him because he is not an elector,⁵⁵ and the statutes frequently provide that a juror must be over twenty-one,⁵⁶ while some statutes require that jurors have

Fla. 509, 24 So. 474. Ill.—Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406. La.—State v. Willie, 130 La. 454, 58 So. 147; State v. Perieux, 107 La. 601, 31 So. 1016. Mo.—Montgomery v. Wabash, St. L. & P. Ry. Co., 90 Mo. 446, 2 S. W. 409 ("they are not to be condemned because they do not know the rules of law"); Keegan v. Kavanaugh, 62 Mo. 230. N. Y.—People v. Conklin, 175 N. Y. 333, 67 N. E. 624. Tex.—San Antonio etc. R. Co. v. Belt, 24 Tex. Civ. App. 281, 59 S. W. 607.

[a] That the juror may have an erroneous idea, or false impression, respecting the principles of law governing the particular case, does not disqualify him where he shows no disposition to be governed thereby, instead of taking the law of the case from the court. Johnson v. Park City, 27 Utah 420, 76 Pac. 216.

[b] **Erroneous Opinion of Law Contrasted With Prejudice as to Issues.** In questioning jurors as to their opinions care must be taken not to confuse their beliefs and opinions as to the issues with their understanding or belief as to the law. A juror is not to be rejected because he has confused or mistaken ideas as to abstract principles of law. If he has no knowledge of the circumstances of the case, nor prejudice or bias as to defendant and has avowed his willingness to accept the law as given him by the court he is competent. State v. Kinney, 45 Wash. 165, 87 Pac. 1123.

[c] **Answer Upon Erroneous Assumption as to Burden of Proof.**—A mere answer to a hypothetical question based upon the erroneous assumption that the burden of proving innocence was on defendant is not sufficient to show prejudice or preconceived opinion. The court allowed the question to be answered at the same time pointing out the error in respect to

the burden. State v. Heft, 155 Iowa 21, 134 N. W. 950.

[d] **Juror Need Not Understand Indictment or Rule of Presumption.** "That a juror should not, until advised, comprehend the office and legal effect of an indictment, or the rule of law respecting the presumption of innocence, is not a matter of wonder, and does not afford ground for challenge." Lindsey v. State, 69 Ohio St. 215, 69 N. E. 126.

[e] **Juror who admits he would not take law from court is properly excused on challenge for cause.** Jones v. People, 23 Colo. 276, 47 Pac. 275.

52. See cases *infra*, this note.

[a] **Words "Bias" and "Prejudice."**—Haw.—Territory v. Robello, 20 Hawaii 7. La.—State v. Dent, 41 La. Ann. 1082, 7 So. 694. Mo.—State v. Duestrow, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

[b] **"Weight" as Applied to Evidence.**—Territory v. Robello, 20 Hawaii 7.

[c] **"Verdict."**—State v. Dent, 41 La. Ann. 1082, 7 So. 694.

[d] **Under a statute requiring the court to determine whether the juror has sufficient knowledge of English to understand the evidence he cannot be tested as to his knowledge of circumstantial evidence.** Roberson v. State, 40 Fla. 509, 24 So. 474.

53. Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

[a] **Inability to clearly understand such English words as "arson," "accomplice," "perjury," "forgery," "presumption," "conclusive," "bias," "prejudice" is good ground for exclusion.** Sutton v. Fox, 55 Wis. 531, 13 N. W. 477, 42 Am. Rep. 744.

54. Quinn v. Halbert, 52 Vt. 353.

55. Watts v. Ruth, 30 Ohio St. 32. See *infra*, VII, F, 8, d.

56. Ala.—Code, §7239. Ariz.—Civ. Code, §3516. Cal.—Code Civ. Proc.,

attained a greater age.⁵⁷ Aside from the general rule as to challenge for lack of qualifications,⁵⁸ some statutes provide that persons under age shall be subject to challenge,⁵⁹ and even under a statute which provides that persons under a certain age shall not be put on the jury, lack of required age has been held only ground for challenge and not an absolute disqualification.⁶⁰ If a minor attains his majority between the time he is put on the list and the time he is drawn on the case he is competent.⁶¹ Some statutes provide that jurors over a specified age shall not be qualified,⁶² but other statutes merely make over age an exemption,⁶³ and so not a cause for challenge under the general rule as to exemptions.⁶⁴ Unless the intention so to do

§198, subd. 1, §199, subd. 1. **Colo.** Mills' St., §4219. **D. C.**—Code, §215. **Fla.**—Gen. St., §1570. **Haw.**—Rev. Laws, §1770, subd. 1. Compare §1770, subd. 2, which reads must be "of ordinary age." **Ill.**—Rev. St., ch. 78, §2, subd. 2. **Kan.**—Gen. St., §§4635, 4636, 5876, 6778. **Ky.**—St., §2253. **La.**—Act 135, 1898, §1, "of full age." **Miss.** Code, 1906, §2684. **Mo.**—Rev. St., 1909, §§7259, 7296, 7312, 7327, 7341. **Mont.** Rev. Code, §6337, subd. 1. **N. M.**—St., 1915, §3087. **N. Y.**—"Judiciary Law," ch. 35, Laws 1909, §502, subd. 2. **Ore.** Lord's Laws, §990, subd. 3. **R. I.** Gen. Laws, ch. 279, §1. **S. C.**—Const. art. V, §22. **S. D.**—Pol. Code, §708. **Tenn.**—Shannon's Code §5813. **Tex.** Vernon Sayles' Civ. St., art. 5114. **Utah.**—Comp. Laws, §§1297, 1298, subd. 1. **Va.**—Code, 1904, §3139. **Wash.** Rem. & Bal. Code, supp. §94. **W. Va.** Code, §4640. **Wyo.**—Comp. Laws, §978, subd. 1.

57. **Conn.**—Gen. St., §656, "not less than twenty-five years of age." **Md.** Gen. Laws, art. 51, §1, not under 25. **Neb.**—Rev. St., §§8135, 8149, over twenty-five.

58. See *supra*, VII, F, 1.

59. **Ala.** Code, §7276, subd. 8, (under twenty-one); **Ga.** Pen. Code, §999, subd. 2.

[a] In the absence of an express statute a minor would be subject to challenge. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

60. *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722.

61. *State v. Perry*, 122 N. C. 1018, 29 S. E. 384.

62. **Ala.**—Code, §7239, must be under sixty. **D. C.**—Code, §215, must be under sixty-five. **Ill.**—Rev. St., ch. 78, §2, subd. 2, must be under sixty-five. **Me.**—Rev. St., ch. 108, §2, must

be under seventy. **Mont.**—Rev. Code, §6337, subd. 1, not over seventy. **N. Y.** "Judiciary Law," ch. 35, Laws 1909, §502, subd. 2, must be under seventy. **S. C.**—Const., art. V, §622, must be under sixty-five. **Wyo.**—Comp. Laws, §978, subd. 1, not over sixty-five.

[a] **Disqualifying Age Attained During Trial.**—Applying the rule that the competency is to be determined as of the date of the examination, a juror who has not then attained the disqualifying age, does not ipso facto, become disqualified so soon as he reaches that age, during the progress of the trial. The juror had disclosed that he would reach that age in ten days. Defendant did not challenge, but more than ten days having elapsed before the trial was concluded, he claimed after verdict that he had been tried by a jury of only eleven qualified jurors. *Funk v. United States*, 16 App. Cas. (D. C.) 478.

63. **Ariz.**—Civ. Code, §3518. **Ark.** Kirby's Dig., §4493, person over sixty-five shall not be compelled; over sixty, court may excuse. **Colo.**—Mills' St., §4221. **Haw.**—Rev. Laws, §1772, subd. 2. **La.**—Act 135, 1898, §2. **Md.**—Gen. Laws, art. 51, §3. **Miss.**—Code, 1906, §2687. **Mo.**—Rev. St., 1909, §§7261, 7296, 7312, 7327, 7341, 7342, but compare *infra*. **Neb.**—Rev. St., §§8135, 8149. **Nev.**—Rev. Laws, §4941. **N. D.** Rev. Code, §514. **Ohio.**—Gen. Code, §11444. **Okla.**—Rev. Laws, §5857, subd. 2. **S. D.**—Pol. Code, §708. **Tenn.** Shannon's Code, §5816. **Tex.**—Vernon Sayles' Civ. St., art. 5118; *Breeding v. State*, 11 Tex. 257. **Va.**—Code, 1904, §3139. **Wash.**—Rem. & Bal. Code, Supp., §94. **W. Va.**—Code, §4640. **Wis.**—St., 1898, §2525.

64. See *supra*, VII, F, 2.

is plain a statute will not be construed to make persons over age disqualified, but only as giving a personal exemption.⁶⁵ It is not error to excuse on challenge one who is exempt because over age,⁶⁶ and some statutes make over age a ground for challenge.⁶⁷ Where the statute disqualifies jurors who are over a certain age, but makes it a ground of challenge if they are beyond a certain and greater age, jurors between the two ages are exempt but not subject to challenge.⁶⁸ Where jurors are subject to challenge because over or under age they may be excluded on the state's challenge.⁶⁹

e. *Sex*.—Many of the statutes specifically provide that a juror must be a male,⁷⁰ and that is, of course, the practical effect of those statutes which require jurors to be electors and confine the franchise to males.⁷¹ It has also been held that the mere granting to women of the elective franchise does not render them eligible as jurors.⁷²

65. **Fla.**—*Brown v. State*, 40 Fla. 459, 25 So. 63. **Kan.**—*Moore v. Cass*, 10 Kan. 288; *State v. York*, 7 Kan. App. 291, 53 Pac. 838, but see statute, *infra*. **Md.**—*Green v. State*, 59 Md. 123, 43 Am. Rep. 542. **Mich.**—*Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41; *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955; *People v. Rann*, 90 Mich. 377, 51 N. W. 522, *overruling dictum* in *People v. Baumann*, 52 Mich. 584, 18 N. W. 369. **Tex.**—*Breeding v. State*, 11 Tex. 257. **Va.**—*Booth v. Com.*, 16 Gratt. (57 Va.) 519.

[a] **Georgia Statutes Construed To Create Exemption Only.**—*Staten v. State*, 141 Ga. 82, 80 S. E. 850, reviewing previous cases, *followed* in *Thomas v. State*, 144 Ga. 298, 87 S. E. 8.

[b] **An Exemption or Ground for Challenge.**—*Davison v. People*, 90 Ill. 221; *Chase v. People*, 40 Ill. 352; *Davis v. People*, 19 Ill. 74.

[c] **Old age unaccompanied by any impairment of the intellect**, does not render the juror incompetent in such a sense as to vitiate the verdict. *United States v. Folsom*, 7 N. M. 532, 38 Pac. 70.

66. *McGrail v. Kalamazoo*, 94 Mich. 52, 53 N. W. 955; *Luebe v. Thorpe*, 94 Mich. 268, 54 N. W. 41.

67. **Ala.**—Code §7276, subd. 8 (over seventy); *Arp v. State*, 97 Ala. 5, 12 So. 301, 38 Am. St. Rep. 137, 19 L. R. A. 357. **Kan.**—Gen. St., §§4635, 4636, 5876, 6778, ground for challenge to be determined by court. **Miss.**—Rev. Code, 497, art. 126; *Williams v. State*, 37 Miss. 407. **Mo.**—Rev. St., 1909, §§7297, 7313, 7328, 7341, 7342.

[a] Where the statute reads “shall

not be permitted to serve” over age is ground for challenge. *Blair v. Paterson*, 131 Mo. App. 122, 110 S. W. 615. See Rev. St., 1909, §§7312, 7327.

68. *Williams v. State*, 67 Ala. 183.

69. *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330.

70. **Ala.**—Code, §7239. **Ariz.**—Civ. Code, §§3515, 3516. **Colo.**—Mills’ St., §4219. **Fla.**—Gen. St., §1570. **Haw.**—Rev. Laws, §1770, subd. 1. **La.**—Act, 135, 1898, §1. **Miss.**—Code, 1906, §2684. **Mo.**—Rev. St., 1909, §§7259, 7341. **Mont.**—Rev. Code, §6337. **Neb.**—Rev. St., §§8135, 8158. **N. M.**—St., 1915, §3087. **N. Y.**—“Judiciary Law,” ch. 35, Laws, 1909, §502, subd. 1. **N. D.**—Rev. Code, §514. **Okl.**—Rev. Laws, §3698. **Ore.**—Lord’s Laws, §990, subd. 2. **S. D.**—Pol. Code §708. **Tenn.**—Shannon’s Code, §5813. **Tex.**—Ver-non Sayles’ Civ. St., Art. 5114. **Va.**—Code, 1904, §3139. **W. Va.**—Code, §4640. **Wyo.**—Comp. Laws, §978, subd. 1.

71. See S. C. Const. art. V, §22, must be an elector, and by art. II, §3, elector must be male. Compare *infra*, VII, F, 8, d.

72. *White v. Territory*, 3 Wash. Terr. 397, 19 Pac. 37; *Rumsey v. Territory*, 3 Wash. Terr. 332, 21 Pac. 152; *Harland v. Territory*, 3 Wash. Terr. 131, 13 Pac. 453, but the decisions seem in part to have been based upon the unconstitutionality of the law giving the franchise.

[a] Some earlier cases held that since under the law she was a “householder” equally with her husband a married woman might be a grand juror under a law making “electors and

But in at least one state women are eligible for jury duty,⁷³ and in some states their eligibility is recognized but they are entitled to claim exemption on account of their sex.⁷⁴

f. *Race or Color.*⁷⁵—It is no ground of challenge by a white man that a colored man is called to sit on the jury.⁷⁶ The statutes not only provide that there shall be no discrimination by reason of race or color,⁷⁷ but any statute which makes only white men eligible is unconstitutional.⁷⁸

6. *Character, Reputation and Habits.*—Some statutes provide in terms that jurors must be of "good moral character,"⁷⁹ or of "fair character,"⁸⁰ or of "good reputation,"⁸¹ or "good character,"⁸² and "of approved integrity."⁸³ Another requirement sometimes found is that the juror must be "sober,"⁸⁴ or "sober, temperate and of good demeanor,"⁸⁵ and not an habitual drunkard,⁸⁶ and it is also sometimes

householders" eligible to grand jury duty, and said that it was within the power of the legislature to make women eligible as petit jurors, if it should see fit to so do. *Rosencrantz v. Territory*, 2 Wash. Terr. 267, 5 Pac. 305; *Hayes v. Territory*, 2 Wash. Terr. 286, 5 Pac. 927.

73. Cal. Code Civ. Proc., §§190, 193, and 194, formerly defined a jury as a "body of men." By St., 1917, ch. 692, this phraseology has been changed to "body of persons," and the word "persons" has been substituted for "men" in Code Civ. Proc. §226, providing for the summoning of talesmen; while the commissioners in making up lists (see Code Civ. Proc., §204) are to include "men and women."

74. Utah Comp. Laws, §1299, subd. 14; Wash. Rem. & Bal. Code, Sup. 94-2.

75. *Prejudice or bias on account of race or color*, see *infra*, VII, F, 13, b, (1V).

Right of colored man to insist upon having men of his own color on the jury, see *supra*, II, B, 1.

76. *Brittle v. People*, 2 Neb. 198, discussing at length the question as affected by the constitutions of the state and the United States and the organic act admitting Nebraska to statehood.

77. Haw.—Rev. Laws, §1770, subd. 4. Ind.—Burns' Ann. St., §3865. La. Act 135, 1898, §1.

78. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664.

79. Ariz.—Civ. Code, §3516. Ark. Kirby's Dig., §§4506, 4508. Ia.—Code, §332. Me.—Rev. St., ch. 108, §2. N. C. Revisal, §1957. Okla.—Rev. Laws,

§3698. S. C.—Const., art. V, §22. Tex. Vernon Sayles' Civ. St., art. 5115, subd. 3.

80. Fla.—Gen. St., §1571. Ill.—Rev. St., ch. 78, §2, subd. 4. Neb.—Rev. St., §8149. N. Y.—"Judiciary Law," ch. 35, Laws 1909, §502, subd. 5.

81. Mo. Rev. St., 1909, §7259, qualification.

[a] "Esteemed in the community for their good character." Ala. Code, §7239. For similar statutes see Conn. Gen. St., §656; Wis. St., 1898, §2530.

82. Mich. How. St., §12877; N. Y. "Judiciary Law," ch. 35, Laws 1909, §§598, 686.

83. Ark.—Kirby's Dig., §§4506, 4508. Fla.—Gen. St., §1571. Ill.—Rev. St., ch. 78, §2, subd. 4. Me.—Rev. St., ch. 108, §2. Mich.—How. St., §12877. Neb.—Rev. St., §8149. N. Y.—"Judiciary Law," ch. 35, Laws 1909, §502, subd. 5.

[a] "Esteemed in the community for their integrity." Ala. Code, §7239. Similar statutes see Conn.—Gen. St., §656. Md.—Gen. Laws, art. 51, §7, provides jurors are to be selected "with special reference to integrity." Wis. St., 1898, §2530.

84. Ariz.—Civ. Code, §3516. Md. Gen. Laws, art. 51, §7, provides jurors are to be selected "with special reference to sobriety." Mo.—Rev. St., 1909, §7259.

85. Ky. St., §2253.

86. Ala.—Code, §7241. Miss.—Code, 1906, §2684. Okla.—Rev. Laws, §3698. Tenn.—Shannon's Code, §5815.

[a] *Ground for Challenge.*—Ind. Burns' Ann. St., §2101, subd. 8. Neb. Rev. St., §9109, subd. 8. Ohio.—Gen.

made ground for challenge that the juror is then intoxicated,⁸⁷ or that he is of drunken or disorderly habits.⁸⁸ That a person is of bad reputation, or has no visible means of support, is also recognized as a ground for challenge.⁸⁹

7. Religious or Political Beliefs.⁹⁰ — That the juror is an atheist has been recognized as a ground for challenge,⁹¹ but the better rule is that religious belief or disbelief is no disqualification.⁹² One can never be disqualified merely because the defendant in a criminal trial is of opposite political faith.⁹³ In an election contest it is no ground for challenge that the juror belonged to an opposing political party from respondent,⁹⁴ nor that he voted against him.⁹⁵ Mere active participation in politics, and strong political convictions, are not, as a matter of law, disqualifying in proceedings to guard the purity of elections,⁹⁶ but the court may in its discretion permit questions which show bias or prejudice, where it appears that the juror regards the case primarily as one involving political interests.⁹⁷

Code, §13653, subd. 7; *Weis v. State*, 22 Ohio St. 486.

87. Ga. Pen. Code, §999, subd. 3; Shannon's Code (Tenn.) §5821.

88. Mo. Rev. St., 1909, §7342, provides that such shall not be put on list and are subject to challenge if they are.

89. Kan. Gen. St., §§4635, 4636; Mo. Rev. St., 1909, §§7296, 7297, 7312, 7313, 7327, 7328, 7342.

90. Membership in religious, political, or secret organizations, see *infra*, VII, F, 10.

Prejudice against political, social or religious bodies and their members, see *infra*, VII, F, 13, b, (III).

91. *State v. Davis*, 80 N. C. 412, but the case was decided on the ground of waiver by failure to challenge. See also *McClure v. State*, 1 Yerg. (Tenn.) 206.

[a] **Juror Reckless as to Divine and Human Law.**—Where juror misbehaved on former trials and stated he "would as lief swear on a spelling book as on a Bible" the supreme court held he was properly challenged because he was "reckless of both human and divine law." *McFadden v. Com.*, 23 Pa. 12, 62 Am. Dec. 308.

92. *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73; *United States v. Miles*, 2 Utah 19, *affirmed*, 103 U. S. 304, 26 L. ed. 481.

[a] **Constitutional Provision.**—See Utah Const. art. 1, §4; W. Va. Const., art. 3, §11.

93. *Powers v. Com.*, 114 Ky. 237, 70

S. W. 644, 1050, 71 S. W. 494, "it cannot be true that per se a Democrat is disqualified from fairly trying a Republican charged with crime, or vice versa."

94. *Gray v. State*, 19 Tex. Civ. App. 521, 49 S. W. 699.

95. *Gray v. State*, 19 Tex. Civ. App. 521, 49 S. W. 699.

96. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033, every citizen is assumed to be equally interested in the honest conducting of elections and his strong convictions are not inconsistent with that interest.

[a] **Question Improper.**—"To what political party do you belong and what were your political affiliations in November, A. D. 1890," is properly disallowed. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033. But see note following.

97. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033.

[a] **Question Dependent on Circumstances.**—"Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?" standing alone is an improper question, but if the previous examination had brought out in any manner that the juror might possibly be influenced by his political surroundings, the court might, in its discretion, allow the question. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033.

8. Political or Social Status.—a. *Convicted o. Crime or Charged Therewith.*—At common law one was disqualified who had been convicted of a felony,⁹⁸ and that rule has been carried into the statutes of some states,⁹⁹ while other statutes disqualify persons convicted of "felony or misdemeanor involving moral turpitude,"¹ or of "felony or other high crime,"² or of "treason, felony, or infamous crime,"³ or of "any infamous crime,"⁴ or "convicted of any scandalous crime or guilty of any gross immorality."⁵ Persons who have been convicted of malfeasance in office,⁶ or of certain specified crimes are also disqualified by some statutes.⁷ Persons under prosecution for crime are disqualified by some statutes.⁸ Some statutes make conviction of crime a ground for exemption rather than disqualification,⁹ and conviction of crime has been held a ground for challenge, and not an absolute disqualification.¹⁰

As elsewhere noted, the common-law challenge "propter delictum"

98. Mass.—Com. v. Wong Chong, 186 Mass. 231, 71 N. E. 292. **Mich.**—People v. Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95. **Okla.**—Queenan v. Territory, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324.

[a] At common law, jurors must be "legales homines," that is they must not be outlawed; villiens. Quinn v. Halbert, 52 Vt. 353.

99. Ariz.—Civ. Code, §3516. **Colo.**—Mills' St., §4219. **Mo.**—Rev. St., 1909, §§7312, 7327, but applies only to certain counties. **Neb.**—Rev. St., §8135. **N. D.**—Rev. Code, §514. **Okla.**—Rev. Laws, §3698, "served a term of imprisonment in any penitentiary for the commission of a felony." **S. D.**—Pol. Code, §708. **Tex.**—Vernon Sayles' Civ. St., art. 5115, subd. 6.

1. D. C.—Code, §215. **Haw.**—Rev. Laws, §1771, subd. 2. **Idaho.**—Code Civ. Proc. §3942, subd. 2. **Ore.**—Lord's Laws, §990.

2. Cal.—Code Civ. Proc. §199, subd. 2. **Mont.**—Rev. Code, §6338, subd. 2. **Utah.**—Comp. Laws, §1298, subd. 2. **Wyo.**—Comp. Laws, §979, subd. 2.

3. Nev.—Rev. Laws, §4929.

4. La.—Act 135, 1898, §1 ("convicted at any time of any crime or offense punishable by hard labor, unless he has been pardoned." See State v. Petit, 119 La. 1013, 44 So. 848, which says the constitution only excludes persons convicted of "infamous crime." **Minn.**—Rev. Laws, 1905, §5263. **Miss.**—Code 1906, §2684. **N. M.**—St., 1915, §3087. **Okla.**—Rev. Laws, §3698.

5. Me.—Rev. St., ch. 108, §5; S. C. Civ. Code, §2934.

6. Cal.—Code Civ. Proc., §199, subd. 2. **Mont.**—Rev. Code, §6338, subd. 2. **Utah.**—Comp. Laws, §1298, subd. 2. **Wyo.**—Comp. Laws, §979, subd. 2.

7. U. S.—Rev. Laws, §822. **Fla.**—Gen. St., §§1570, 1572. **Miss.**—Code, 1906, §2684. **Tenn.**—Shannon's Code, §5815. See also Laws 1897, ch. 52, and Jenkins v. State, 99 Tenn. 569, 42 S. W. 263. **Vt.**—Pub. St., §5788, 5803. **Va.**—Code, 1904, §3139.

8. Ariz.—Civ. Code, §3516, "under indictment or other legal accusation of larceny or any felony." **Fla.**—Gen. St., §§1570, 1572. **La.**—Act 135, 1898, §1. **Tex.**—Vernon Sayles' Civ. St., art. 5115, subd. 7, "under indictment or other legal accusation of theft or any felony."

[a] **Juror's Answer Sufficient.**—One who on being asked whether he was under prosecution for any crime, answered that he believed he was, was properly excused. Ellis v. State, 25 Fla. 702, 6 So. 768.

9. Wis.—St., 1898, §2525. See Mo. Rev. St., 1909, §§7296, 7297.

10. Busey v. State, 85 Md. 115, 36 Atl. 257.

[a] One who had been convicted of crime thirty-six years previously would not necessarily be disqualified. Possibly it would be ground for challenge, but under the statutes the board of commissioners might put even a criminal's name on the list if they found him of good moral character and otherwise suitable. Com. v. Wong Chung, 186 Mass. 231, 71 N. E. 292.

specifically lay against those accused of crime.¹¹ Aside from the rule that lack of qualifications is a ground for challenge,¹² the statutes of many states specifically make conviction of a felony a ground for challenge,¹³ it being "general cause" for challenge by the statutes of some states,¹⁴ and a "principal cause" by others.¹⁵ Indictment within a specified time or for a similar offense is sometimes made ground for challenge,¹⁶ as is the carrying on of an unlawful business similar to that charged against the defendant.¹⁷ But where the constitution only excludes persons convicted of infamous crime, it is not ground for challenge that the juror has been engaged in an unlawful pursuit, not amounting to an infamous crime.¹⁸ Though one tried and acquitted of carrying on an illegal business and who has not carried it on since, is not technically disqualified, it is not error to exclude him.¹⁹ Nor is it reversible error to sustain the state's challenge to a juror against whom a criminal case is then pending in the same court.²⁰ Assuming that a crime for which a juror had been sentenced to the reform school is within the statute the challenge is *propter defectum*.²¹

Where the statute does not expressly provide that persons who have been convicted in another state are disqualified, conviction in one state does not affect the juror's competency in another.²² The

11. See *supra*, VII, E, 1, d, e.

12. See *supra*, VII, F, 1.

13. Ala.—Code §7276, subd. 5. Ariz. Pen. Code, §1023, subd. 1. Ia.—Code §3688, subd. 1, §5360, subd. 1. Mo. Rev. St., 1909, §§7297, 7313, 7328. Tex. Code Crim. Proc. Art. 673, subd. 4 and 5, and by Art. 676, cannot serve by consent of parties. See *Sewell v. State*, 15 Tex. App. 56.

14. Ariz.—Civ. Code, §3558, subd. 1. Ark.—Kirby's Dig., §2360, subd. 2. Cal.—Pen. Code, §1072, subd. 1. Idaho. Rev. Codes, §7832. Ky.—Code Crim. Proc. §207, subd. 2. Minn.—Rev. Laws, 1905, §5389, subd. 1. Mont.—Rev. Code, §9260, subd. 1. Nev.—Rev. Laws, §7146, subd. 1. N. Y.—Code Crim. Proc., §375, subd. 1. N. D.—Rev. Code, §9971, subd. 1. Okla.—Rev. Laws, §5857, subd. 1. Ore.—Lord's Laws, §120, subd. 1. S. D.—Code Crim. Proc., §337, subd. 1. Utah.—Comp. Laws, §4832, subd. 1. Wash.—Rem. & Bal. Code §327, subd. 1.

15. Kan.—Gen. St., §§4635, 4636, 5876, 6778. Ohio.—Gen. Code, §11437, subd. 1. Okla.—Rev. Laws, §4997.

16. Ala. Code, §7276, subd. 3.

[a] What Is Offense of Same Character.—An assault with intent to commit murder, is an offense of the same character as murder, within this stat-

ute. *Charleston v. State*, 133 Ala. 118, 32 So. 259, following *Crockett v. State*, 58 Ala. 387.

17. Ia.—Code §5360, subd. 14. Nev. Rev. Laws, §7148, subd. 10. Utah. Comp. Laws, §4834, subd. 10.

[a] It is proper to exclude a juror who refuses to answer a question as to his then being subject to a similar prosecution, on the ground that it would incriminate him. *United States v. Reynolds*, 1 Utah 319, affirmed, 98 U. S. 145, 25 L. ed. 244.

18. *State v. Petit*, 119 La. 1013, 44 So. 848, applied where one had been carrying on an unlawful gambling game. The commissioners might well have omitted him from the list.

19. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885, the court from his whole demeanor may have considered him an improper juror.

20. *Lewis v. State*, 85 Miss. 35, 37 So. 497.

21. *Goad v. State*, 106 Tenn. 175, 61 S. W. 79.

22. *Queenan v. Territory*, 11 Okla. 261, 71 Pac. 218, 61 L. R. A. 324, that is the conviction has no "extra territorial effect." Judgment in this case was affirmed in 190 U. S. 548, 23 Sup. Ct. 762, 47 L. ed. 1175.

[a] Conviction in federal court for

general rule is that a pardon removes the disability,²³ but a general amnesty act has been held not to restore the qualification of one who had committed the act, so long as the statute giving the right of challenge was not repealed.²⁴ A law disqualifying one as a juror for crime committed before the law was enacted is not *ex post facto*.²⁵

b. *Residence*.—At the common law jurors were drawn from "the county where the fact was committed."²⁶ Many statutes make it a qualification that the jurors shall be "residents of the county,"²⁷ often with the added provisions that the residence shall have continued for a specified time,²⁸ and that he shall have been a resident of the state²⁹ for a specified time.³⁰ In the various United States courts the jurors are usually required to be residents of the district.³¹ Nonresidence is

sending obscene mail, as disqualifying one from acting as juror in state court on trial for murder, see *Harrison v. State* (Tex. Crim.), 191 S. W. 548.

23. *United States v. Bassett*, 5 Utah 131, 13 Pac. 237, judgment reversed on another point, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. ed. 762.

[a] **Discharge for Good Behavior.** Person sentenced, and discharged for good behavior before the expiration thereof held competent, the custom being to restore convicts to their civil rights under such circumstances. *Turley v. State*, 74 Neb. 471, 104 N. W. 934.

24. *United States v. Butler*, 1 Hughes 457, 25 Fed. Cas. No. 14,700, under the statute giving right of challenge against all who had voluntarily served in the Confederate army.

25. *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70.

26. *People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75, *citing* 4 Bl. 250, which defines "visne or neighborhood" to mean the "county where the fact is committed."

[a] **That jurors reside in the vicinage** has always been associated with the jury system in criminal cases in both England and America. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95.

27. *Ala.*—Code, §7239. *Ill.*—Rev. St., ch. 78, §2, subd. 1. *Ind.*—Burns' Ann. St., §1674. *Mo.*—Rev. St., 1909, §7259. See also §7341. *Neb.*—Rev. St., §§8135, 8149. *Nev.*—Rev. Laws, §4929. *N. Y.*—"Judiciary Law" ch. 35, Laws 1909, §502, subd. 1. *N. D.*—Rev. Code, §514. *S. D.*—Pol. Code, §708.

28. *Ariz.*—Civ. Code, §3516. *Cal.* Code Civ. Proc. §198, subd. 1, §199, subd. 1. *Fla.*—Gen. St., §1570. *La.*

Act 135, 1898, §1. *Mont.*—Rev. Code, §6337, subd. 1. *N. M.*—St., 1915, §3087. *Ore.*—Lord's Laws, §990, subd. 2. *S. C.*—Const. Art. V, §22, requires jurors to be electors, and by Art. II, §4, electors must have one year's residence in county. *Utah.*—Comp. Laws, §1297, subd. 3; §1298, subd. 1. *Wash.* Rem. & Bal. Code, Supp. §941. *Wyo.* Comp. Laws, §978, subd. 1.

[a] **Juror resident of territory out of which new county is created** is not disqualified where the act creating the new county has not gone into effect at the time of trial. *People v. Wallace*, 101 Cal. 281, 35 Pac. 862.

[b] **In Virginia** (1) if resident jurors "cannot be conveniently found" the court may summons outside jurors. See Code, 1904, §4024. (2) The intent of the statute is not to take away the right of "trial by a jury of his vicinage." *Richards v. Com.*, 107 Va. 881, 59 S. E. 1104, holding the facts insufficient to justify resort to non-resident jurors. (3) For facts held sufficient to warrant court in summoning outside jurors, see *Sands v. Com.*, 21 Gratt. (62 Va.) 871; *Wormeley v. Com.*, 10 Gratt. (51 Va.) 658.

29. *Okla.* Rev. Laws, §3698.

30. *Cal.*—Code Civ. Proc., §198, subd. 1, §199, subd. 1. *Fla.*—Gen. St., §1570. *Mont.*—Rev. Code, §6337, subd. 1. *N. M.*—St., 1915, §3087. *Va.*—Code (1904), §3139. *Wyo.*—Comp. Laws, §978, subd. 1.

31. U. S. Rev. St., §§814-818, and various acts creating districts; see 4 Fed. St. Ann. pgs. 752-761. See also D. C. Code, §215. *Hawaii* Rev. Laws, §1770, subd. 1.

Conflict between state and federal laws, see *supra*, VII, F, 4, b.

not only ground for challenge for lack of qualifications,³² but it is specifically recognized as a ground of challenge by some statutes³³ and cases.³⁴

"Residence" is used in the statutes in the sense of domicile according to the weight of authority,³⁵ but persons may be treated as residents, for jury duty, though they are not domiciled.³⁶ Generally a temporary absence with the intent of returning does not disqualify,³⁷ nor does actual physical residence qualify where there is no intention of becoming domiciled,³⁸ nor actual intention not coupled with physical residence.³⁹ An emancipated minor coming of age during the required

32. See *supra*, VII, F. 1.

33. Ga. Pen. Code, §999, subd. 3; Mo. Rev. St., 1909, §7342.

34. *Arp v. State*, 97 Ala. 5, 12 So. 201, 38 Am. St. Rep. 137, 19 L. R. A. 357; *Amos v. State*, 96 Ala. 120, 11 So. 424; *Carson v. Pointer*, 11 Ala. App. 462, 66 So. 910; *Herndon v. State*, 2 Ala. App. 118, 56 So. 85; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Waller*, 88 Mo. 402.

[a] **Not a Mere Exemption.**—It is a ground for challenge and not merely an exemption. *State v. Kennedy*, 8 Rob. (La.) 590.

[b] **That a citizen, though residing within the county, lives without the territorial jurisdiction of the court, is ground for challenge propter defectum.** *Walker v. State*, 118 Tenn. 375, 99 S. W. 366.

35. Cal.—*People v. Stonecipher*, 6 Cal. 405; *People v. Peralta*, 4 Cal. 175. Ia.—*State v. Burke*, 107 Iowa 659, 78 N. W. 677; *State v. Groome*, 10 Iowa 308. La.—*State v. Wimby*, 119 La. 139, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. (N. S.) 98. Mich.—*People v. Johnson*, 81 Mich. 573, 45 N. W. 1119. Mo.—*State v. France*, 76 Mo. 681. Wis.—*Lask v. United States*, 1 Pin. 77.

36. See *People ex rel. Turner v. Flimley*, 8 App. Div. 323, 17 Misc. 457, 41 N. Y. Supp. 365.

[a] **In the District of Columbia one is a resident who is residing there, although it may be for an indefinite purpose.** The juror in question was held competent though, being a bachelor, he had no family, and no fixed abode except his boarding house; he had been employed in the city fifteen years but had every summer revisited his former home, and had voted there. *United States v. Nardello*, 4 Mackey (D. C.) 503.

37. Cal.—*People v. Stonecipher*, 6 Cal. 405; *People v. Peralta*, 4 Cal. 175. Ia.

State v. Burke, 107 Iowa 659, 78 N. W. 677. La.—*State v. Wimby*, 119 La. 139, 43 So. 984, 121 Am. St. Rep. 507, 12 L. R. A. (N. S.) 98.

[a] **Juror's Residence in Hotel.** Where juror's absences were temporary and always with the intention of returning and his legal residence was a hotel, he was eligible as being a qualified voter though he said he had no "home," by which he evidently meant house or family residence. *Hughes v. State*, 109 Wis. 397, 85 N. W. 333.

[b] **One temporarily in another county on a visit but retaining his legal residence in the county where the trial is being held, is competent.** *Sikes v. State*, 116 Ga. 182, 42 S. E. 346.

38. *People v. Stonecipher*, 6 Cal. 405; *People v. Peralta*, 4 Cal. 175.

[a] **Intention Not Fixed Within Statutory Time.**—Juror was incompetent where his intention to fix his residence was not made more than one year previous to venire though he had actually been living in the state more than the year. *State v. Kennedy*, 8 Rob. (La.) 590.

[b] **Absence Followed by Return.** Person who has been absent from the state for two years with intent to change his domicile and has only returned a few months previous to the time of trial, their being no showing that this return was *animo manendi* is properly excused. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[c] **Citizen of Another State Intending To Return.**—One who admits he is a refugee from another state and claims his citizenship there, it being his intention to return, is disqualified though he has lived in this state for over a year and has bought property. *Johnson v. State*, 27 Tex. 758.

39. *Hart v. State*, 14 Neb. 572, 16 N. W. 905.

term of residence has been held competent though his parents resided out of the state.⁴⁰ In determining residence the place where the juror votes may be a determining factor.⁴¹

c. *Citizenship*.⁴²—Aliens were disqualified at common law,⁴³ the only exception was where one of the parties being an alien the jury was composed half of aliens.⁴⁴ At common law the challenge "propter defectum" lay as to aliens.⁴⁵ Some courts in this country say that alienage is an absolute disqualification,⁴⁶ while others hold it is merely ground for challenge,⁴⁷ and it is specifically made ground for challenge under some statutes.⁴⁸ The disqualification of alienage is not removed by the fact that the juror is a freeholder,⁴⁹ but under some

40. *Russell v. State*, 62 Neb. 512, 87 N. W. 344.

41. *State v. Burns*, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588.

[a] **Juror Not Certain Residence Within County.**—Though a juror states that he does not know whether he lives in the county or not he may be held competent where he also states that he has resided for years near the county line and has always voted in the county. *Amos v. State*, 96 Ala. 120, 11 So. 424. See also *State v. Gonsulin*, 38 La. Ann. 459.

[b] **Juror is properly adjudged a resident of the county where the evidence preponderates that he was a citizen of the county, had voted at the spring election and expressed his intention to vote at the fall election in said county, and was an old resident of the state.** *State v. Burns*, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588.

[c] **One who had not voted, nor tried to vote, and disclosed that he hardly knew whether to consider himself a resident or not, was not an elector and hence was properly excused as being disqualified, although he had been in the county for some time and had been assessed as a resident.** *Omaha, etc. R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

[d] **Where the statute required sufficient residence to entitle one to vote, it was proper to exclude a juror who had not been so residing, notwithstanding he had formed an intention to remove to the county previous thereto.** *Hart v. State*, 14 Neb. 572, 16 N. W. 905.

[e] **One not having sufficient residence to make him an elector may have established his domicile sufficiently to make him a competent juror.**

Anderson v. State, 5 Ark. 444. Necessity that juror be a voter, see *infra*, VII, F, 8, d.

42. **Citizenship as disqualifying because of interest**, see *infra*, VII, F, 14, c.

43. **Vt.**—*Quinn v. Halbert*, 52 Vt. 353. **Wis.**—*Schumaker v. State*, 5 Wis. 324. **Eng.**—*Rex v. Sutton*, 8 Barn. & Cress. 417, 15 E. C. L. 208, 108 Eng. Reprint 1097.

[a] **Aliens have always been disqualified at common law and this was expressly continued so by statute of William and Mary.** *Rex v. Despard*, 2 M. & R. 406, 17 E. C. L. 716.

44. *Quinn v. Halbert*, 52 Vt. 353.

Right to jury half of aliens, see *supra*, II, B, 1.

45. *Schumaker v. State*, 5 Wis. 324.

[a] **Coke Lit.**, 156b, states that aliens born may be challenged propter defectum patriae. *Rex v. Sutton*, 8 Barn. & Cress. 417, 15 E. C. L. 208, 108 Eng. Reprint 1097.

46. **Cal.**—*People v. Chin Mook Sow*, 51 Cal. 597. **Mont.**—*Territory v. Hart*, 7 Mont. 42, 14 Pac. 768. **Wis.**—*State v. Vogel*, 22 Wis. 471.

[a] **To show that one is an alien it must appear that neither he nor his parents were naturalized.** *Schuster v. State*, 80 Wis. 107, 49 N. W. 30; *Keenan v. State*, 8 Wis. 132. See *State v. Salge*, 1 Nev. 455.

47. **Ill.**—*Davison v. People*, 90 Ill. 221; *Chase v. People*, 40 Ill. 352, *overruling* *Guykowski v. People*, 2 Ill. 456. **S. C.**—*State v. Quarrel*, 2 Bay 150, 1 Am. Dec. 637. **Tenn.**—*Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

48. *Burns' Ann. St. (Ind.)* §2101, subd. 9.

49. *Borst v. Beecker*, 6 Johns. (N. Y.) 332.

statutes persons are competent who have declared their intention to become citizens of the United States.⁵⁰ The statutes very generally require that a juror shall be a citizen of the state,⁵¹ or of the United States,⁵² or of both.⁵³ Under the general rule as to qualifications, lack of the required citizenship is ground for challenge,⁵⁴ and some statutes also make it specifically a ground for challenge.⁵⁵

d. *Electors*.⁵⁶—Unless the statute otherwise provides, persons may be citizens and so competent as jurors, although they are not qualified electors.⁵⁷ But the statutes frequently prescribe that a juror shall be an "elector" or "voter,"⁵⁸ or a "qualified elector,"⁵⁹ or "qualified

Necessity of being a freeholder see *infra*, VII, F, 9, b.

50. **Colo.**—Mills' St., §4219. **Minn.** State v. Barrett, 40 Minn. 65, 41 N. W. 459. **Mo.**—State v. Pagels, 92 Mo. 500, 4 S. W. 931. **Tex.**—Abrigo v. State, 29 Tex. App. 143, 15 S. W. 408.

[a] **Construction or Word "Alien."** In *McDonel v. State*, 90 Ind. 320, it is held that the word "alien" as used in the statute making that a ground of challenge must be considered in connection with other provisions making voters eligible and those provisions which give the right of suffrage to residents who have declared their intention to become naturalized.

[b] **As to evidence of intention to become a citizen**, proper identification and authentication of books, etc., see *State v. Barrett*, 40 Minn. 65, 41 N. W. 459.

51. **Fla.**—Gen. St., §1570. **Ky.**—St., §2253. **Mo.**—Rev. St., 1909, §§7259, 7341. **N. D.**—Rev. Code, §514. **Tex.** Vernon Sayles' Civ. St., Art. 5115, subd. 1. **W. Va.**—Code, §4640.

[a] **Persons who are qualified electors** are citizens of the state within the statute. *State v. Pagels*, 92 Mo. 500, 4 S. W. 931. Being an elector as prerequisite to competency, see *infra*, VII, F, 8, d.

52. **Ariz.**—Civ. Code, §3516. **Cal.** Code Civ. Proc., §§198, 199. **Colo.** Mills' St., §4219, or have declared his intention to become. **D. C.**—Code, §215. **Idaho.**—Code Civ. Proc., §3941. **Neb.** Rev. St., §8149. **N. M.**—St., 1915, §3087. **N. Y.**—"Judiciary Law," ch. 35, Laws, 1909, §502, subd. 1. **Ore.** Lord's Laws, §990. **Utah.**—Comp. Laws, §§1297, 1298. **Wyo.**—Comp. Laws, §978, subd. 1.

53. **Hawaii** Rev. Laws, §1770, subd. 1; La. Act 135, 1898, §1.

54. See *supra*, VII, F, 1.

[a] **Challenge by State.**—Persons

who are not citizens are properly excluded on the state's challenge. *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Waller*, 88 Mo. 402.

55. **Ala.**—Code, §7276, subd. 2, "that he is not a citizen of Alabama." **Ga.** Pen. Code, §999, subd. 3. **Mo.**—Rev. St., 1909, §7342. **Tex.**—Code Crim. Proc., art. 673, subd. 1.

56. **Place where juror votes as factor in determining his residence**, see *supra*, VII, F, 8, b.

57. *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895.

[a] **Citizenship and Residence Raise No Implication.**—The requirements that one be a citizen of the state and United States and a resident of the parish for one year, does not by implication require that he be an elector, the requirements for which include residence within the state for two years. *State v. Willie*, 130 La. 454, 58 So. 147.

[b] **Elector as Being Equivalent to "Peer."**—There being no class distinctions in America, the common-law requirement that one be tried by a jury of his peers, is satisfied by a jury of electors, an elector being in the law, the peer of any man. *People v. Harding*, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95.

[c] **Right Under State Constitution Though Disabled Under Federal.**—*Sands v. Com.*, 21 Gratt. (62 Va.) 871.

58. **Conn.**—Gen. St., §656. **Idaho.** Code Civ. Proc., §§3941, 3942. **Ind.** Burns' Ann. St., §1674. **Neb.**—Rev. St., §8148. **Wash.**—Rem. & Bal. Code, Supp., §94-1.

[a] **One does not lose his qualifications as a juror by mere removal from one township to another in the same county.** *People v. Wright*, 89 Mich. 70, 50 N. W. 792.

59. **Ia.**—Code, §332. **Me.**—Rev. St., ch. 108, §2. **Miss.**—Code, 1906, §2684.

to vote,"⁶⁰ or one "having the qualifications of" a voter or elector.⁶¹ Where such statutes prevail, persons not electors may be challenged.⁶² Under the statute one must be entitled to vote on the day of the trial.⁶³

Registration has been held not necessary, provided the juror has the constitutional right to vote,⁶⁴ and by some statutes it is expressly provided that "qualified electors" may be jurors whether they are registered or not.⁶⁵ But the constitution of some states makes registration one of the requisite qualifications of voters.⁶⁶ Where failure to register within a given time destroys the right to vote, an otherwise qualified voter is not disqualified as a juror until the time within which he may register has elapsed.⁶⁷ In some jurisdictions electors must have paid certain taxes to entitle them to vote and to become jurymen.⁶⁸

e. *Official Position*.—Generally the holding of an official position is merely ground for exemption,⁶⁹ and so not a ground for challenge

[a] **The fact that he has not voted** does not disqualify him. *Dixon v. State*, 74 Miss. 271, 20 So. 839.

60. *Vernon Sayles' Civ. St. (Tex.)*, art. 5115, subd. 1; *R. I. Gen. Laws*, ch. 279, §1.

61. *Haw.—Rev. Laws*, §1770, subd. 1. *Mich.—How. St.*, §12,877. *N. D. Rev. Code*, §514. *Ohio.—Gen. Code*, §11,423. *Okl.—Rev. Laws*, §3698.

S. D.—Pol. Code, §708.

62. See *supra*, VII, F, 1.

[a] **Ground for challenge but not an absolute disqualification.** *State v. Jackson*, 27 Kan. 581, 41 Am. Rep. 424.

[b] **By statute made ground for challenge.** *Texas Code Crim. Proc.*, art. 673, subd. 1.

63. *Hart v. State*, 14 Neb. 572, 16 N. W. 905.

64. *Territory v. Evans*, 2 Idaho 651, 23 Pac. 232.

[a] Registration is not a qualification of the voter but is only a convenient means of ascertaining who is entitled to vote. It does not confer the right to vote but is merely proof of that right. *Craft v. Com.*, 24 Gratt. (65 Va.) 602.

65. *Nev. Rev. Laws*, §4929.

66. *Mew v. Charleston, etc. Ry. Co.*, 55 S. C. 90, 32 S. E. 828.

[a] **Suspension of Constitutional Provisions.**—Constitutional provisions requiring jurors to be registered voters must of necessity be suspended until the first registration under the constitution is completed. *Nail v. State*, 70 Miss. 32, 11 So. 793.

[b] **Where the constitution prescribes "qualified elector"** a legislative provision making "registered vot-

ers" eligible is unconstitutional if there be other provisions than registration required to make one qualified. *Mabry v. State*, 71 Miss. 716, 14 So. 267.

67. *State v. Salge*, 1 Nev. 455, time had not expired within which he might register and pay poll tax.

68. *S. C. Const. art. V, §22; art. II, §4*. See *Nail v. State*, 70 Miss. 32, 11 So. 793, poll tax.

[a] **In Texas this requirement may be dispensed with if there are not sufficient jurymen in the county.** Whether there are enough persons who have paid poll tax becomes a question of fact in each particular case. Though the court may determine the matter at the beginning of the term, this does not preclude each defendant from raising the question in his case. The trial court cannot dispense with the poll tax requirement and his decision is reviewable. It appearing that there were some three thousand persons in the county who were qualified and had paid, reversal followed. *Taylor v. State*, 47 Tex. Crim. 101, 81 S. W. 933.

[b] **Making proof to the election officers of the payment of taxes is not necessary, if payment has actually been made.** *Dixon v. State*, 74 Miss. 271, 20 So. 839.

69. See the statutes granting exemptions.

[a] **That one is a member of the legislature** does not disqualify him on the theory that a juror is a civil officer within the meaning of a constitutional provision forbidding a legislator to be appointed to a civil office during the

under the general rule,⁷⁰ but under some statutes certain officials are disqualified to act as jurors.⁷¹ That jurors are court officials does not of itself disqualify them in the absence of statute,⁷² and even the fact that persons have some knowledge of the case derived from their official positions may not be disqualifying,⁷³ nor are justices of the peace subject to challenge to the poll because of their office.⁷⁴

9. Property Qualifications and Payment of Taxes.⁷⁵ — a. *In General.* — Under some statutes no property qualification can be required,⁷⁶ under others paupers, or persons in charitable institutions are disqualified,⁷⁷ and it is sometimes provided that the juror must be assessed as the owner of specified property,⁷⁸ or must have been "assessed on the last assessment roll of the county on property belonging to

term for which he is elected. *Queen v. Self*, 8 Hawaii 434.

70. Ala.—*Jackson v. State*, 74 Ala. 26, coroner. **La.**—*State v. Petit*, 119 La. 1013, 44 So. 848 (officers of court and justices of peace); *State v. Forbes*, 111 La. 473, 35 So. 710, deputy sheriff. **N. J.**—*State v. Barker*, 68 N. J. L. 19, 52 Atl. 284, member of national guard. See *supra*, VII, F, 2.

71. Fla. Gen. St., §1572, subd. 2.

[a] Statutes usually name judges of supreme and district courts, clerks, sheriffs, coroners, jailors and other court officials, sometimes including licensed attorneys. See **Neb.**—*Rev. St.*, §8135. **N. D.**—*Rev. Code*, §514. **Okla.** *Rev. Laws*, §3698. **S. C.**—*Civ. Code*, §2933. **S. D.**—*Pol. Code*, §708. **Tenn.** *Shannon's Code*, §5823. **Utah.**—*Comp. Laws*, §1298, subd. 3. **Va.**—*Code*, 1904, §3139.

[b] Ground for "Peremptory Challenge" in Arkansas.—*Kirby's Dig.*, §4537. This means it is challenge for cause. *Langford v. State*, 98 Ark. 327, 135 S. W. 895, quoting with approval from *Terrell v. State*, 69 Ark. 449, 64 S. W. 223. See also *Hankins v. State*, 118 Ark. 419, 176 S. W. 691; *Cureton v. State*, 117 Ark. 655, 174 S. W. 810.

72. King v. Loomens, 8 Hawaii 10, practice is to excuse them in court's discretion.

[a] But is bad practice not to exclude one who was constable and deputy sheriff, and had been acting as bailiff during the term, though possibly the error is not of itself cause for reversal. *Chapman v. State* (Tex. Crim.), 147 S. W. 580.

73. McNish v. State, 47 Fla. 69, 36 So. 176, bailiff in attendance at former trial.

[a] Mere fact that juror was the

coroner who conducted inquest on deceased does not render him incompetent where it is not shown the evidence before the coroner pointed to prisoner as one who did the killing, and he had not formed or expressed any opinion. *O'Connor v. State*, 9 Fla. 215.

[b] **Magistrate Taking Depositions Is Disqualified.**—*Rollins v. Ames*, 2 N. H. 349, 9 Am. Dec. 79.

[c] **Juror Acting as Interpreter May Continue To Serve.**—That a juror was permitted by court and counsel to act as an interpreter during the examination of a witness did not in any manner incapacitate him to continue to act as a member of the jury. He would not become so engrossed in his duty of interpreting that he could not fairly hear and weigh the evidence, nor would he give the evidence undue weight, nor would he hear incompetent evidence. He did not lose his identity as a juror. *People v. Thiede*, 11 Utah 241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237. Compare *Lendberg v. Brotherhood Iron M. Co.*, 75 Mich. 84, 42 N. W. 675, where the fact that jurors, who understood the language, overheard matters not properly interpreted, was held ground for a new trial.

74. King v. Edmonds, 4 B. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009.

75. Payment of taxes by electors, see *supra*, VII, F, 8, d.

76. Md. Gen. Laws, art. 51, §4; *Nelson v. State*, 57 Miss. 286, 34 Am. Rep. 444, abolished by constitution.

77. S. C. Const., art. II, §6; art. V, §22; *Va. Code*, 1904, §3139.

78. Mich.—*How. St.*, §12,877. **N. Y.** "Judiciary Law," ch. 35, Laws, 1909, §502, subd. 3, §§598, 686. **S. C.**—*Const.*, art. II, §4; art. V, §22.

him."⁷⁹ The assessment roll contemplated is the one in existence at the time the list of jurors is made up.⁸⁰ Under such a statute, while the juror's name need not be separately placed on the assessment roll,⁸¹ it must appear that the property upon the assessment roll belongs to the juror.⁸² Under a statute which requires that a juror be the owner of real property, he need not be its owner in fee simple.⁸³ One who has disposed of his property before the trial is disqualified though he was the holder of assessed property when his name was placed on the list.⁸⁴ Some statutes require the juror to have paid certain taxes,⁸⁵ or to be a "taxpayer."⁸⁶ Failure to possess the necessary property is ground for challenge and not a mere right of exemption.⁸⁷ Persons who have not been taxpayers or on the assessment roll as required are properly excused on challenge.⁸⁸

79. Cal.—Code Civ. Proc., §198, subd. 4 (repealed in 1915), see *People v. Sampo*, 17 Cal. App. 135, 118 Pac. 957. Mont.—Rev. Code, §6337, subd. 4. Wyo.—Comp. Laws, §978, subd. 4.

80. *Houghton v. Market-St. Ry. Co.*, 1 Cal. App. 576, 82 Pac. 972, that jurors are on a subsequent roll does not render them competent.

81. *People v. Owens*, 123 Cal. 482, 56 Pac. 251.

82. *People v. Warner*, 147 Cal. 546, 82 Pac. 196.

[a] **Nature of Ownership.**—One who is not on the assessment roll but is an heir to an estate which has property on the roll is properly excused on challenge where it does not appear that any of the property belonged to the juror, or that he would become the owner thereof on final distribution of the estate. *People v. Warner*, 147 Cal. 546, 82 Pac. 196, *distinguishing* *People v. Owens*, 123 Cal. 482, 56 Pac. 251, where the juror was a member of a partnership the property of which was upon the assessment-roll in the firm's name.

[b] **Need Not Be Real Property.** *State v. Linebarger*, 12 Mont. 292, 30 Pac. 140.

83. *Territory v. Young*, 2 N. M. 93.

[a] **Reason for Rule.**—"All the requirements embraced in the reason of the law are met by actual occupation and undisputed possession of real estate." The object of the law was to get jurors who were "to some extent established in, and identified with the territory." *Territory v. Young*, 2 N. M. 93.

84. *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *Conway v. Clinton*, 1 Utah 215.

85. N. C. Rev., §1957, must have paid all taxes assessed against them.

Payment of taxes by elector or voter, see *supra*, VII, F, 8, d.

[a] **A tales juror is ineligible unless** he has paid the same taxes as a regular juror, but he need not have paid subsequent taxes. *State v. Hargrave*, 100 N. C. 484, 6 S. E. 185; *State v. Carland*, 90 N. C. 668.

86. Utah Comp. Laws, §1297, subd. 4; §1298, subd. 1; Rem. & Bal. Code (Wash.), Sup., §94-1.

[a] **Statute Held Unconstitutional.** In *Reece v. Knott*, 3 Utah 451, 24 Pac. 757, it was held that a territorial statute requiring jurors to be taxpayers was contrary to the federal constitution, the provisions of which refer to common-law juries, and the qualification of being a taxpayer being unknown at common law.

[b] **Person Not Assessed.**—One who owns taxable property and is ready to pay taxes is qualified though he has not been assessed. *United States v. Reynolds*, 1 Utah 226.

[c] **If he is a taxpayer within the state,** he need not pay any taxes within the county where he is called to serve. *Lasityr v. Olympia*, 61 Wash. 651, 112 Pac. 752; *State v. Jahns*, 61 Wash. 636, 112 Pac. 747.

87. *Fenwick v. Parker*, 3 Code Rep. (N. Y.) 254.

[a] **At Common Law.**—"Deficiency of property" was a challenge "propter defectum" at common law. *State v. Williams*, 2 Hill (S. C.) 381.

General rule that challenge will be for disqualification, see *supra*, VII, F, 1, and that it will not lie for mere exemption see *supra*, VII, F, 2.

88. *People v. Warner*, 147 Cal. 546,

b. *Freeholder or Householder*.⁸⁹ -- At common law a juror was required to be a freeholder.⁹⁰ The statutes sometimes provide in terms that the jurors must be "freeholders or householders,"⁹¹ or "housekeepers."⁹² Generally there is no distinction in this respect between jurors summoned on the original venire facias or those summoned on a subsequent order.⁹³ Under the old English law the freehold must be within the county,⁹⁴ but under most statutes the freehold or occupancy qualification is not confined to the county,⁹⁵ so long as it is within the state,⁹⁶ though under some statutes the rule is otherwise.⁹⁷ Where the statute reads "householder or freeholder" a freeholder is qualified whether he be a householder or not,⁹⁸ but where the statute prescribes "householders" without mention of "freeholders," a freeholder to be qualified must also be a householder.⁹⁹ As applied to jurors a "householder" means the master of a house or family.¹ It

82 Pac. 196; *People v. Owens*, 123 Cal. 482, 56 Pac. 251; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Schlacker v. Ashland Iron Min. Co.*, 89 Mich. 253, 50 N. W. 839. See *People v. Thompson*, 34 Cal. 671.

[a] Where the statute does not in express terms require that the juror's name be on the assessment roll where he is not on the regular panel, it seems it is error to sustain a challenge on that ground. But the error is harmless. *State v. Harding*, 16 Ore. 493, 19 Pac. 449, following *State v. Ching Ling*, 16 Ore. 419, 18 Pac. 844.

[b] Where collection of the tax has been enjoined by the juror and other citizens, the juror is not disqualified to act through his non-payment. *State v. Heaton*, 77 N. C. 505.

89. Being a freeholder as removing the disqualification of challenge, see *supra*, VII, F, S, c.

90. Cal.—*People v. Powell*, 87 Cal. 348, 25 Pac. 481, 11 L. R. A. 75. Ill. *Kerwin v. People*, 96 Ill. 206. Vt. *Quinn v. Halbert*, 52 Vt. 353.

[a] The reason is said to be that he might have the incentive to find the issue truly. For on attain, if his verdict were found to be false, among other penalties his lands and tenements might be seized by the king. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

91. *Burns' Ann. St. (Ind.)*, §1674; *Shannon's Code (Tenn.)*, §5813; *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

[a] *Constitutionality*. — A statute that jurors shall be householders is not repugnant to the constitutional provision that the right to trial by jury shall remain inviolate. *State v. Holed-*

ger, 15 Wash. 443, 46 Pac. 652; *Redford v. Spokane St. Ry. Co.*, 15 Wash. 419, 46 Pac. 650.

92. Ky. St., §2253.

93. *Dowdy v. Com.*, 9 Gratt. (50 Va.) 727, 60 Am. Dec. 314.

[a] But under a statute referring only to special venires in connection with the jurors "being freeholders," tales jurors in addition to the qualifications of regular jurors must be freeholders, while jurors who are drawn on special venire out of the regular box need not be. *State v. Freeman*, 100 N. C. 429, 5 S. E. 921; *State v. Hargrave*, 100 N. C. 484, 6 S. E. 185; *State v. Carland*, 90 N. C. 668.

94. *Day v. Com.*, 3 Gratt. (44 Va.) 629.

95. *State v. Bryant*, 10 Yerg. (Tenn.) 527.

96. *Sheepshanks & Co. v. Jones*, 9 N. C. 211; *State v. Bryant*, 10 Yerg. (Tenn.) 527.

97. See *Vernon Sayles' Civ. St. (Tex.)*, art. 5115, subd. 2.

[a] *Freeholders of Bailiwick*.—Under a statute commanding the sheriff to summon freeholders "of his bailiwick," the freehold must be within the county. *Day v. Com.*, 3 Gratt. (44 Va.) 629.

98. *McKnight v. Seattle*, 39 Wash. 516, 81 Pac. 998.

99. *Bradford v. State*, 15 Ind. 347, but statute now names both.

1. *Bradford v. State*, 15 Ind. 347.

[a] *Definition*.—As applied to jurors a householder means "the occupier of a house, being the head or master and having and providing for a household." *Katzenberg v. Lehman*, 80 Ala. 512, 2 So. 272.

is not necessary that he be a married man,² or a parent,³ or that he own a house,⁴ but he must have something in the nature of a family,⁵ and mere tenants or occupants of rooms are not householders.⁶ One who has merely rented land is not a freeholder or householder within the statute,⁷ but one may be a "freeholder" though he be not seized of the legal estate.⁸ Aside from the rule that the challenge lies for want of qualifications,⁹ it is a specific ground for challenge under some statutes, that one is not a freeholder or householder,¹⁰ or has not been a resident householder or freeholder for a specified time.¹¹

10. Membership in Organizations.¹² — a. In General. — Mere mem-

[b] To be a householder implies the idea of domestic management, the management of a household. "He must be the head or master of the establishment." *Lane v. State*, 29 Tex. App. 310, 15 S. W. 827.

[c] "Householder" is synonymous with "housekeeper," which is defined to be "one who keeps house." To be such one "must be in actual possession of the house." *Lester v. State*, 2 Tex. App. 432.

[d] **Householder Must Be Chief of a Domestic Establishment.**—*Nelson v. State*, 57 Miss. 286, 34 Am. Rep. 444.

2. *Nelson v. State*, 57 Miss. 286, 34 Am. Rep. 444; *Lane v. State*, 29 Tex. App. 310, 15 S. W. 827; *Lester v. State*, 2 Tex. App. 432.

3. *Nelson v. State*, 57 Miss. 286, 34 Am. Rep. 444; *Hall v. State*, 6 Baxt. (Tenn.) 522.

4. *Nelson v. State*, 57 Miss. 286, 34 Am. Rep. 444; *Lester v. State*, 2 Tex. App. 432.

[a] **Title Need Not Be in Him.** *Sylvester v. State*, 72 Ala. 201.

5. *Lane v. State*, 29 Tex. App. 310, 15 S. W. 827.

[a] **Renter Living With Widowed Sister.**—One who resided in part of a house occupied by him as a grocery store, his widowed sister and her children living with him and he renting the house and furnishing the supplies, is the "master of the house and a householder" within the statute. *Hall v. State*, 6 Baxt. (Tenn.) 522.

[b] **Partners living and messing together are not householders.** "Neither could be considered the head of the other in the sense of the family relation." *Territory v. Lopez*, 3 N. M. 104, 2 Pac. 364.

6. *Aaron v. State*, 37 Ala. 106, rooms used as sleeping apartments, though by yearly letting.

[a] A single man who boarded at one place and rented a room at a lodging house from a different person which room he controlled only so long as he paid rent, is not a householder and was properly excused on state's challenge. *McArthur v. State*, 41 Tex. Crim. 635, 57 S. W. 847, following *Lane v. State*, 29 Tex. App. 310, 15 S. W. 827, which overrules *Robles v. State*, 5 Tex. App. 346, in so far as that case seems to hold that one who merely rents a room and boards is a householder.

[b] But a juror who "owned and controlled a room," is a householder. *Mays v. State*, 50 Tex. Crim. 165, 96 S. W. 329.

7. *Iverson v. State*, 52 Ala. 170.

[a] One who only had a license to lay off an oyster bed has not a sufficient interest in the land to make him competent as a freeholder. *State v. Young*, 138 N. C. 571, 50 S. E. 213.

8. *State v. Mills*, 91 N. C. 581, one who is tenant by the courtesy initiate, and entitled to possession, rents and profits, is a "freeholder."

9. See *supra*, VII, F, 1.

10. *Tex. Code Crim. Proc.*, art. 673, subd. 2.

11. *Ala. Code*, §7276, subd. 1.

[a] One who has been a resident for many years but is neither a householder nor freeholder is properly excluded on the state's challenge though the defendant is willing he shall serve. *Williams v. State*, 109 Ala. 64, 19 So. 530.

12. Generally as to stockholders and member's interest in litigation, see *infra*, VII, F, 14, 15.

Religious or political beliefs as disqualifying see *supra*, VII, F, 7.

Prejudice against political, social or religious bodies and their members, see *infra*, VII, F, 13, b, (III).

bership in some organization is not disqualifying.¹³ Whether one may be asked as to his membership in any organization depends primarily upon whether such organization is directly, or indirectly, interested in the litigation.¹⁴ It is proper to ask whether he belongs to a society which is a party to the action,¹⁵ and his membership in a certain church may disqualify him to serve as a juror on the prosecution as a crime of a practice which his church upholds as a duty.¹⁶ It has been held, in a homicide case, that defendant should be permitted to ask jurors as to their membership in certain named societies to which it was claimed deceased had belonged,¹⁷ but he cannot be disqualified simply because he happens to belong to the same society as one of the parties.¹⁸ It is error to refuse questions as to juror's membership in an organization which had bound its members by an oath which made it impossible to afford defendant a fair trial without breaking that oath.¹⁹

b. *In Associations for Prevention or Prosecution of Crime.*²⁰ Mere membership in an organization which is in favor of prosecuting persons accused of the particular crime charged,²¹ is not disqualify-

13. *Jones v. Wright* (Tex. Civ. App.), 92 S. W. 1010, membership in an organization known as "Actual Settlers," does not disqualify one as a juror in an action of trespass to try title.

[a] **Harmless error to refuse to permit counsel to ask jurors whether they belonged to certain named secret societies.** *Burgess v. Singer Mfg. Co.* (Tex. Civ. App.), 30 S. W. 1110.

[b] **Mere previous membership in a labor union does not disqualify one in a prosecution for the unlawful use of a trade mark which was a "union label."** *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771.

14. *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295, applied to church organization or secret society.

[a] **Whether Stockholders of Corporation Not Interested.**—Proper to refuse to permit examination as to whether jurors were stockholders of a corporation not shown by the record to be interested in the litigation. *Clay v. Western Maryland R. Co.*, 221 Pa. 439, 70 Atl. 807.

15. *Woodmen of the World v. Wright*, 7 Ala. App. 255, 60 So. 1006, whether they are members of defendant insurance order.

[a] **Religious Society Directly Interested.**—Juror may be disqualified from acting as a juror in a controversy to which the particular religious denomination to which he belongs has a

direct interest in the matter being litigated. So where two denominations were litigating the right of possession to certain church property and whichever won the property would be held in trust for the benefit of that particular denomination or society, the members of neither are eligible to serve on the jury. *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73.

16. *United States v. Miles*, 2 Utah 19, affirmed, 103 U. S. 304, 26 L. ed. 481, he might fear some sort of church discipline if he failed to uphold the doctrine in the jury box.

17. *State v. Tighe*, 27 Mont. 327, 71 Pac. 3, the case was reversed on other grounds and the supreme court refused to say whether the refusal would alone have been ground for reversal.

18. *Purple v. Horton*, 13 Wend. (N. Y.) 9, 27 Am. Dec. 167, holding that a Royal Arch Mason may be competent to sit where only one of the parties was a Mason.

19. *People v. Reyes*, 5 Cal. 347, questioned as to his membership in the "Know-nothing" party, the defendant belonging to the class that party was aligned against.

20. **As ground for challenge to the array**, see *supra*, VII, E, 3, b.

Prejudice against crime or criminal acts generally, see *infra*, VII, F, 13, d.

21. *Colo.*—*Boyle v. People*, 4 Colo. 176, 34 Am. Rep. 76. *Ill.*—*Musick v. People*, 40 Ill. 268, association for prosecution of horse thieves. *Md.*—*Guy*

ing. It is not ground for challenge for implied bias,²² but may be ground for challenge to the favor.²³ If the association is not itself back of the particular prosecution in some way, its members are clearly not disqualified;²⁴ and even where it is, those particular members who have not in some way contributed to the particular prosecution may be permitted to serve,²⁵ but where the prosecution was by an agent of the association, hired for the express purpose of securing evidence, the member is incompetent.²⁶ And to aid the intelligent

v. State, 96 Md. 692, 54 Atl. 879. *N. M. Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968.

[a] That one is a member of a commercial club which passed a resolution in favor of enforcing the local option law does not disqualify him from serving as a juror in a local option case even though he was present at the meeting and voted in favor of the resolution. *State v. Stephens* (Mo. App.), 189 S. W. 630.

[b] Mere membership in an organization for promoting temperance and not specially for enforcing the prohibition laws does not disqualify jurors from sitting in a case for the unlawful sale of liquor. *State v. Estlinbaum*, 47 Kan. 291, 27 Pac. 996.

22. *State v. Wilson*, 8 Iowa 407, membership in association for general purpose of preventing horse-stealing.

23. *Boyle v. People*, 4 Colo. 176, 34 Am. Rep. 76.

[a] The trial court has a discretion to exclude persons who are members of organizations, whose activities in whole or in part, are directed toward the suppression of the very offense with which defendant is charged. *Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968. See also *Boyle v. People*, 4 Colo. 176, 34 Am. Rep. 76, court in a horse stealing prosecution excused on challenge officers of a cattlemen's association having for one object the prosecution of cattle thieves.

[b] Members who have not formed or expressed any opinion as to the guilt or innocence of the accused, or any opinion upon the local option law he was accused of violating, that would prevent them from returning a fair and impartial verdict based on the law and evidence in the case, are not disqualified. *Guy v. State*, 96 Md. 692, 54 Atl. 879.

24. *Guy v. State*, 96 Md. 692, 54 Atl. 879; *Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884. See *Com. v. Thrasher*, 11 Gray (Mass.) 55.

[a] Whether the juror had ever belonged to a so-called "Committee of One Hundred," is not a proper question, there being nothing to show that such committee was in fact behind the prosecution and actively supplying the prosecution with information to convict defendant. *Connors v. United States*, 158 U. S. 408, 15 Sup. Ct. 951, 39 L. ed. 1033.

[b] Membership in a so-called "law and order league" for the suppression of crime cannot be shown if there is no foundation laid to show that the jurors had interested themselves particularly in the prosecution of the case at bar by contributing money or otherwise. *Dodd v. State* (Tex. Crim.), 82 S. W. 510.

[c] No error in refusing to permit defendant to show who were the members of a committee which was engaged in prosecuting the case, it appearing in the bill of exceptions that it was not shown that any juror was a member of the committee, nor that any juror was questioned as to the matter. *Moore v. State*, 36 Tex. Crim. 574, 38 S. W. 209.

25. *Guy v. State*, 96 Md. 692, 54 Atl. 879.

[a] Stockholder of railway corporation which was participating in the prosecution of defendant accused of attempting to murder a caretaker of a depot. The mere pecuniary interest would not disqualify the stockholder. *Taylor v. State*, 13 Ga. App. 715, 79 S. E. 924.

[b] That the organization may have hired detectives to obtain proof, and that those detectives are to be witnesses in the particular case does not disqualify the members. That does not of itself constitute active participation by the members though they may have contributed to the general fund of the association. *Guy v. State*, 96 Md. 692, 54 Atl. 879.

26. *Com. v. Moore*, 143 Mass. 136, 9

exercise of the right of peremptory challenge, membership in such societies may be inquired into in some states.²⁷ If prospective jurors should be members of an organization the purpose or practical operation of which was to delay or obstruct the enforcement of law they would be subject to challenge by the state,²⁸ but not by the accused,²⁹ and so long as it is not done in a way prejudicial to defendant, jurors may be asked whether they have bound themselves by an oath not to prosecute.³⁰

11. Matters Relating to Selection.³¹ — a. *Drawing and Summoning.* — By statute it is sometimes provided that any person not drawn or selected according to law may be challenged for cause,³² but where the array had been quashed it does not necessarily follow that the individual jurors are subject to challenge to the poll.³³ Some statutes expressly disqualify any person who is placed on the jury list by request of himself or another,³⁴ or make such fact ground for challenge for cause.³⁵ That the officer who summoned a venireman was a state witness is no ground for challenge to the individual juror summoned.³⁶ Jurors are not disqualified by the fact that they were served on Sunday.³⁷ That jurors being absent when called were brought in on attachment does not affect their competency.³⁸

N. E. 25, 58 Am. Rep. 128, *distinguishing* Com. v. O'Neil, 6 Gray (Mass.) 343, and Com. v. Livermore, 4 Gray (Mass.) 18, in so far as they seem to hold to the contrary.

[a] **Though He Says He Can Try Fairly.**—State v. Fullerton, 90 Mo. App. 411.

27. Lavin v. People, 69 Ill. 303, in an action for damages for selling liquor to a drunkard, it was improper to refuse to permit questions as to the juror's membership in certain temperance societies or leagues having for one object the enforcement of liquor laws.

[a] **Under the rule that considerable latitude should be permitted counsel in order that they may intelligently exercise the right of peremptory challenge the judgment was reversed where defendant's counsel was not permitted to question jurors as to their membership in such organizations or their activities in prosecutions including the one at bar.** State v. Mann, 83 Mo. 589.

[b] **Particular Form of Question Is for the Trial Court.**—State v. Wilson, 8 Iowa 407.

As to right to examine in aid of peremptory challenge, see *supra*, VII, E, 5, m, (1).

28. Guy v. State, 96 Md. 692, 54 Atl. 879.

29. Boldt v. State, 72 Wis. 7, 38 N. W. 177, since their bias would be

favorable rather than prejudicial to him.

30. Fletcher v. State, 6 Humph. (Tenn.) 249, jurors need not answer, and it will be assumed the inquiry was not permitted to an extent that would influence the verdict because of public opinion.

31. **As ground for challenge to the array,** see *supra*, VII, E, 3, b.

32. Kan. Gen. St., §§4635, 4636; Mo. Rev. St., 1909, §§7296, 7313, 7328, 7342.

33. State v. Yordi, 30 Kan. 221, 2 Pac. 161, the objection to the array was to the manner of its selection and not to the juror's qualifications.

34. Mich.—How. St., §12,877. Minn. Rev. Laws, 1905, §5263. Neb.—Rev. St., §§8147, 8157. Va.—Code, 1904, §3152.

[a] **Challenge for Want of Qualifications.**—See *supra*, VII, F, 1.

35. Burns' Ann. St. (Ind.), §§2098, 2101, subd. 10; Ia. Code, §337; *In re Goldthorp's Estate*, 115 Iowa 430, 88 N. W. 944.

36. Fla.—Hodge v. State, 26 Fla. 11, 7 So. 593. Neb.—Rev. St., §8144. S. D. Code Civ. Proc., §252, subd. 10.

37. State v. Kornstett, 62 Kan. 221, 61 Pac. 805.

38. State v. Forbes, 111 La. 473, 35 So. 710; Wormeley v. Com., 10 Gratt. (51 Va.) 658.

b. *Choosing for Trial.*—Exclusion of jurors from the court room during the examination of other jurors does not disqualify them,³⁹ nor does the fact that they were present and heard argument on a motion for security for costs,⁴⁰ nor are mere imprudent, untruthful statements on the voir dire, made in a joking or flippant manner ground for challenge.⁴¹ Private conversations with the jurors do not, of themselves, make the jurors subject to challenge.⁴²

12. *Service on Jury Within Prohibited Time.*⁴³—By some statutes it is a personal privilege of exemption only, that the juror has performed previous jury duty within a specified time,⁴⁴ but in many jurisdictions statutes are found directed at "professional jurymen" and which forbid too frequent jury service.⁴⁵ Some of these statutes apply particularly to talesmen or bystanders.⁴⁶ others only to the

39. *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805.

[a] Though disqualifying opinions of other jurors was disclosed by the examination which was necessarily overheard. To hold otherwise would make it almost impossible to secure a jury. *State v. Russell*, 13 Mont. 164.

40. *Murdock v. Roe*, 186 Mich. 233, 152 N. W. 969.

41. *State v. Petit*, 119 La. 1013, 44 So. 848, while deserving "the animadversion of the court" are not ground for challenge, when the true answer was given immediately thereafter.

[a] Such remarks made out of the presence of the court, do not render him incompetent, where he admits on his voir dire that he made the remark in a jocular manner, but says he has no opinion or bias in the case on trial. *State v. Birdwell*, 36 La. Ann. 859.

42. *Simmons v. State*, 171 Ala. 16, 54 So. 612, that the prosecutor talked with the juror privately is not ground for challenge where it appears he was not talking about the case, but was making inquiry as to the physical fitness of another juror for jury service.

[a] It was proper to excuse a juror for cause who stated on his examination that he had been talking that day with the agent of defendant fire insurance company who said there was a case, he thought, of incendiarism. It appeared that on approval of plaintiff's counsel the agent had quit talking and then resumed the conversation as soon as counsel passed. *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238, 18 N. W. 797.

43. *Incompetency by reason of having served on a jury in an action in-*

volving one of the parties, see *infra*, VII, F, 17, d, e, f.

44. Fla.—*Lambright v. State*, 34 Fla. 564, 16 So. 582, *following Blount v. State*, 30 Fla. 287, 11 So. 547. La.—*State v. Hopkins*, 113 La. 786, 40 So. 166; *State v. Guidry*, 28 La. Ann. 630. Wis.—*Conkey v. Northern Bank*, 6 Wis. 447.

[a] Juror having claimed his exemption under the statute the court properly excluded him. His service would not have invalidated the verdict. *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[b] *Statutory Provisions Granting Exemption.*—Ark.—*Kirby's Dig.*, §4523. Cal.—*Code Civ. Proc.*, §200, subd. 13. D. C.—*Code*, §207. La.—*Act* 135, 1898, §2. Miss.—*Code*, §2687. Mo.—*Rev. St.*, 1909, §§7296, 7361. R. I.—*Gen. Laws*, ch. 279, §9. S. C.—*Civ. Code*, §2936. Va.—*Code*, 1904, §3149. Wis. *St.*, 1898, §2533.

45. Ind.—*Brooks v. Jennings, etc. Assn.*, 35 Ind. App. 221, 73 N. E. 951. Mich.—*Burden v. People*, 26 Mich. 162. Neb.—*Wiseman v. Bruns*, 36 Neb. 467, 54 N. W. 858.

[a] The object of the statute is not merely to relieve men from service but to preserve the purity of the jury box, by preventing "over-willingness" to serve in that capacity. *Christie v. State*, 44 Ind. 408, *followed in Barker v. Hine*, 54 Ind. 542; *Williams v. State*, 45 Ind. 299; *Kassebaum v. State*, 45 Ind. 277; *State v. Brown*, 28 Ore. 147, 41 Pac. 1042.

46. Ind.—*Burns' Ann. St.*, §2101, subd. 15. Kan.—*Gen. St.*, §§5876, 6778. Mich.—*How. St.*, §12,902. Miss.—*Code*, §2684. N. C.—*Rev.*, §1967. Ohio.

regular jurors,⁴⁷ still others distinctly specify both,⁴⁸ or do not make any distinction in terms,⁴⁹ in which case they have been construed to apply to both talesmen and regular jurors.⁵⁰ A statute which applies only to jurors not of the regular panel does not apply to jurors put on the regular panel, but in an irregular manner.⁵¹ Persons who are made members of the regular panel by the court under its discretionary power to fill vacancies are members of the regular panel within the statute,⁵² as are persons who have been discharged by the court and recalled,⁵³ or who have been temporarily excused by the trial court.⁵⁴ Nor does the erroneous excusing of a juror followed by his immediate recall make him a bystander within the statute.⁵⁵ One form of the statute forbids the summoning of the same person as a juror for a certain length of time after he has been once drawn,⁵⁶ or has been summoned and attended,⁵⁷ or has actually attended as a juror.⁵⁸ By other statutes the same person shall not serve more than once in a specified length of time,⁵⁹ or shall not have served for more than

Gen. Code, §11,437, subd. 9. **Okla.** Rev. Laws, §4997. **S. D.**—Code Civ. Proc., §252, subd. 9; Code Crim. Proc., §339, subd. 9.

[a] One who is a regular juror for a week is not subject to challenge as a tales juror under the statute. *Louisville N. O. & T. Ry. Co. v. Mask*, 64 Miss. 738, 2 So. 360.

47. Ill. Rev. St., ch. 78, §14; Kan. Gen. St., §§4635, 4636.

[a] **Construing Missouri Statute.** Rev. St., 1909, §7268, providing: "No person shall be summoned as such standing juror twice within the period of one year, in any court of record," refers only to standing jurors and not talesmen or "bystanders." *Schneider v. Chew*, 157 Mo. App. 354, 138 S. W. 357.

[b] **Construing Wisconsin Statute.** Person summoned as a talesman is not subject to the rule as to service on regular panel within a year. *Hughes v. State*, 109 Wis. 397, 85 N. W. 333.

[c] **Construing North Carolina Statute.**—Jurors are competent when drawn on special venire though they have served as jurors within two years preceding. *State v. Starnes*, 94 N. C. 973.

48. **Ala.**—Code, §7247. **Colo.**—Mills' St., §4255, "any person summoned in any way." **Ind.**—Burns' Ann. St., §1667. **Mich.**—How. St., §12,907. See *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *Wise v. Otter Creek Lumber Co.*, 86 Mich. 40, 48 N. W. 695. **Ore.**—See Lord's Laws, §§990, 1011. **Wash.**—Rem. & Bal. Code, §§111, 328.

49. U. S. Rev. St., §812; Kan. Gen. St., §4598.

50. **U. S.**—*Walker v. Collins*, 50 Fed. 737, 1 C. C. A. 642. **Kan.**—*Kansas City v. Kirkham*, 9 Kan. App. 236, 59 Pac. 675. **Neb.**—*Figg v. Donahoo*, 4 Neb. (Unof.) 661, 95 N. W. 1020; *Coil v. State*, 62 Neb. 15, 86 N. W. 925; *Wiseman v. Bruns*, 36 Neb. 467, 54 N. W. 858.

51. *Mueller v. Rebhan*, 94 Ill. 142, *distinguishing Brooks v. Bruyn*, 35 Ill. 392, and *Bissell v. Ryan*, 23 Ill. 566, as being decided under a former statute.

52. *City of Michigan City v. Phillips*, 163 Ind. 449, 71 N. E. 205.

53. *Smith v. State*, 24 Ind. App. 688, 57 N. E. 572.

54. *Douglass v. State*, 18 Ind. App. 289, 48 N. E. 9.

55. *Detroit, M. & T. S. L. R. Co. v. Kimball*, 211 Fed. 633, 128 C. C. A. 565.

56. **Md.**—Gen. Laws, art. 51, §11. **Mo.**—Rev. St., 1909, §7268. **Neb.**—Rev. St., §8144. **Vt.**—Pub. St., §1477.

57. U. S. Rev. St., §812; Lord's Laws (Ore.), §990. See *Walker v. Collins*, 50 Fed. 737, 1 C. C. A. 642.

58. Mo. Rev. St., 1909, §7302; N. H. Pub. St., ch. 209, §14.

59. **Ind.**—Burns' Ann. St., §2101, subd. 15. **Ia.**—Code, §337. **Kan.**—Gen. St., §§4635, 4636. **Ky.**—Gen. St., §2247. **Mich.**—How. St., §12,907. **Mo.**—Rev. St., 1909, §§7312, 7327. **Neb.**—Rev. St., §8158. **N. C.**—Rev., §1967. **Ohio.**—Gen. Code, §11,437, subd. 9. See *Taylor v. State*, 36 Ohio St. 212. **Ore.**—Lord's

a specified length of time during a specified time,⁶⁰ or during a specified term of the court.⁶¹ Some statutes specifically forbid the service of talesmen more than once in the same term,⁶² or during the same or the next term,⁶³ and others provide that he must not have served in the trial of more than a specified number of cases at that or the last preceding term nor have been on the regular panel for the last two preceding terms.⁶⁴

Under a statute forbidding the summoning of any juror who had been summoned and attended at any term within a stated time, talesmen must have been summoned at a previous term and not merely at another trial at the same term,⁶⁵ and under a statute forbidding service again within a specified time, jurors are not disqualified from sitting on more than one jury in the term for which they are drawn or summoned.⁶⁶ In the absence of a statute too frequent service is not ground for challenge.⁶⁷

Some statutes disqualify the persons who come within their provisions,⁶⁸ and they are then subject to challenge for lack of qualifications under the general rule,⁶⁹ but other statutes make it a specific ground for challenge for cause,⁷⁰ sometimes further characterizing it

Laws, §990. **R. I.**—Gen. Laws, ch. 279. **S. D.**—Code Civ. Proc., §252, subd. 9. See also Code Crim. Proc., §339, subd. 9.

60. **Ala.**—Code, §7247. **Tenn.**—Shannon's Code, §5821. See *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263; *Bloodworth v. State*, 6 Baxt. 614, 32 Am. Rep. 546. **Tex.**—Vernon Sayles' Civ. St., art. 5115, subd. 5; art. 5116.

61. *Kirby's Dig.* (Ark.), §4529.

62. **Kan.** Gen. St., §§5876, 6778; **Okla.** Rev. Laws, §4997.

63. *How. St.* (Mich.), §12,902.

64. **Miss.** Code, §2684, "served as such in the trial of as many as three cases."

65. *Walker v. Collins*, 50 Fed. 737, 1 C. C. A. 642.

66. See cases *infra*, this note.

[a] **Applied to Talesmen.**—*Carlson v. Holm*, 2 Neb. (Unof.) 38, 95 N. W. 1125; *Bond v. State*, 23 Ohio St. 349.

[b] **Applied to Regular Jurymen.** *Burden v. People*, 26 Mich. 162.

[c] **Applied to Either.**—If one has served within the year, immediately preceding his selection, either as a member of the regular jury panel or as a talesman, then he is not competent to be again selected as a juror either upon the regular panel or as a talesman. *Mason v. State*, 170 Ind. 195, 83 N. E. 613; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; *Brooks v. Jennings*

County, etc. Assn., 35 Ind. App. 221, 73 N. E. 951.

67. *Irwin v. Irwin*, 3 Okla. 184, 41 Pac. 383.

68. **Ala.**—Code, §7247. **Ark.**—*Kirby's Dig.*, §4529. **N. H.**—Pub. St., ch. 209, §14. **R. I.**—Gen. Laws, ch. 279. **Tenn.**—Shannon's Code, §§5799, 5800. **Tex.**—Vernon Sayles' Civ. St., art. 5115, subd. 5. **Vt.**—Pub. St., §1477.

69. See *supra*, VII, F, 1.

70. **U. S.**—Rev. St., §812. **Ia.**—Code, §337. **Ky.**—Gen. St., §2247. **Mich.** *How. St.*, §§ 12902, 12903. **Miss.**—Code, §2684. **Neb.**—Rev. St., §§ 8144, 8158. And see *Kerr v. State*, 63 Neb. 115, 88 N. W. 240; *Coil v. State*, 62 Neb. 15, 86 N. W. 925. **N. C.**—Rev., §1967, "shall be a disqualification and ground of challenge." **Ore.**—Lord's Laws, §990. **S. D.**—Code Civ. Proc., §252, subd. 9. **Tenn.**—Shannon's Code, §5821. **Wash.**—Rem. & Bal. Code, §328.

[a] It is not a disqualification but only a ground for challenge. *State v. Hall*, 24 Wash. 255, 64 Pac. 153.

[b] **Missouri Statutes Construed.** By Rev. St., 1909, §§ 7268, 7296, 7302, 7312, 7327, jurors are not to be summoned, or "not permitted to serve" in certain counties after specified jury service, while by §§ 7297, 7313, and 7328, it is ground for challenge in certain counties. The effect of these statutes is that in some counties it is ground for challenge and in others it

as a ground of principal challenge,⁷¹ or of challenge for implied bias.⁷²

Where the statute forbids the service within a specified time "next preceding the trial" it applies to service within that time regardless of the terms of court,⁷³ but where the service is "at any prior term within one year next preceding," the service at such prior term is controlling though more than a year has elapsed since the service.⁷⁴ Except in so far as the statutes may exclude certain jurors,⁷⁵ the statutes apply to all juries whether common or special,⁷⁶ but some provisions of the statutes are limited to civil juries.⁷⁷

That a juror had been summoned previously in an illegal manner would not bring him within the statute,⁷⁸ but a juror having actually served, he is within the statute, though the case was dismissed without verdict.⁷⁹ Statutes providing for a certain length of service have been construed to mean actual jury service and not mere attendance on call.⁸⁰ Objection having been properly made it is reversible error to refuse to exclude the juror,⁸¹ unless the record fails to show that the juror was improperly selected.⁸²

is not, that a juror has become disqualified on account of previous service during the year. *Schneider v. Chew*, 157 Mo. App. 354, 138 S. W. 357.

71. Kan. Gen. St., §§ 5876, 6778; Okla. Rev. Laws, §4997.

72. S. D. Code Crim. Proc., §339, subd. 9.

73. *Williamson v. St. Louis Transit Co.*, 202 Mo. 345, 100 S. W. 1072. It does not mean that the juror must have served since the preceding October term of the court.

74. *Denver City Tramway Co. v. Kennedy*, 50 Colo. 418, 117 Pac. 167; *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680, *construing* Act, 1905, §1, Laws 1905, p. 280.

75. Ala. Code, §7247, by its terms does not apply to special juries in capital cases. And see cases *supra*, as to distinction between tales jurors and regular jurors.

76. *Williamson v. St. Louis Transit Co.*, 202 Mo. 345, 100 S. W. 1072, *construing* Rev. St., 1909, §7342, providing court shall excuse, on challenge, in cities over 100,000, any person on list "who has served on any jury in any court of this state within twelve months next preceding," or may excuse without challenge.

77. *Benton v. State*, 52 Tex. Crim. 360, 107 S. W. 838, *following* *Hunter v. State*, 30 Tex. App. 314, 17 S. W. 414. See also *Monk v. State*, 27 Tex. App.

450, 11 S. W. 460, *construing* *Vernon Sayles' Civ. St.*, art. 5115, subd. 5.

78. *Randolph v. State*, 65 Neb. 520, 91 N. W. 356, he must have attended as a juror at a term prior to the term at which he is challenged.

79. *Famulener v. Anderson*, 15 Ohio St. 473, case compromised and judgment entered by consent.

80. *Humphrey v. State*, 74 Ark. 554, 86 S. W. 431.

[a] **Jurors Excused From Attendance From Time to Time.**—The term began on September 19th, on which day the jurors were excused until October 3rd, and October 8th the court adjourned until October 24th and the cause was called for trial November 9th. A motion to discharge the jury will not lie. *Humphrey v. State*, 74 Ark. 554, 86 S. W. 431.

81. *Brooks v. Jennings, etc. Assn.*, 35 Ind. App. 221, 73 N. E. 951; *Figg v. Donahoo*, 4 Neb. (Unof.) 661, 95 N. W. 1020, the court has no discretion but to sustain it.

82. *Mason v. State*, 170 Ind. 195, 83 N. E. 613; *City of Goshen v. England*, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; *Douglass v. State*, 18 Ind. App. 289, 48 N. E. 9.

[a] **Record Held Not To Show Error.**—Where the juror only stated that he served "a year ago this spring" and did not know when he was discharged, this trial having begun June 20th, there is no showing that his serv-

13. Bias, Partiality or Prejudice.⁸³ — a. *In General.* — Technically the cases recognize a distinction between "bias" and "prejudice,"⁸⁴ but the word "impartial" as used in the cases and statutes clearly includes both.⁸⁵ In civil suits the parties litigant have the absolute right to an impartial and disinterested jury,⁸⁶ and it is unquestionably

ice was less than a year prior to the beginning of the trial. *State v. Casaday*, 58 Ore. 429, 115 Pac. 287.

83. Statements during trial showing bias as being misconduct of juror, see *infra*, IX, G, 5.

Right to question juror as to his state of mind as to bias generally, see *supra*, VII, E, 4, i, (III), (D).

84. *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063, "bias" means "leaning" and "prejudice" means "prejudgment."

[a] "**Bias**" and "**Prejudice**" Distinguished.—Says Russell, C. J., in *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777: "The words 'prejudice' and 'bias' as used in regard to the qualification of a juror, do not bear their ordinary and popular significance. 'Bias,' in its legal acceptance, means only a leaning toward one of the parties rather than the other; and 'prejudice' imports the formation of a fixed anticipatory judgment as contradistinguished from those opinions which may yield to evidence." See also *Willis v. State*, 12 Ga. 444.

[b] **Definition of Prejudice.**—"Prejudice" means "prejudgment," "judgment beforehand." It follows that expressions of opinion by a juror after verdict are no evidence of his having been prejudiced before the trial. *State v. Anderson*, 14 Mont. 541, 57 Pac. 1.

[c] **Prejudice Is Personal.**—Constructing the provisions of the statute on challenges together, the word "prejudice" refers only to the person of the accused, and means hatred, ill-will, dislike, antipathy, etc. *Randle v. State*, 34 Tex. Crim. 43, 28 S. W. 953.

[d] "**Bias**" is defined (1) to be "a leaning of the mind; propensity or prepossession toward an object or view, not leaving the mind indifferent; bent; inclination." *Gulf, C. & S. F. Ry. Co. v. Gilvin* (Tex. Civ. App.), 55 S. W. 985; *Pierson v. State*, 18 Tex. App. 524. (2) "It has no definition in our codes; therefore the above, being the common acceptance and usual meaning of the word, is applicable to the statute."

Withers v. State, 30 Tex. App. 383, 17 S. W. 936, citing Webster's Dictionary.

[e] "**Bias** is that which sways the mind toward one opinion rather than another. Therefore a juror is biased when from any cause or influence he is inclined toward one party to the action rather than the other; or when, in a criminal case, he is inclined to convict rather than to acquit, or *vice versa*." *Olive v. State*, 11 Neb. 1, 23, 7 N. W. 444. "Bias" as used in the code means "being under an influence which so sways his mind to one side as to prevent his deciding the cause according to the evidence." It is "a leaning of the mind; propensity towards an object; not leaving the mind indifferent; inclination; prepossession; bent." *Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. 769.

85. Meaning of "Impartial."—According to the standard lexicographers a man who is "impartial" is one "who is not biased in favor of one party more than another," who is "indifferent; unprejudiced; disinterested." The primary idea is freedom from personal bias, indifference between the parties as persons; not prejudiced against one or the other; disinterested as between them. But in the constitution the word is not used exclusively in its primary sense, but in its secondary or more general sense—as freedom from any bias, or unindifference, or disinterestedness. *Eason v. State*, 6 Baxt. (Tenn.) 466.

[a] "**Impartial** means 'not partial'; not favoring one party more than another; unprejudiced; disinterested; equitable; just." . . . "As thus defined 'impartial' evidently means not favoring a party or an individual because of the emotions of the human mind, heart, or affections. It means that, to be impartial, the party, his cause, or the issues involved in his cause, should not, must not be prejudiced." *Randle v. State*, 34 Tex. Crim. 43, 28 S. W. 953.

86. Ala.—Citizens' Light, etc. Co. v. Lee, 182 Ala. 561, 62 So. 199. III.

the right of a person on trial for an alleged crime to have the issue determined by a disinterested jury, standing impartially between him and his accusers,⁸⁷ and the state as well as the prisoner is entitled to an impartial jury.⁸⁸ The mere difficulty of obtaining an impartial jury does not excuse failure to give one.⁸⁹

It was a cardinal rule of the common law that juries, to be impartial, should stand indifferent between the parties.⁹⁰ Under the constitution

West Chicago St. R. Co. v. Huhnke, 82 Ill. App. 404, "It cannot be that our jurisprudence will leave litigants at the mercy of an unfair, prejudiced and even revengeful juror." *Ind.*—*Pearcy v. Michigan Mut. Life Ins. Co.*, 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673; *Terre Haute Elect. Co. v. Watson*, 33 Ind. App. 124, 70 N. E. 993. *Ky.*—*Dow Wire Works Co. v. Morgan*, 29 Ky. L. Rep. 854, 96 S. W. 530. *W. Va.*—*Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078.

[a] "A big part of the battle is the selection of the jury, and an impartial jury is the cornerstone of the fairness of trial by jury." *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128.

[b] "The whole spirit of Anglo-Saxon jurisprudence is that causes shall be tried by men who are free from partiality or bias for or against the litigants; which indeed is the essence of a trial properly so-called." *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536.

87. *Md.*—*Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601. *Neb.*—*Lucas v. State*, 75 Neb. 11, 105 N. W. 976. *N. Y.*—*People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. *N. C.*—*State v. McAfee*, 64 N. C. 339. *W. Va.*—*State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626. *Wis.*—*Carthaus v. State*, 73 Wis. 560, 47 N. W. 629.

[a] One of the "cardinal principles of our system" is that a man "shall have a fair trial by an impartial jury." *Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985.

[b] This Is Essential to the Proper Administration of Justice.—*State v. Crofford*, 121 Iowa 395, 96 N. W. 889.

[c] "However notorious the case may be, the defendant is entitled to be tried by a jury having the statutory qualifications—men who have not prejudged the case." *State v. Morrison*, 64 Kan. 669, 68 Pac. 48.

[d] Duty of Both Court and Counsel To Obtain.—*Com. v. Sushinski*,

242 Pa. 406, 89 Atl. 564. See also *Respublica v. Dennie*, 4 Yeates (Pa.) 267, 2 Am. Dec. 402.

[e] Verdict by Partial Jury Must Be Set Aside.—*People v. Riggins*, 159 Cal. 113, 112 Pac. 862. The reviewing court in determining whether the juror was fair and impartial cannot be guided by the fact that the particular juror's action on the deliberation of the case was fair and impartial and that the verdict seems just. If the juror was not fair and impartial the defendant has not had a constitutional trial. *Hughes v. State* (Tex. Crim.), 60 S. W. 562.

88. *Mo.*—*State v. Miller*, 156 Mo. 76, 56 S. W. 907. *Tex.*—*Pierson v. State*, 18 Tex. App. 524. *Vt.*—*State v. Shaw*, 73 Vt. 149, 50 Atl. 863; *State v. Ward*, 39 Vt. 225.

89. *State v. Start*, 60 Kan. 256, 56 Pac. 15.

90. *Ill.*—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Chicago & A. R. Co. v. Adler*, 56 Ill. 344. *N. Y.*—*Blair v. M. McCormack Const. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750. *Pa.*—*Harrisburg Bank v. Forster*, 8 Watts 304, citing 3 Bl. Com. 363.

[a] The common law maxim is "must stand indifferent as he stands unsworn." This maxim of Lord Coke's is often quoted by the courts and "expresses a rule of justice as well as a rule of law." *Balbo v. People*, 80 N. Y. 484. See also *U. S.*—*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. *Miss.*—*Ferriday v. Selser*, 4 How. 506; *State v. Flower*, Walk. 318. *Nev.*—*State v. McClear*, 11 Nev. 39.

[b] Two things in respect to juries "have remained fixed and immovable" from the earliest days of the common law. There must be twelve men; and they must be intelligent and impartial. *People v. Cosmo*, 205 N. Y. 91, 98 N. E. 408, 39 L. R. A. (N. S.) 967.

[c] "It is an old and cherished maxim of the law, that jurors should be omni exceptione majores. They

every person who demands an impartial jury is entitled to it,⁹¹ and any act which required or authorized a trial by a partial jury would be unconstitutional,⁹² as would any act which even tended to modify the right, to an impartial jury.⁹³ Though these principles are said to be so plain and just as to require little more than a bare statement,⁹⁴ and so fundamental that they cannot be questioned,⁹⁵ the question is constantly arising in practice as to what standard or test is to be applied in order to obtain, with reasonable certainty, the

should be entirely exempt from every influence calculated to produce the slightest bias towards either party." *Ferriday v. Selser*, 4 How. (Miss.) 506. See also *Almand v. Rockdale*, 78 Ga. 199; *Georgia R. Co. v. Cole*, 73 Ga. 713; *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777; *Atlantic Coast Line R. Co. v. Bunn*, 2 Ga. App. 305, 58 S. E. 538; *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063; *State v. McClear*, 11 Nev. 39.

[d] **The theory of the common law** is "that jurors should come to a trial with minds like white paper, upon which prejudice, passion, or calumny, hope, interest, or fear, have made no stain or blot." *Temple v. Sumner*, Smith (N. H.) 226, *citing* 3 Burr. (Eng.) 1856.

91. **U. S.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. **Cal.** *People v. Riggins*, 159 Cal. 113, 112 Pac. 862. **Ga.**—*Wells v. State*, 102 Ga. 658, 29 S. E. 442. **Miss.**—*Dennis v. State*, 1 Miss. 221, 44 So. 825. **Mont.** *Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958; *State v. Mott*, 29 Mont. 292, 74 Pac. 728. **Neb.** *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106; *Wilson v. State*, 87 Neb. 638, 128 N. W. 38; *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

[a] **The constitution affirmatively declaring for a trial by an "impartial jury"** by that declaration impliedly prohibits the trial by a partial jury. *Woods v. State*, 99 Tenn. 182, 41 S. W. 811.

[b] **Under the general provision "that the right of trial by jury shall be inviolate"** the jury must not be partial. *Padueah, T. & A. R. Co. v. Muzzell*, 95 Tenn. 200, 31 S. W. 999.

[c] **An inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution is that the jury be unbiased and unprejudiced.** *Lombardi v. California St. C. R. Co.*, 124 Cal. 311, 57 Pac. 66.

[d] **The Constitutional Provision Affirms the Common Law.**—*State v. Wilson*, 38 Conn. 126. But *compare People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871, where the court says that the conception of an impartial jury as guaranteed by the constitution as one that will decide the case "solely from the testimony produced before them, did not come from the ancient rules of the common law."

92. *Stephens v. People*, 38 Mich. 739; *Stokes v. People*, 53 N. Y. 164, 13 Am. Rep. 492.

[a] **"It is not within the power of the legislature to deprive a citizen accused of crime of the right to challenge a juror for actual bias."** *State v. McClear*, 11 Nev. 39.

93. *Lucas v. State*, 75 Neb. 11, 105 N. W. 976; *Stagner v. State*, 9 Tex. App. 440.

[a] **"Any statute which would even tend to deprive a defendant of a trial by an impartial jury would be unconstitutional and void."** *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059.

[b] **"Neither legislative discretion nor a discretion conferred by the legislature upon the court, can be allowed to detract one jot or tittle from the guarantee of the constitution that the accused shall be tried by an impartial jury."** *Palmer v. State*, 42 Ohio St. 596. See also *McHugh v. State*, 42 Ohio St. 154; *Cooper v. State*, 16 Ohio St. 328.

94. *Pearcy v. Michigan Mutual Life Ins. Co.*, 111 Ind. 59, 12 N. E. 98, 60 Am. Rep. 673. See also *Terre Haute Elect. Co. v. Watson*, 33 Ind. App. 124, 70 N. E. 993.

95. **Md.**—*Garlitz v. State*, 71 Md. 263, 18 Atl. 39, 4 L. R. A. 601. **Mo.** *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536. **Wis.** *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629.

requisite degree of fairness and impartiality to qualify the jurors.⁹⁶

Where there is partiality inferable from the relations of kindred or business, or where there is personal prejudice or ill-will, or an existing controversy, the question of indifference is easily determined.⁹⁷ The broad general principle is that each juror shall be so free from either prejudice or bias as to guarantee the inviolability of an impartial trial,⁹⁸ and the better rule is to exclude any juror whose business or social relations, past or present, with either party are such that he could be suspected of possible bias.⁹⁹ The rule is that prejudice exists sufficient to disqualify the juror if it will take evidence to remove that prejudice.¹ No evidence or proof can be considered as to the weight or extent of the juror's prejudice,² and if the impartiality or bias be present the cause thereof is wholly immaterial.³ Where the juror entertains such views about the case or the parties as will pre-

96. *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

[a] "Bias or prejudice is such an elusive condition of the mind, that it is most difficult, if not impossible, to always recognize its existence." *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, reversing 30 App. Cas. (D. C.) 1.

[b] "We have not found the decisions plentiful on the precise question of what bias against a party to a suit will disqualify a venireman." *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536.

97. *State v. Wilson*, 38 Conn. 126.

[a] "Actual" and "Implied Bias" Distinguished.—*Block v. State*, 100 Ind. 357, makes this distinction: "Actual, where a real bias for or against one of the parties exists. Implied, where the relations which the juror sustains to one of the parties are such as to raise a presumption of bias in his favor." Hence the "bias" declared by one code to be a ground for challenge, has reference, primarily, to actual bias, and implied bias "has not, therefore, been made a principal cause for challenge by our statute, but continues to belong to that class of objections to a juror which, at common law, could only be made available by a challenge to the favor."

[b] Implied Bias Based on Relationship.—Since one who is related to one of the parties might be positive he has no bias, the law "most wisely says that with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual

existence need not be given." *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, reversing 30 App. Cas. (D. C.) 1.

Classification and statutory definitions of "implied" and "actual" bias, see *supra*, VII, E, 1, f.

As to implied bias through relationships see *infra*, VII, F, 18 to 22 inclusive.

98. *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777.

99. *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287. See *infra*, VII, F, 18 to 22 inclusive.

1. *Winnesheik Ins. Co. v. Schueller*, 60 Ill. 465.

[a] "No juror can be impartial whose prejudice or bias, as to the whole issue, has the force or effect of evidence at trial." *Palmer v. State*, 42 Ohio St. 596.

[b] Must not require a considerable amount of evidence to remove a prejudice before they can decide the issues of fact. *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354; *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536.

2. *People v. Reyes*, 5 Cal. 347 ("prejudice is a state of mind, which, in the eye of the law has no degrees"); *Curry v. State*, 4 Neb. 545.

3. *McGough v. State*, 113 Ark. 301, 167 S. W. 857. See also *State v. Webster*, 13 N. H. 491.

The common law permits no one who from any cause "has a motive or inducement to favor one person or wrong the other to sit in judgment upon their rights." *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

vent him from looking solely to the evidence, he should be excluded,⁴ or if he cannot try the case solely on the law and evidence.⁵

A juror who admits that his verdict would depend on a particular fact, if proved, without reference to the other evidence in the case is clearly incompetent.⁶ That a juror expresses sympathies "which lie in every human heart" does not render him incompetent.⁷ A juror who has a preconceived idea of the rights of one party, should be excluded,⁸ but a mere preconceived idea of the law does not render him incompetent where he shows no bias or prejudice in the particular case and will take the law from the court and apply it to the facts.⁹ Bias or prejudice does not relate solely to the persons who are parties to the action but to the case as well.¹⁰ It is immaterial whether the juror is affected by a direct personal interest in the case, or an indirect interest in the result as affecting some one else.¹¹ Jurors should be

4. *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

5. Ark.—*McGough v. State*, 113 Ark. 301, 167 S. W. 857. Cal.—*People v. Plyler*, 126 Cal. 379, 58 Pac. 904. Ohio.—*Martin v. State*, 16 Ohio 364.

[a] Mere fact that juror said he would decide against defendant if the evidence was equally balanced does not render him incompetent, where from his whole examination it appears that he knew nothing of preponderance or weight of evidence or burden of proof, and he showed an entire willingness to take all the law from the court. *Montgomery v. Wabash, St. L. & P. Ry. Co.*, 90 Mo. 446, 2 S. W. 409.

6. *In re Goldthorp's Estate*, 115 Iowa 430, 88 N. W. 944.

[a] **Certain Facts Inducing to Leniency.**—On trial of one for murder of his wife a juror was properly excused on the people's challenge, who said he would be more lenient, if it appeared defendant killed in a fit of jealousy, and that the wife had actually been going with other men. *People v. Decker*, 157 N. Y. 186, 51 N. E. 1018.

7. *Albert v. St. Louis Elect. T. R. Co.*, 192 Mo. App. 665, 179 S. W. 955.

[a] "A feeling of brotherly sympathy toward the plaintiff because of his misfortune" is but natural and does not disqualify where the juror says he can lay it aside. *Burch v. Southern Pac. Co.*, 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166.

[b] A mere "conditional or hypothetical" sympathy for an injured party which is "nothing more than

any fair-minded citizen would have for anyone in plaintiff's unfortunate condition" does not render a juror incompetent, and the trial court's discretion in overruling defendant's challenge will not be interfered with where his entire examination shows him to have been fair and frank and willing to decide solely on the evidence and instructions. *Bemis v. City of Omaha*, 81 Neb. 352, 116 N. W. 31.

[c] In an action for the death of plaintiff's child, where a juror stated that his sympathy for the death of the child might influence him in plaintiff's favor, if the evidence were evenly balanced, unless the court instructed otherwise, the court did not err in overruling the challenge for cause. *Albert v. St. Louis Elect. T. R. Co.*, 192 Mo. App. 665, 179 S. W. 955.

8. *Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612.

9. *Johnson v. Park City*, 27 Utah 420, 76 Pac. 216.

Right to question jurors as to their knowledge of law, see *supra*, VII, E, 4, K, (V).

Knowledge of law or legal terms as a qualification see *supra*, VII, F, 5, c, (III).

10. *Couts v. Neer*, 70 Tex. 468, 9 S. W. 40; *Houston, etc. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670. See also *Queen v. Hepburn*, 7 Cranch (U. S.) 290, 3 L. ed. 348; *Joice v. Alexander*, 1 Cranch C. C. 528, 13 Fed. Cas. No. 7,435.

11. *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777.

indifferent not only upon the particular issue to be tried, but should be impartial as between the parties,¹² but the rule as to indifference does not require merely that the juror shall be free from personal partiality, or personal malevolence.¹³ If juror has received favors from one party or the other, he is clearly incompetent.¹⁴

Though the very purpose of allowing challenges is to obtain impartiality,¹⁵ no legislative act is necessary to make partiality a ground of challenge.¹⁶ However, the statutes frequently provide in terms that it shall be a ground for challenge for cause,¹⁷ it being in its nature a challenge to the favor.¹⁸ Also in many states it is made the duty of

12. *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

[a] Though a juror has not a prejudice in the strict sense of the word, not having prejudged the particular case, nor formed an opinion about it, he should be excused, on challenge for cause, where he discloses a bitter and resentful feeling against a party which would be apt to affect his judgment. *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536.

[b] Where a juror admitted he was prejudiced against dancing, and it appeared that evidence would be required to remove his initial prejudice, the juror was properly excluded on challenge for cause he having stated in the first instance that his prejudice was so strong he would be prejudiced against plaintiff who was injured while returning from a dance, though on further questioning he said that if the injury appeared not to have grown out of the attendance at the dance he would not lay it up against plaintiff but would go according to the law and evidence. *Beach v. Seattle*, 85 Wash. 379, 148 Pac. 39.

13. *State v. Benton*, 19 N. C. 196, "the indifference required by the law must be one of the judgment, as well as of the passions."

14. *Omana, etc. R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943, "the effect might and probably would, be to affect the verdict."

[a] That juror has taken money for his verdict is ground for challenge at common law. *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

15. *State v. Caron*, 118 La. 349, 42 So. 960, "the great end of civil society is justice and impartiality."

[a] "All the precedents of challenges propter affectum, either to the

array or to the polls, are for matter which either manifests or argues a prejudice against the person challenging." *State v. Benton*, 19 N. C. 196.

16. *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287; *State v. McClear*, 11 Nev. 39; *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

[a] "The statute does not speak of bias or prejudice of a juror affecting his qualifications, because it is fundamental in our system of jurisprudence that a juror shall be free from bias or prejudice." *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354. See also *State v. Chatham Nat. Bank*, 10 Mo. App. 482, where holding "personal prejudice against one of the parties" though not a statutory disqualification, renders the juror incompetent.

General rule that juror may be challenged for a cause not specifically mentioned in the statute, see *supra*, VII, F, 1.

17. *Ala.*—Code, §7276, subd. 6. *Ariz.* Civ. Code, §3558, subd. 7; Penal Code, §1023, subd. 13. *Cal.*—Code Civ. Proc., §602, subd. 7. *Idaho.*—Code Civ. Proc., §3941, subd. 7. *Ind.*—Burns' Ann. St., §2101, subd. 11. *Kan.*—Gen. St., §6777. *Mont.*—Rev. Code, §6741, subd. 7. *Nev.*—Rev. Laws, §5206, subd. 7. *N. D.*—Rev. Code, §7017, subd. 7. *S. D.* Code Civ. Proc., §252, subd. 7. *Tex.* Code Crim. Proc. art. 673, subd. 12. *Giebel v. State*, 28 Tex. App. 151, 12 S. W. 591. *Utah.*—Comp. Laws, §3144, subd. 6. *Wyo.*—Comp. Laws, §4496, subd. 7; §6207, subd. 2.

18. *Toledo Rys. & L. Co. v. Ward*, 2 Ohio Cir. Ct. (N. S.) 256; *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087.

[a] The intent of the statute is not to enlarge or extend the causes of challenges for favor. *Dew v. McDivitt*, 31 Ohio St. 139.

the court to examine the juror on motion of either party with particular reference to his bias or prejudice,¹⁹ and some statutes disqualify jurors who have a bias or prejudice in favor of or against either of the parties,²⁰ which subjects them to challenge, under the general rule, for lack of qualifications.²¹

Bias in favor of either party is as much a cause of challenge as prejudice against either,²² but by the statutes it is sometimes provided that bias against one party is no ground of challenge by the other.²³ Whether a juror is, or is not, impartial, is to be determined by the court, and is not settled by the juror's oath or statement that he will be impartial,²⁴ nor by his statement that he thinks himself partial.²⁵

[b] So the statutes sometimes provide in effect that if there be no principal ground of challenge the juror may be challenged "on suspicion of favor to or prejudice against either party." *Kan.*—Gen. St., §§5876, 6778. *Ohio.*—Gen. Code, §11438. *Okl.*—Rev. Laws, §4997. See *Border v. Carrabine*, 30 *Okl.* 740, 120 *Pac.* 1087.

19. See *infra* this note.

[a] Usual Form of Statute.—Court on motion may examine juror on oath to know whether "he is sensible of any bias or prejudice therein" and shall excuse him if it appears to the court he is not indifferent. *Fla. Gen. St.*, §1492. Similar statutes are: *Haw. Acts*, 1905, ch. 5. *Me.*—Rev. St., ch. 84, §94. *N. H.*—Pub. St., ch. 209, §25. *R. I.*—Gen. Laws, ch. 279, §37. *S. C.*—Civ. Code, §2944. *Va.*—Code, 1904, §3154. *W. Va.*—Code, §4656.

20. *Ariz. Civ. Code*, §3517, subd. 4; *Vernon Sayles' Civ. St. (Tex.)*, art. 5117, subd. 4.

21. See *supra*, VII, F, 1.

22. *Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 *S. D.* 394, 53 *N. W.* 769.

23. *Ia. Code*, §5368.

24. *U. S.*—*Crawford v. United States*, 212 *U. S.* 183, 29 *Sup. Ct.* 260, 53 *L. ed.* 465 (*reversing* 30 *App. Cas.* [D. C.] 1); *United States v. Burr*, 25 *Fed. Cas. No.* 14,692g. *La.*—*State v. Caron*, 118 *La.* 349, 42 *So.* 960. *Neb.* *Bemis v. City of Omaha*, 81 *Neb.* 352, 116 *N. W.* 31; *Gandy v. State*, 27 *Neb.* 707, 43 *N. W.* 747, 44 *N. W.* 108.

Compare juror's belief as to his opinion, *infra*, VII, F, 23.

[a] The mere fact that a juror may swear he is not sensible of any bias is not sufficient to qualify him. *State v. Prater*, 26 *S. C.* 198, 2 *S. E.* 108.

[b] If a juror shows himself, by

his examination to be biased, no statement by him that he can render an impartial verdict will remove the disqualification. *Monaghan v. Agricultural F. Ins. Co.*, 53 *Mich.* 238, 18 *N. W.* 797.

[c] The common law rule still obtains, that where bias appears the juror is incompetent notwithstanding his opinion of his own fairness. *People v. Riggins*, 159 *Cal.* 113, 112 *Pac.* 862; *People v. Helm*, 152 *Cal.* 532, 93 *Pac.* 99; *Quill v. Southern Pac. Co.*, 140 *Cal.* 268, 73 *Pac.* 991; *Lombardi v. California St. Ry. Co.*, 124 *Cal.* 311, 57 *Pac.* 66.

[d] The Determination of the Question Is for the Court and Not for the Juror.—"The conclusion of the court should rest upon the facts stated by the juror with reference to his state of mind, and should not be allowed to depend upon the conclusions of the juror as to whether or not he could or would divest himself of a prejudice he admitted existed in his mind." *Theobald v. St. Louis Transit Co.*, 191 *Mo.* 395, 417, 90 *S. W.* 354.

[e] The state's challenge is properly allowed to a juror who said he had a bias in favor of defendant but that the bias would not prevent him from trying the case impartially. *Giebel v. State*, 28 *Tex. App.* 151, 12 *S. W.* 591.

25. *State v. Bush*, 117 *La.* 463, 41 *So.* 793, in a murder case the juror stated he was friend of deceased and did not think himself competent, but on further questioning said he would try defendant fairly.

[a] The fact that the juror states he would prefer not to sit in certain cases, does not make him incompetent. *Fahnestock v. State*, 23 *Ind.* 231.

b. *For or Against Certain Persons.*²⁶ — (I.) In General. — The general rule is that one who has a prejudice against a class of which a party is one, is not fair and impartial.²⁷ So prejudice in favor of a particular class of persons may be such as disqualify the juror.²⁸

(II.) *Against Corporations.*²⁹ — A mere general prejudice against corporations, not extending to the corporation party to the suit is not disqualifying,³⁰ but where the prejudice extends to the particular corporation he should be excluded on challenge.³¹

(III.) *Religious, Social, or Political Bodies and Their Members.*³² — For the purpose of exercising his peremptory challenges one may ask whether jurors entertain any prejudice against the people of a certain faith,³³ but it is improper to ask whether the testimony of persons who profess a certain faith will receive as much credit as members of any

26. Prejudice or bias growing out of relationship of juror to particular persons, see *infra*, VII, F, 18 to 22 inclusive. For or against certain witnesses, see *infra*, VII, F, g.

27. *Shane v. Butte Elect. Ry. Co.*, 37 Mont. 599, 97 Pac. 958. But see *infra* this section.

[a] A prejudice against all insurance companies being of a "bigoted and reprehensible character," and founded upon his inability to understand their proceedings, renders the juror incompetent in a case on an insurance policy. *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465.

[b] Prejudice against railway companies (1) so strong that the juror said "perhaps" he could not take the case in the same impartial way as he could were it between individuals, is clearly ground for challenge. *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60. (2) One who had a general prejudice against street railroads should have been excused where his prejudice grew out of having received a similar injury. *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354.

28. See cases *infra*, this note.

[a] A juror who would be influenced by the fact that the prisoner is a woman and a mother is biased and properly excluded on the state's challenge. *Withers v. State*, 30 Tex. App. 383, 17 S. W. 936.

[b] But it is not error to overrule a challenge for cause where the juror knew neither party, nor any facts, but who said his sympathies were with farmers but it would not affect his verdict in a case between a farmer

and a merchant. *Schwartz v. Lee Gon*, 46 Ore. 219, 80 Pac. 110.

29. Prejudice against corporations of a particular class see *supra*, VII, F, 13, b, (I).

Prejudice against corporations or individuals engaged in a particular business see *infra*, VII, F, 13, c.

30. *Kadner v. Omaha & C. B. St. R. Co.*, 97 Neb. 678, 151 N. W. 169, juror said he would be willing to submit a case of his own to a jury which felt toward him exactly as he felt toward defendant. See *Natchez, J. & C. R. R. Co. v. Bolls*, 62 Miss. 50.

[a] Improper to ask of a juror on his voir dire whether he is prejudiced against corporations. *Atlantic & D. Ry. Co. v. Rieger*, 95 Va. 418, 28 S. E. 590.

31. *Billmeyer v. St. Louis Transit Co.*, 108 Mo. App. 6, 82 S. W. 536.

[a] Prejudice Extending to Employees of Defendant.—A juror who stated that he had a prejudice "that would probably unconsciously bias his opinion" should have been excused on challenge, especially where he was not only prejudiced against the defendant corporation but stated he would "give more preference to the testimony of a non-employee of the company than I would an employee." *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 90 S. W. 354.

32. Membership in various organizations as disqualifying, see *supra*, VII, F, 10.

Religious or political belief as disqualifying, see *supra*, VII, F, 7

33. *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97, Jewish faith.

other faith,³⁴ or whether, in the juror's opinion, members of a certain faith are not to be believed on oath.³⁵ Prejudice against unlawful economic or political doctrines does not disqualify a juror from trying one accused of a crime growing out of the advocacy of such doctrines.³⁶ But a prejudice against a society and against defendants as members thereof is disqualifying where the society was organized for a lawful purpose and was not shown to have been connected with the crime charged.³⁷ Prejudice in favor of or against labor unions may be inquired into where it might influence the juror's verdict.³⁸

(IV.) Race Prejudice.³⁹ — If a white man will not give a negro as fair and impartial a trial as he would a white man he is clearly incompetent,⁴⁰ and jurors may be asked whether they would give a negro

Questions to aid exercise of peremptory challenge, see *supra*, VII, E, 5, m, (I).

34. *Horst v. Silverman*, 20 Wash. 233, 55 Pac. 52, 72 Am. St. Rep. 97.

35. *Com. v. Buzzell*, 16 Pick. (Mass.) 153, Roman Catholic.

36. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

As to prejudice against crime or unlawful acts, see *infra*, VII, F, 13, d.

[a] One may be prejudiced against communism or anarchism and yet be able to try fairly a murder claimed to have been committed by anarchists. *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320.

[b] Belief in "Direct Action."—It is proper for the state to ask the juror whether he believes in the doctrine of a certain organization which advocates "direct action," that is, physical force in redressing wrongs. *People v. Warr*, 22 Cal. App. 663, 136 Pac. 304.

37. *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, *distinguishing* *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 3 Am. St. Rep. 320.

38. See cases *infra*, this note.

[a] Where the action was for conspiracy (1) in which a labor union was involved it was not proper to exclude questions as to the juror's bias against such unions. *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003, 80 Am. St. Rep. 17, 49 L. R. A. 475, this goes to his competency and is also proper to determine peremptory. (2) But challenge for actual bias was properly disallowed where it was not claimed that defendant belonged to a labor union, though the juror stated he had no prejudice against organized labor, though his men

had joined in a strike, but that he would believe more readily that men belonging to a labor organization would enter into a conspiracy than ordinary individuals, and that he believed there must be "more organization there." *People v. Duncan*, 8 Cal. App. 186, 96 Pac. 414.

[b] Case Involving Misuse of Union Label.—Mere prejudice in favor of labor unions does not disqualify one from sitting on the trial of a prosecution for the unlawful use of a trade mark which was a union label. *State v. Montgomery*, 57 Wash. 192, 106 Pac. 771, juror was not a member of any union, nor had he any prejudice against defendant or opinion as to his guilt.

39. Unwillingness to as readily believe witnesses of one race as those of another, see *supra*, VII, F, 13, b, (III).

Race or color as disqualifying, see *supra*, VII, F, 5, f.

40. Ark.—*Milan v. State*, 24 Ark. 346. Fla.—*Jenkins v. State*, 31 Fla. 196, 12 So. 677; *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75. N. C.—*State v. McAfee*, 64 N. C. 339.

[a] Questions Proper To Bring Out Racial Prejudice.—(1) "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?" It was held reversible error to refuse to permit this question in a capital case. *Pinder v. State*, 27 Fla. 370, 8 So. 837, 26 Am. St. Rep. 75. (2) It is proper to ask a juror "if he could and would give to the defendant the same fair and impartial trial under the law and the evidence that he would give to a white man under the same circum-

the same verdict that they would a white person under similar circumstances.⁴¹ The mere fact that juror may think his race superior to all others would not render him incompetent,⁴² but to be disqualifying the prejudice must extend to the party because of his race,⁴³ and questions along this line have been refused where the juror had already answered the statutory questions in a manner showing no prejudice.⁴⁴

stances, and would try the case without regard to the question of color." *Cavitt v. State*, 15 Tex. App. 190.

[b] It was reversible error to refuse to permit a colored prisoner to ask a juror if "he believed he could, as a juror, do equal and impartial justice between the state and a colored man." It is clear that if the juror had answered that he could not do so he would have been grossly unfit to serve. *State v. McAfee*, 64 N. C. 339.

[c] Question Improper.—"Have you the same neighborly regard for this defendant, though a negro, and his race generally, as you have for individuals of the white race?" This is not directed to the issue as to whether or not he would try the case fairly and impartially. *Cavitt v. State*, 15 Tex. App. 190.

[d] It was not ground for reversal, though jurors were taken, over defendant's challenge, who said they could not give a black man as fair a trial as a white man in a case between a black and a white, where the defendant, a colored man, was accused of the murder of a colored boy, and the jurors had also said that in a case where all the parties interested were black, they would give a black man the same impartial trial as a white man, and that they had no prejudice against defendant in the particular case about to be tried. *State v. Mayfield*, 104 La. 173, 28 So. 997.

[e] The juror having already answered that he was not conscious of any bias or prejudice for or against the prisoner it was not reversible error to refuse to permit the question whether he would be influenced by the fact that the prisoner was a negro. If allowed to answer his answer must have been in the negative. *State v. Bethune*, 93 S. C. 195, 75 S. E. 281.

41. *Fendrick v. State*, 39 Tex. Crim. 147, 45 S. W. 589; *Lester v. State*, 2 Tex. App. 432. See also *Hawkins v. Missouri Pac. R. Co.*, 182 Mo. App. 323, 170 S. W. 459.

[a] The defendant should be allowed to ask whether under the same facts and circumstances the juror would render the same verdict where a negro killed a white man for insulting his wife as he would where a white man killed a negro for a similar insult to the white man's wife. It being a legitimate defense under the statute that defendant was excited by passion over deceased's having insulted his wife. *Fendrick v. State*, 39 Tex. Crim. 147, 45 S. W. 589.

42. *State v. Casey*, 44 La. Ann. 969, 11 So. 583.

[a] Where the record discloses that a juror is a fair and conscientious man, the mere fact that he said on his voir dire that he had a prejudice against the colored race, it appearing on further examination that he had no prejudice against the defendant, a negro, and that he simply meant that he had a feeling or belief that the colored race was inferior to the white race. *Johnson v. State*, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B, 965.

43. *State v. Casey*, 44 La. Ann. 969, 11 So. 583; *Balbo v. People*, 80 N. Y. 484.

[a] No ground for disqualification is shown though the juror admitted that he would not have a negro work for him but stated that was because his neighbors objected to negroes being in the neighborhood and that he himself had no prejudice against the negro on trial, and could and would give him the same fair trial as if he were a white man. *Hubbard v. State*, 43 Tex. Crim. 564, 67 S. W. 413.

[b] Mere previous statements indicating bias against the colored race, will not disqualify where the juror states he has no feeling against defendant because of his race or color and that he can give him the same fair, impartial treatment as he would a white man. *State v. Buford*, 158 Iowa 173, 139 N. W. 464.

44. *Sullivan v. Padross*, 122 Ga. 338, 50 S. E. 142.

c. *Prejudice Against Particular Business.*— Mere prejudice against a particular business is not disqualifying where the juror can lay aside his prejudice and try the case impartially on the evidence,⁴⁵ nor is mere prejudice against the way a business is sometimes conducted.⁴⁶ Where the business is not illegal and the prejudice is so deep seated that evidence would be required to remove it, the juror is incompetent.⁴⁷ Though one may be opposed to the policy of permitting the sale of intoxicants, he is not necessarily disqualified, either in prosecutions for the unlawful sale,⁴⁸ or in civil damage suits;⁴⁹ nor is he disqualified by the fact that he may have some prejudices against persons engaged in the traffic,⁵⁰ provided that prejudice be not directed toward the particular defendant.⁵¹ Jurors are held qualified to try offenders against the prohibition laws, though they

45. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711; *Robinson v. Randall*, 82 Ill. 521; *Kroer v. People*, 78 Ill. 294; *Meaux v. Whitehall*, 8 Ill. App. 173.

[a] In a suit for the violation of a liquor dealer's bond, neither bias in favor of, nor prejudice against the traffic affects the juror's competency. *Grady v. Rogan*, 2 Wills. Civ. Cas. (Tex.), §§259, 263.

46. *Press Pub. Co. v. McDonald*, 73 Fed. 440, 19 C. C. A. 516, assuming that a prejudice against a party's business might make him incompetent.

[a] If a business be illegal a prejudice against it amounts only to a prejudice against crime and so is not disqualifying under the general rule that juror may be competent though he is prejudiced against crime. *United States v. Borger*, 7 Fed. 193, 19 Blatchf. 249.

As to prejudice against crime or unlawful acts, see *infra*, VII, F, 13, d.

47. *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465, a deep seated prejudice against insurance companies and the insurance business, where it "would have required as much evidence to remove his unfounded prejudice as to convince him of the justice of the defense," clearly made the juror incompetent to try a case arising out of an insurance policy.

48. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711; *Stoots v. State*, 108 Ind. 415, 9 N. E. 380. See also *Remer v. State*, 3 Okla. Crim. 706, 109 Pac. 247.

[a] Reason for Rule.—In a county where the local option law absolutely forbids the sale of liquor it would be practically impossible to get a jury which did not have a prejudice against persons engaged in the traffic; since the

majority of people are law-abiding, and have a natural prejudice against acts of lawlessness which prejudice would extend to any person engaged in the business which was unlawful. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711. As to prejudice against crime, see *infra*, VII, F, 13, d.

49. *Depuy v. Quinn*, 61 Hun 237, 16 N. Y. Supp. 708, 40 N. Y. St. 837; *Carpenier v. Hyman*, 67 W. Va. 4, 66 S. E. 1078.

50. *Stoots v. State*, 108 Ind. 415, 9 N. E. 380.

[a] **Prejudice Against Unlawful Clubs.**—Jurors having stated that they had no bias against defendant and had not formed any conclusion or expressed any opinion in the case at bar, it was not material whether they had any prejudice against unlawful beer clubs run in a local option precinct. *Arnold v. State*, 38 Tex. Crim. 5, 40 S. W. 735.

[b] A mere general prejudice against saloon keepers as a class, not coupled with any bias or prejudice against defendant is clearly not disqualifying in a murder case, though defendant is a saloonkeeper. *People v. Thiede*, 11 Utah 241, 39 Pac. 837, affirmed in 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237.

51. *Depuy v. Quinn*, 61 Hun 237, 16 N. Y. Supp. 708, 40 N. Y. St. 837, civil damage act case.

[a] Jurors who say they can fairly and impartially try may be permitted to sit notwithstanding prejudices which the court believed from their statements, appearance, and manner, they could lay aside. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711.

are prohibitionists,⁵² and a juror is not disqualified though he contributed to a fund to help carry on an election contest over the prohibition law.⁵³ Even though the general prejudice against the business amounts to a belief that moral men would not engage therein, the juror is competent where the prosecution is for illegal sale,⁵⁴ but the dealer being licensed, and indicted for keeping his saloon in a disorderly manner, the juror was incompetent.⁵⁵ Where the question before the jury is whether an applicant for a liquor license is a man of moral character, a juror's fixed opinion that any man who sells liquor is immoral necessarily makes him incompetent,⁵⁶ or where his opposition to the traffic is so strong that he would not grant a license under any circumstances,⁵⁷ but his disbelief in the policy of a license law does not necessarily disqualify him.⁵⁸ Jurors are incompetent who disclose that their prejudice is so fixed that they would not give as much credit to the testimony of witnesses engaged in the traffic as to those not so engaged.⁵⁹ But where, despite their belief, they will accept the testimony of persons so engaged on the same

52. *Lively v. State* (Tex. Crim.), 73 S. W. 1048.

[a] **Prohibitionists.**—In *State v. Tomlinson*, 7 N. D. 294, 74 N. W. 995, jurors were held qualified to try offenders under the prohibition law who said they had no prejudice whatever against defendant, but were prohibitionists, had a very strong prejudice against the unlawful traffic, and would gladly render a verdict against anyone shown by the evidence to be guilty of violating the liquor laws.

[b] **A juror is not disqualified who states that he voted for the local option law, that he is in favor of the law and its enforcement, that he is opposed to the saloon business or has conscientious scruples against it, and that he believes in prohibition.** The question being tried is not the policy of the law but whether or not defendant has been guilty of its violation. *People v. Keefer*, 97 Mich. 15, 56 N. W. 105.

53. *Taul v. State* (Tex. Crim.), 61 S. W. 394, juror had made no contribution to aid prosecution of case at bar.

54. *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711 (jurors believed traffic immoral whether licensed or not but had no personal prejudice); *Shields v. State*, 95 Ind. 299; *Elliott v. State*, 73 Ind. 10, no personal prejudice shown.

[a] **In prosecution for sale of liquor to a minor, questions as to the juror's belief as to the morality of persons engaged in the licensed selling of liquor**

is not pertinent to any issue in the case. *Pemberton v. State*, 11 Ind. App. 297, 38 N. E. 1096.

55. *Swigart v. State*, 67 Ind. 287, juror who declared he thought a man engaged in selling liquor was an immoral man was held incompetent though he said he could give a fair and impartial trial according to the law and evidence.

56. *Chandler v. Ruebelt*, 83 Ind. 139, appeal from commissioners who had refused license.

57. *Keiser v. Lines*, 57 Ind. 431, appeal from commissioners who refused license.

58. *Chandler v. Ruebelt*, 83 Ind. 139.

59. *Stoots v. State*, 108 Ind. 415, 9 N. E. 380.

[a] **Civil Damage Case; Two Classes Distinguished.**—Of two jurors called in an action for damages for selling liquor to a drunkard, one who confessed to prejudice against men who were engaged in selling liquors but would "be governed by the evidence and the law," was properly permitted to serve, but another who said he had a great prejudice against the traffic, and could not give testimony of a person engaged in the same business the same weight as he could a man engaged in another business should have been excused on challenge for bias. *Robinson v. Randall*, 82 Ill. 521. To same effect see *Kroer v. People*, 78 Ill. 294; *Meaux v. Whitehall*, 8 Ill. App. 173.

[b] **Contrary Intimation.**—It has been suggested that bias or prejudice

basis as the testimony of others, they are competent.⁶⁰ It is proper to inquire whether the jurors have any prejudice against defendant because of his being engaged in the business,⁶¹ and to aid in exercise of the right to challenge peremptorily, a juror's prejudice for or against the liquor business and persons engaged in it may be inquired into under proper circumstances.⁶² So, where the prosecution is for violation of a prohibition law, a juror may be asked whether he believes that it is a good law,⁶³ except where that is not one of the statutory questions,⁶⁴ and the same is true in other prosecutions where the offense grew out of an attempt to enforce the prohibition law.⁶⁵

against witnesses who are liquor sellers would not prevent juror from standing indifferent in a prosecution for unlawful sale. But the case was decided on other grounds. *Com. v. Poisson*, 157 Mass. 510, 32 N. E. 906. See also *Com. v. Burroughs*, 145 Mass. 242, 13 N. E. 884; *Com. v. Thrasher*, 11 Gray (Mass.) 57.

60. *Smith v. State*, 24 Ind. App. 688, 57 N. E. 572.

[a] The juror's belief as to the morality of selling liquor under a license would not affect his competency where he said he would accept the testimony of persons so engaged on the same basis as testimony of others. *Pember-ton v. State*, 11 Ind. App. 297, 38 N. E. 1096; *Dolan v. State*, 122 Ind. 141, 23 N. E. 761.

61. *Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078, civil damage case.

[a] **General Question May Be Sufficient.**—It appearing that the general nature of the proceeding had been explained to the jurymen, who must have understood therefrom that the defendant was being sued for damages for selling liquor, the general question whether any juror knew of any reason why he was not impartial, sufficiently included the matter sought to be inquired of, and it was not an abuse of the court's discretion "to refuse to permit a more direct and searching question, though it would have been better practice to have done so." *Carpenter v. Hyman*, 67 W. Va. 4, 66 S. E. 1078.

62. See cases *infra*, this note.

Right to examine as basis for peremptory challenge, see *supra*, VII, E, 5, m, (f).

[a] Where violation of the liquor laws is charged (1) a juror may be questioned as to his view of the immorality of the traffic, for the pur-

pose of determining peremptories. *State v. Munch*, 57 Mo. App. 207. (2) For the same purpose jurors may be asked whether they have any prejudice against persons who from their occupation or surroundings might be suspected of being in a position to enable them to violate the law. *Patrick v. State*, 45 Tex. Crim. 587, 73 S. W. 947.

63. **Question as to Belief Not Argumentative.**—After stating to the jurors on their examination that the law made it a felony to engage in or pursue the occupation of selling intoxicants in local option counties the district attorney asked them if they believed that was a good and wholesome law which should be enforced like other laws. This was not open to the objection that it was "argumentative, tending to prejudice the facts in the case, and get the facts in advance." *Wilson v. State*, 69 Tex. Crim. 567, 154 S. W. 571.

[a] Jurors may be asked their opinion as to the constitutionality of liquor laws, and whether they could convict or acquit a person indicted under such laws, notwithstanding their views differed from the instructions of the court on the constitutionality of the law. *Pierce v. State*, 13 N. H. 536.

64. *Rothschild v. State*, 12 Ga. App. 728, 78 S. E. 201.

65. *Territory v. Lynch*, 18 N. M. 15, 133 Pac. 405, it was reversible error to refuse to permit any inquiry. "The least that can be said in favor of permitting the inquiry is that it was necessary in order that the defendant might intelligently exercise his right to peremptory challenge."

[a] Not entitled to ask jurors how they voted on the local option statute, the case being one of homicide growing in some way out of a violation

d. *Prejudice Against Crime or Criminal Acts.*⁶⁶—A mere bias or prejudice against crime, is not disqualifying,⁶⁷ nor against a criminal or unlawful act,⁶⁸ nor against immorality,⁶⁹ nor against a mean or dishonest action,⁷⁰ nor even against the particular crime which the prisoner is accused of committing, provided that prejudice does not amount to a bias against the particular defendant.⁷¹ If, however, the

of the local option law and defendant claiming that certain witnesses for the state were adverse to him because of some previous local option cases. Not permissible even for determining peremptories. *Yardley v. State*, 50 Tex. Crim. 644, 100 S. W. 399, 123 Am. St. Rep. 869.

[b] In a prosecution for bribing an officer not to enforce the prohibition laws court may refuse question as to whether juror's belief in that law would require a different degree of faithfulness to duty than under any other law. *State v. Smith*, 72 Vt. 366, 48 Atl. 647.

66. Opinion that character of prisoner is bad, see *infra*, VII, F, 23.

Prejudice against political or other organizations which hold to criminal principles, as anarchists, etc. See *supra*, VII, F, 13, b, (III).

Actively engaged in the prosecution, see *infra*, VII, F, 14, d.

Membership in societies or organizations opposed to the particular criminal act charged, see *supra*, VII, F, 10, b.

67. U. S.—United States *v. Borger*, 7 Fed. 193, 19 Blatchf. 249. **Dak.** *Territory v. Pratt*, 6 Dak. 483, 43 N. W. 711. **Ga.**—Williams *v. State*, 3 Ga. 453. **Ill.**—Spies *v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; Robinson *v. Randall*, 82 Ill. 521. **Ind.**—Butler *v. State*, 97 Ind. 378; Chandler *v. Ruebelt*, 83 Ind. 139. **Mo.**—State *v. Mace*, 262 Mo. 143, 170 S. W. 1105. **N. D.**—State *v. Tomlinson*, 7 N. D. 294, 74 N. W. 995. **Wash.** *State v. Croney*, 31 Wash. 122, 71 Pac. 783.

[a] "All men, by natural instinct, are supposed to be more or less biased against crime in the abstract." Garlitz *v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601.

68. Davis *v. Hunter*, 7 Ala. 135.

[a] **Prejudice Against Carrying Concealed Weapons.**—One is not disqualified merely because he states he has a prejudice against men carrying weap-

ons without legal permission; where he also states that defendant's unlawful practice of so doing would not affect his verdict. *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092.

[b] **Prejudice Against Charivari Parties.**—Applying the rule that it is not proper to ask a juror whether he has any prejudice or bias against crime or against the particular crime charged, it was improper in an action for shooting a member of a charivari party, to ask a prospective juror whether he had any prejudice against such parties. "Every good, law-abiding citizen must and does condemn such unlawful and riotous assemblies." Higgins *v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 23 Am. St. Rep. 428, 11 L. R. A. 138.

69. Butler *v. State*, 97 Ind. 378; Chandler *v. Ruebelt*, 83 Ind. 139; Elliott *v. State*, 73 Ind. 10; Swigart *v. State*, 67 Ind. 287 (defendant is entitled to a juror who can either acquit or convict, "without violating his moral sense"); Pemberton *v. State*, 11 Ind. App. 297, 38 N. E. 1096.

70. Winnesheik Ins. Co. *v. Schueller*, 60 Ill. 465.

71. **Mo.**—State *v. Sykes*, 191 Mo. 62, 89 S. W. 851. **N. Y.**—People *v. McGonegal*, 136 N. Y. 62, 32 N. E. 616. **Okla.**—Remer *v. State*, 3 Okla. Crim. 706, 109 Pac. 247. **Tex.**—Collins *v. State* (Tex. Crim.), 178 S. W. 345. **Utah.**—See State *v. Thorne*, 41 Utah 414, 126 Pac. 286, Ann. Cas. 1915D, 90.

[a] **Prejudice against the crime of murder** does not disqualify a juror from sitting in a murder case. Franks *v. State*, 47 Tex. Crim. 638, 88 S. W. 923.

[b] **Prejudice Against Robbery by Use of Fire Arms.**—"There is no law-abiding citizen that has not, to some extent at least, a prejudice against the crime of robbery by the use of fire arms. They all think it wrong, and one who commits the crime should be punished." Collins *v. State* (Tex. Crim.), 178 S. W. 345.

prejudice be personal, having the defendant for its object, the juror is incompetent as a matter of law,⁷² and it has also been recognized that a juror's prejudice against particular criminal actions might be so strong as to disqualify him.⁷³ It is proper to ask a juror whether he thinks that a certain act is not a crime.⁷⁴ Also for the purpose of determining peremptories one may be asked whether he would be prejudiced against defendant merely because he was accused of crime,⁷⁵ and, at least for the same purpose, it may be proper to ask a juror as to his being prejudiced by the doing of a particularly reckless, if not criminal, act.⁷⁶

e. *Prejudice Against Particular Actions.*—Prejudice against a particular kind of action may be so strong as to disqualify one for jury service in such an action.⁷⁷ Such prejudice does not disqualify one as a matter of law,⁷⁸ but it must extend to the particular parties

[c] *Question Properly Refused.*—It was proper to refuse to permit defendant to ask jurors whether they "were prejudiced against the offense with which defendant was charged, as distinguished from every other offense," where the jurors were permitted to be asked whether they had any opinion in the case or any prejudice against defendant." *Leach v. State* (Tex. Crim.), 49 S. W. 581.

[d] *General Prejudice Because of Accusation.*—The mere fact that the juror said in effect that a charge of having committed a heinous crime would, to a certain extent, create in the juror's mind a prejudice against one so accused, does not render him incompetent where he had no disqualifying opinion as to the guilt or innocence of the particular defendant. *Bridges v. State*, 80 Neb. 91, 113 N. W. 1048.

72. *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616.

73. *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346. See also *Wragg v. State*, 65 Tex. Crim. 131, 145 S. W. 342, where the court says, arguendo: "In some cases proper questions may be asked to show prejudice as to certain offenses." But compare Texas cases, *supra*.

74. *Com. v. Buzzell*, 16 Pick. (Mass.) 153, in prosecution for arson in burning a Roman Catholic convent jurors may be asked if they consider that no crime.

[a] *A juror who declares that he believes a party is justified in taking the law into his own hands in certain cases, though he thereby commits a crime is not competent.* *People v. Ply-*

ler, 126 Cal. 379, 58 Pac. 904.

75. *State v. Cleary*, 97 Iowa 413, 66 N. W. 724; *Basye v. State*, 45 Neb. 261, 63 N. W. 811.

76. *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346.

[a] *As to Effect of Rigging a Spring Gun.*—It was error to overrule questions as to the effect upon the juror's mind of the fact, if it should be shown, that defendant had put a spring gun, or gun so rigged as to be discharged, by any one who should open his trunk. The defendant was entitled to find out if such an act by him would, of itself, prejudice the juror against him. This both for the purpose of interposing a challenge for cause, or to exercise his right of peremptory challenge, though the affirmative answer might not of itself show that the juror was so biased as to be disqualified. *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346.

77. *Cal.*—*Fitts v. Southern Pac. Co.*, 149 Cal. 310, 86 Pac. 710, 117 Am. St. Rep. 130. *Mo.*—*McCarthy v. Cass Ave. Ry. Co.*, 92 Mo. 536, 4 S. W. 516. *Wash.*—*State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346.

78. *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618, juror was a newspaper man and prejudiced against libel suits as being "in somewhat the same character as speculations."

[a] *A general abstract bias which a juror may entertain against a certain class of litigation will not, of itself, disqualify him from trying a cause.*

or the particular case at bar.⁷⁹ So if the juror says he can lay aside his prejudice and try the case on its merits on the evidence adduced he may be retained on the jury,⁸⁰ but if the juror admits, or his answers show, that he cannot lay aside the prejudice, he should be excluded.⁸¹ Disqualifying prejudice appears where the juror admits evidence would be required to remove his prejudice,⁸² or where he will not say that he would be willing, if plaintiff, to have his own case tried by a juror in his then frame of mind.⁸³

f. Prejudice Against Particular Defenses.—Neither prejudice against, nor bias in favor, of any particular defense raised in a criminal action, is, of itself, disqualifying.⁸⁴ At the same time prejudice against a particular defense may be strong enough to disqualify.⁸⁵ The true test is whether the juror can give the accused the benefit of all reasonable doubt as to guilt, whether raised by the particular defense or not.⁸⁶ It is proper to ask as to the juror's prejudice against a particular defense, for the purpose of determining peremptories.⁸⁷

Where the plea is insanity a mere prejudice against sham, bogus, or simulated defense of insanity, is not disqualifying,⁸⁸ if it does not

Fitts v. Southern Pac. Co., 149 Cal. 310, 86 Pac. 710, 117 Am. St. Rep. 130; *Baker v. Borello*, 136 Cal. 160, 68 Pac. 591.

79. *Ruschenberg v. Southern Elect. R. Co.*, 161 Mo. 70, 61 S. W. 626; *Coppersmith v. Mound City Ry. Co.*, 51 Mo. App. 357.

80. *Fitts v. Southern Pac. Co.*, 149 Cal. 310, 86 Pac. 710, 117 Am. St. Rep. 130; *Graybill v. De Young*, 146 Cal. 421, 80 Pac. 618; *Baker v. Borello*, 136 Cal. 160, 166, 68 Pac. 591; *McCarthy v. Cass Ave. Ry. Co.*, 92 Mo. 536, 4 S. W. 516.

[a] Though a jurymen admits he has a prejudice against the particular class of cases of which the case at bar is one, he may be permitted to serve where his whole examination shows that he is frank and fair, has no knowledge of the particular case, nor predilections concerning its merits, and would try the case solely on the evidence and disregarding his prejudices. *Denham v. Washington Water Power Co.*, 38 Wash. 354, 80 Pac. 546.

81. *Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991, answers showed he was at least doubtful of his ability to lay it aside.

82. *Fitts v. Southern Pac. Co.*, 141 Cal. 310, 86 Pac. 710, 117 Am. St. Rep. 130 (juror admitted it would take "strong evidence" to overcome his prejudice); *Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991, juror incompetent who said he would require

"conclusive evidence" that defendant was in error.

83. *Fitts v. Southern Pac. Co.*, 149 Cal. 310, 86 Pac. 710, 117 Am. St. Rep. 130 (his answer to the question was "Possibly not"); *Quill v. Southern Pac. Co.*, 140 Cal. 268, 73 Pac. 991.

84. *Miss.*—*Gammons v. State*, 85 Miss. 103, 37 So. 609. *N. Y.*—*People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. *Wash.*—*State v. Royse*, 24 Wash. 440, 64 Pac. 742.

See *State v. Ford*, 42 La. Ann. 255, 7 So. 696.

85. *State v. Marfaudille*, 48 Wash. 117, 92 Pac. 939, 14 L. R. A. (N. S.) 346.

86. *Gammons v. State*, 85 Miss. 103, 37 So. 609.

[a] The mere fact that he is opposed to the use of intoxicants does not make him incompetent to try a case where drunkenness is set up in mitigation or excuse, if his belief would not influence his verdict. *Brinegar v. State*, 82 Neb. 558, 118 N. W. 475.

87. *Towl v. Bradley*, 108 Mich. 409, 66 N. W. 347, defense of statute of limitations.

88. *Cal.*—*People v. Sowell*, 145 Cal. 292, 78 Pac. 717. *Mo.*—*State v. Wells*, 117 Mo. 570, 21 S. W. 443; *State v. Pagels*, 92 Mo. 360, 4 S. W. 931. *N. Y.*—*People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. *Tex.*—*Cannon v. State*, 41 Tex. Crim. 467, 56 S. W. 351.

[a] That one is inclined to view the

amount to a prejudice against the defendant because of the plea,⁸⁹ and it is sufficient that as to real insanity the juror will be guided solely by the evidence and the instructions of the court.⁹⁰ Nor is one incompetent who says in effect that he would not believe in insanity unless it were proven, at least in these jurisdictions where the insanity must be affirmatively established.⁹¹ A challenge on the ground that the juror does not believe in the defense of insanity is properly denied where no such defense is made or contemplated,⁹² and where insanity arising from certain sources is relied upon as a defense a juror is not

defense "with scrutinizing caution" is no objection where he shows he is only prejudiced against feigned defenses of insanity. *Butler v. State*, 97 Ind. 378.

89. *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. See *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314.

[a] A juror is competent who states he can give the defendant a fair and impartial trial, and that if the plea of insanity was established to his reasonable satisfaction he would find defendant not guilty; notwithstanding he says he is "prejudiced against the bogus plea of insanity and had mighty little use for it." *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

[b] Jurors who say they will treat it like any other defense the defendant might urge and would follow the court's instructions though different from their own ideas on the subject, are competent. *State v. Howard*, 30 Mont. 518, 77 Pac. 50. See also *Cannon v. State*, 41 Tex. Crim. 467, 56 S. W. 351.

[c] Juror Confused as to Distinction Between Intoxication and Insanity. A juror who at first said he had a prejudice against the defense of insanity where caused by excessive use of intoxicants was properly held competent when further examination by the court showed that he had confused the difference between rules governing insanity and intoxication as defenses, and he said he would give defendant the benefit of the defense of insanity under the law. *State v. Croney*, 31 Wash. 122, 71 Pac. 783.

90. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717; *State v. Welsor*, 117 Mo. 570, 21 S. W. 443.

[a] Juror is competent who says that if it is shown that the defendant at the time of commission of the offense was legally insane under the evidence adduced and the instructions of the court, he would give proper credit

to such defense. *State v. Casey*, 34 Nev. 154, 117 Pac. 5.

[b] Notwithstanding he first said "beyond reasonable doubt" (1) juror is competent where on further examination in which the whole matter is explained, he says he would follow the court's instructions and give defendant the benefit of the defense if proved by a preponderance of the evidence. *Maxey v. State*, 66 Tex. Crim. 234, 145 S. W. 952. (2) But where after an elaborate examination on the effect of proof of insanity the juror had said in effect that if he was convinced by a preponderance of the evidence the prisoner was insane at the time of committing the crime, he would acquit if the court so charged, but in answer to the direct questions said the evidence would have to be "overwhelming," he was not competent. *Jones v. State*, 60 Tex. Crim. 139, 131 S. W. 572.

91. *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

[a] Though a juror may in some of his answers state that he "does not believe in hereditary insanity," he is competent when from his whole examination it appears that all he meant was that the plea of hereditary insanity would have to be proven before he would believe it. *State v. Royse*, 24 Wash. 440, 64 Pac. 742.

[b] Where the rule is that insanity must be shown by preponderance of evidence, jurors are competent who say they will acquit if they believe the prisoner insane, and it was proper to refuse to permit the question whether they would acquit if they had "reasonable doubt" as to prisoner's insanity. *Jones v. State*, 60 Tex. Crim. 139, 131 S. W. 572.

92. *People v. Collins*, 105 Cal. 504, 39 Pac. 16; *Franks v. State*, 47 Tex. Crim. 638, 88 S. W. 923, no plea of insanity was made.

disqualified by expression of his personal views as to the defense of insanity arising from other sources.⁹³ Prejudice against insanity as a defense can only be considered on a challenge for "actual bias."⁹⁴

g. *Prejudice Against Certain Witnesses.*⁹⁵—A juror to be impartial, is not obliged to say that he will give equal credence to every witness who testifies,⁹⁶ especially where the witness in question is one who under the law is not entitled to the same credit as witnesses generally.⁹⁷ Mere prejudice against an important witness of the challenging party is not ground for objection,⁹⁸ and a juror may be qualified though he is friendly toward one of the state's principal witnesses.⁹⁹ So a juryman may be competent who says he would believe a white man sooner than he would a Chinaman.¹ And a mere inclination to discredit negro witnesses generally, is not necessarily disqualifying.²

93. *Gammons v. State*, 85 Miss. 103, 37 So. 609, juror said he was not prejudiced against insanity arising from the sources relied upon.

94. *State v. Hanley*, 34 Minn. 430, 26 N. W. 397, it is not one of the grounds enumerated as the basis of a challenge for "implied" bias.

[a] But compare *State v. Arnold*, 12 Iowa 479, which holds that though inquiry as to the juror's attitude toward particular defenses, as insanity, is proper under some circumstances, it is not proper to ask him whether he has formed or expressed an opinion on the subject, for the purpose of challenging for actual bias in having formed or expressed an opinion as to the guilt or innocence of prisoner. *State v. Arnold* 12 Iowa 479.

[b] In a civil case it is not proper to ask jurors merely as to their opinion on the subject of insanity. That being an issue, they may be asked whether they have expressed such an opinion on that issue as would influence their judgment. *McComas v. Covenant Mutual Ins. Co.*, 56 Mo. 573.

95. Prejudice against witnesses engaged in business against which juror is prejudiced, see *supra*, VII, F, 13, c.

Prejudice against or bias in favor of witnesses who are members of any particular religious, social or political bodies, see *supra*, VII, F, 13, b, (III).

Generally as to the right to question jurors as to the weight or credence they will give to certain evidence or testimony, see *supra*, VII, E, 4, k, (VII).

96. *Queen v. Leong Man*, 8 Hawaii 339.

[a] To ask of a juror whether he would attach to the word of a preacher,

outside of court, more importance or credibility than to the word of any other gentleman, or whether he would place more credence to the testimony of a certain named minister than to any one else, is improper and irrelevant, and properly disallowed. *State v. Holedger*, 15 Wash. 443, 46 Pac. 652.

97. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709, convict.

98. *Southern Kansas R. Co. v. Sage*, 43 Tex. Civ. App. 38, 94 S. W. 1074.

99. *Giles v. State*, 66 Tex. Crim. 638, 148 S. W. 317, juror said, notwithstanding his friendship, he could and would give defendant a fair and impartial trial.

1. *Wise v. Tong Ong*, 16 Hawaii 457 (it is not requisite that jurors consider all races and nationalities on a par in respect of habits of veracity); *Queen v. Leong Man*, 8 Hawaii 339.

2. *Moore v. State*, 52 Tex. Crim. 336, 107 S. W. 540, but one white witness was called and his testimony was not material.

[a] Compare *Woodroe v. State*, 50 Tex. Crim. 212, 96 S. W. 30. The following question was proposed, "Would you give the same credence to colored witnesses that you would to white witnesses when they testify with the same degree of intelligence and with the same degree of apparent credibility, and who have the same opportunity to know the facts?" Several answered negatively and the state's attorney's objection that the question was upon the credibility of witnesses and not subject to inquiry was sustained. The reviewing court refused to reverse in the absence of any showing that any juror who had so answered sat in the case.

But in all these cases the discrediting must not go to the extent of refusing a fair trial on account of the party's race or color,³ and there must be no ill-will or prejudice against the party based on his race or color.⁴ It has been held reversible error to refuse questions based on such prejudice against certain classes of witnesses, because they are proper for the purpose of determining peremptories.⁵

Prejudice against hired detectives as witnesses, may be inquired into⁶ at least for the purpose of laying a foundation for peremptory challenges.⁷ But the mere fact that a juror expresses a prejudice against such testimony does not subject him to challenge for cause.⁸

h. Prejudice Against Circumstantial Evidence.—Jurors who state they will not convict upon circumstantial evidence are properly excused on the commonwealth's challenge for cause.⁹ Under some stat-

[b] It was improper to ask jurors whether they would give evidence of colored persons the same weight as that of white people. *Jenkins v. State*, 31 Fla. 196, 12 So. 677.

3. *Moore v. State*, 52 Tex. Crim. 336, 107 S. W. 540. Compare *supra*, VII, F, 13, b, (IV).

4. *Wise v. Tong Ong*, 16 Hawaii 457; *Queen v. Leong Man*, 8 Hawaii 339. Compare *supra*, VII, F, 13, b, (IV).

5. *People v. Han Tin*, 57 Cal. 142; *People v. Car Soy*, 57 Cal. 102.

As to right to ask questions for that purpose, see *supra*, VII, E, 5, m, (I).

6. *Irvine v. State*, 55 Tex. Crim. 347, 116 S. W. 591, where the prosecution was predicated upon the testimony of a hired detective.

[a] *Question Held Proper.*—"Have you any prejudice against a witness or his testimony who has been employed by the sheriff to hunt up local option violations and receive money for his services?" *Irvine v. State*, 55 Tex. Crim. 347, 116 S. W. 591.

7. *Morrow v. State*, 56 Tex. Crim. 519, 120 S. W. 491, after having correctly stated the law as to detectives in liquor selling prosecutions not being obliged to be corroborated as being accomplices.

8. *State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677, if from his whole examination it appears that he is willing to consider such evidence the same as all other evidence under the instructions of the court and that he will render an impartial verdict despite his prejudice, the ruling of the trial court that he is qualified will not be disturbed.

9. *Ala.*—*Underwood v. State*, 179 Ala. 9, 60 So. 842; *Whatley v. State*, 144 Ala. 68, 39 So. 1614. *Neb.*—*Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361. See also *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371. *Pa.*—*Com. v. Sushinskie*, 242 Pa. 406, 89 Atl. 564. *Va.*—*Cluverius v. Com.*, 81 Va. 787.

[a] "The trial court commits no error in excluding a juror on his voir dire who is unwilling to be governed by the rules of evidence." *State v. Barker*, 46 La. Ann. 798, 15 So. 98.

[b] *Where They Will Not Convict on Such Evidence Alone.*—*Fla.*—*Holland v. State*, 39 Fla. 178, 22 So. 298; *Olive v. State*, 34 Fla. 203, 15 So. 925. *La.*—*State v. Stephens*, 116 La. 36, 40 So. 523; *State v. Frier*, 45 La. Ann. 1434, 14 So. 296. *Mo.*—*State v. Miller*, 156 Mo. 76, 56 S. W. 907; *State v. Labo*, 89 Mo. 247, 1 S. W. 288; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506. *Wis.*—*Spick v. State*, 140 Wis. 104, 121 N. W. 664.

[c] *Upon Such Evidence, However Strong.*—*Fla.*—*Holland v. State*, 39 Fla. 178, 22 So. 298, juror would not convict "no matter how conclusive" the evidence might be. *Mo.*—*State v. Young*, 119 Mo. 495, 24 S. W. 1038. *Ohio.*—*Blair v. State*, 5 Ohio Cir. Ct. 496, 3 Ohio Cir. Dec. 242, not on circumstantial evidence be it "ever so clear and convincing."

[d] *Such as Would Leave No Doubt.* (1) One who said he would not convict upon circumstantial evidence unless it was such as would leave no doubt whatever in his mind was properly excused, his further answers showing that he did not mean reasonable doubt. *People v. Fanshawe*, 137 N. Y. 68, 32 N. E. 1102. (2) A juror having said

utes the state alone can challenge on this ground.¹⁰ But elsewhere a juror who will not give force and effect to circumstantial evidence to acquit may be excused on defendant's challenge.¹¹ The juror's mind may be searched to learn just what his views on the subject are.¹² The defendant is not entitled to cross-examine a juror who says he will not convict on circumstantial evidence.¹³

The right to challenge does not depend upon whether the evidence in the case will be direct or circumstantial,¹⁴ and that it subsequently

he could convict on circumstantial evidence "if the evidence proved the crime beyond a doubt," it was proper to permit the solicitor to ask: "Suppose the evidence was such that while it left some doubt in your mind, still your mind was satisfied beyond a reasonable doubt, would you convict then?" *Mann v. State*, 134 Ala. 1, 32 So. 704.

[e] One who says that though there might be an exceptional case where he could do so it would take a great deal of such evidence and it would have to be very strong, is properly excluded. *State v. Bauerle*, 145 Mo. 1, 46 S. W. 609.

10. *Gregory v. State*, 148 Ala. 566, 42 So. 829; *Harrison v. State*, 79 Ala. 29, defendant cannot complain if the state waives the challenge.

[a] Though the state has challenged only part of the jurors objectionable on this ground, the defendant cannot challenge the others. *Harrison v. State*, 79 Ala. 29.

11. *State v. Anderson*, 52 La. Ann. 101, 26 So. 781.

12. *Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137.

[a] In framing the question it is not error to say "where the penalty prescribed by law is death" instead of "may be death," notwithstanding the statute permits the jury to add to the verdict "without capital punishment." *Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137.

[b] Proper to ask jurors whether they had any conscientious scruples in regard to the infliction of the death penalty for crime in cases depending wholly upon circumstantial evidence. *Johnson v. State*, 44 Tex. Crim. 332, 71 S. W. 25.

13. *State v. Thompson*, 116 La. 829, 41 So. 107.

[a] When Cross-Examination Proper.

But where the juror discloses scruples the court may elucidate by giving hypothetical examples which if the defendant think too drastic, he may further cross-examine to bring out any disqualification based on his belief. *Morrison v. State*, 40 Tex. Crim. 473, 51 S. W. 358.

14. *Calhoun v. State*, 143 Ala. 11, 39 So. 378 (to hold otherwise would be to compel the cause to be twice tried—first by the judge to ascertain qualification of the jurors and second by the jury); *Coleman v. State*, 59 Miss. 484, for it cannot be known in advance in any case how far it may depend on circumstantial evidence.

[a] Even Though Killing Is Admitted by Accused.—Before jurors who had been excused left the court room, counsel for prisoner announced that circumstantial evidence would cut no figure as the killing was admitted and justification pleaded. The supreme court among other reasons given for refusing to reverse suggests "there are very few cases in which all the evidence is purely positive." *State v. Barker*, 46 La. Ann. 798, 15 So. 98.

[b] If under the evidence a verdict of death might be required, though the evidence was only circumstantial, a juror who says he is not willing to find a verdict of guilty on circumstantial evidence, if the effect would be punishment by death is properly excluded on the prosecution's challenge. *People v. Warner*, 147 Cal. 546, 82 Pac. 196; *People v. Ah Chung*, 54 Cal. 398.

[c] Challenge by Accused.—Notwithstanding a juror said he did not believe in circumstantial evidence, and would not give force and effect to it, either to convict or acquit, the trial judge properly overruled defendant's challenge when counsel refused to inform the court what part circumstantial evidence would play in the case. *State v. Anderson*, 52 La. Ann. 101, 26 So. 781.

transpires that the state's case does not rest on circumstantial evidence, does not render the allowance of the challenge erroneous.¹⁵

These rules are applied most frequently in capital cases,¹⁶ being applied in cases where the jurors said that they had no conscientious scruples against the death penalty as such,¹⁷ and where their "opposition" to capital punishment extends only to convictions based on circumstantial evidence.¹⁸ In the absence of a contrary statute,¹⁹ the rule is not limited to cases involving capital or penitentiary punishment.²⁰

i. *Prejudice Against Particular Punishments.*²¹ — (I.) *In General.* Mere special notions as to his duty in fixing the punishment does not affect the juror's competency where he is willing to follow instruc-

15. *People v. Amaya*, 134 Cal. 531, 66 Pac. 794.

16. **U. S.**—Hardy *v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. ed. 1137. **Ala.**—O'Rear *v. State*, 188 Ala. 71, 66 So. 81; Strickland *v. State*, 151 Ala. 31, 44 So. 90; Parker *v. State*, 7 Ala. App. 9, 60 So. 995. **La.**—State *v. Stephens*, 116 La. 36, 40 So. 523. **Miss.**—Coleman *v. State*, 59 Miss. 484; Jones *v. State*, 57 Miss. 684. **Mo.**—State *v. Bauerle*, 145 Mo. 1, 46 S. W. 609. **Neb.**—Bradshaw *v. State*, 17 Neb. 147, 22 N. W. 361; St. Louis *v. State*, 8 Neb. 405, 1 N. W. 371. **Nev.**—State *v. Pritchard*, 16 Nev. 101; State *v. Pritchard*, 15 Nev. 74. **Tex.**—Brown *v. State* (Tex. Crim.), 174 S. W. 360; Grant *v. State*, 67 Tex. Crim. 155, 148 S. W. 760; Johnson *v. State*, 44 Tex. Crim. 332, 71 S. W. 25. **Wis.**—Spick *v. State*, 140 Wis. 104, 121 N. W. 664.

[a] In a capital case, depending principally on circumstantial evidence, it is proper to sustain the state's challenge to jurors who say on voir dire that no matter how conclusive it might be they would not convict on evidence wholly or in part circumstantial. Holland *v. State*, 39 Fla. 178, 22 So. 298, following Olive *v. State*, 34 Fla. 203, 15 So. 925.

[b] Even though the statute does not so provide one who will not convict on wholly circumstantial evidence, one accused of murder, or who has "scruples in doing so," is incompetent. State *v. West*, 69 Mo. 401, 33 Am. Rep. 506.

[c] The fact (1) that the statute authorizes jurors to fix the punishment at life imprisonment does not cure the objection that the juror is unwilling to inflict the death penalty on circumstantial evidence (State *v. Reeves*, 11

La. Ann. 685; State *v. Melvin*, 11 La. Ann. 535; State *v. Costello*, 11 La. Ann. 283), (2) even though the jurors say they will inflict life imprisonment if satisfied of defendant's guilt. Jones *v. State*, 57 Miss. 684.

17. State *v. Punshon*, 133 Mo. 44, 34 S. W. 25. See Olive *v. State*, 34 Fla. 203, 15 So. 925, wherein the jurors said that they had no conscientious scruples against capital punishment but would not find a man guilty on circumstantial evidence alone, in cases where the penalty was death. Compare Lambright *v. State*, 34 Fla. 564, 16 So. 582, which was a capital case, and where it is said to be improper to ask a venireman whether he would find defendants guilty on circumstantial evidence, and that the question was not properly framed to disqualify the juror under the section relating to scruples against capital punishment.

18. State *v. Bauerle*, 145 Mo. 1, 46 S. W. 609.

[a] A juror who says that he is "opposed to capital punishment as far as circumstantial evidence goes," is properly excluded on the state's challenge. Johnson *v. State*, 34 Neb. 257, 51 N. W. 835.

[b] Though the juror may not have a fixed opinion against either form of punishment, he is subject to challenge if he is only in favor of penitentiary punishment where the conviction is based on circumstantial evidence. Tatum *v. State*, 82 Ala. 5, 2 So. 531; Garrett *v. State*, 76 Ala. 18.

19. See Ala. Code, §7278.

20. Smith *v. State*, 55 Ala. 1.

21. Unwillingness to inflict on circumstantial evidence, see preceding section.

tions.²² But by statute, in some states, persons having a belief that the punishment fixed by law is too severe for the offense are not permitted to serve,²³ it being made a ground for challenge.²⁴ One who cannot on his oath conscientiously find against the accused for a statutory crime, should not be permitted to try an indictment therefor.²⁵ It has been held proper to refuse to permit defendant to ask jurors whether they had any prejudice against the suspended sentence law.²⁶ It seems that a juror who would refuse to consider the question of a recommendation in any case that life imprisonment be substituted for the death penalty, would be subject to challenge,²⁷ and it is proper to examine the jurors along that line to aid in determining as to peremptories.²⁸

(II.) **Scruples Against Capital Punishment.**²⁹ — (A.) **IN GENERAL.** On common-law principle, and in the absence of statute, jurors who swear they have conscientious scruples against capital punishment are properly excluded on challenge.³⁰ The statutes of many states provide in effect that a juror shall be neither allowed nor compelled to serve

22. *State v. Snyder*, 182 Mo. 462, 82 S. W. 12.

23. Kan. Gen. St., §6777.

24. Ala.—Code, §7278. Mont.—Rev. Code, §9262, subd. 9. Utah.—Comp. Laws, §4834, subd. 12.

[a] **The overruling of a challenge** for this cause cannot be prejudicial to the defendant. *State v. Vogan*, 56 Kan. 61, 42 Pac. 352.

[b] **Challenge may be waived** by the state. *Wesley v. State*, 61 Ala. 282.

25. *United States v. Reynolds*, 1 Utah 226.

[a] **In a prosecution of a Mormon for bigamy** in contracting a "plural marriage," members of the Mormon church are properly interrogated as to their belief in the practice, and are properly excluded where it appears that they believe the practice under the rites of their church to be a law of God superior to human laws. The ground of exclusion is not their religious belief but their bias and prejudice growing out of a natural disinclination to punish a fellow member for practicing that which they believe it a religious duty to perform. *United States v. Miles*, 2 Utah 19, *affirmed*, 103 U. S. 304, 26 L. ed. 481.

[b] **"No case of unfitness can be more clear,** than one where the juror holds such opinions, or has such conscientious scruples, that, acting upon those opinions, or scruples, he cannot, and will not, execute the laws of the land, so far as they depend upon the

action of the jury." *Pierce v. State*, 13 N. H. 536.

[c] **The district attorney was properly permitted to ask the jurors** as to any prejudice against the law making statutory rape an offense. *Hamilton v. State*, 74 Tex. Crim. 219, 168 S. W. 536.

26. *Williamson v. State*, 72 Tex. Crim. 618, 163 S. W. 435, defendant's plea for suspended sentence, if convicted, was not filed before the trial began but was filed before some of the jurors were examined.

27. *State v. Thorne*, 41 Utah 414, 126 Pac. 286, but juror should not be excluded on ground that he is opposed in the particular case. The statute provides no test as a basis of the recommendation and the court cannot charge the jury thereon nor the counsel state a hypothetical case and ask juror how he will decide.

28. *State v. Thorne*, 41 Utah 414, 126 Pac. 286.

29. **As element in prejudice against circumstantial evidence,** see *supra*, VII, F, 13, h.

30. **U. S.—***Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429, prosecution's challenge properly allowed. **Ga.—***Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314; *Williams v. State*, 3 Ga. 453, reviewing cases from many jurisdictions. **La.** *State v. Kennedy*, 8 Rob. 590. **Miss.** *Smith v. State*, 55 Miss. 410; *Russell v. State*, 53 Miss. 367; *Lewis v. State*, 9 Smed. & M. 115, good ground for

whose "opinions" are such as to preclude him from finding any defendant guilty of an offense punishable with death,³¹ or whose "conscientious opinions" will so preclude him.³² Such opinions are ground for challenge for cause,³³ being sometimes made a ground of challenge for implied bias.³⁴ In at least one jurisdiction it is made ground for challenge by the state, that the juror has a "fixed opinion" against capital punishment.³⁵ Under this statute only the state can challenge,³⁶ and defendant cannot complain if the state waives its right,³⁷ nor is the court bound to excuse the juror of its own motion.³⁸ But where it is not expressly limited, the ground of chal-

challenge by the state. **Vt.**—*State v. Ward*, 39 *Vt.* 225, properly excused on the state's challenge and over defendant's objection.

[a] Juror would violate either his oath or his conscience and one who would do either is not fit to be a juror. *Williams v. State*, 32 *Miss.* 389, 66 *Am. Dec.* 615.

[b] It is the right and duty of the court to examine the jurors as to their conscientious scruples and where a juror is found who will not perform his duty because of such scruples he should be excluded. *State v. Howard*, 17 *N. H.* 171.

[c] The court properly stood aside a juror who declared he was opposed to capital punishment. He is not impartial. *State v. James*, 34 *S. C.* 49, 579, 12 *S. E.* 657, 13 *S. E.* 325.

31. **Fla.**—*Gen. St.*, §3906. **Mich.** *How. St.*, §15,120. **Mo.**—*Rev. St.*, 1909, §5218. **Va.**—*Code*, 1904, §4022. **W. Va.** *Code*, §5581.

32. **Kan.** *Gen. St.*, §6776.

[a] Ground for Challenge for Cause. *Ariz. Pen. Code*, §1023, subd. 14.

[b] Also Ground for Challenge for Implied Bias.—**Cal.**—*Pen. Code*, §1074, subd. 8. **Idaho.**—*Pen. Code*, §7834, subd. 9. **Minn.**—*Rev. Laws*, 1905, §5391, subd. 8. **Mont.**—*Rev. Code*, §9262, subd. 8. **Nev.**—*Rev. Laws*, §7148, subd. 8. **N. Y.**—*Code Crim. Proc.*, §377, subd. 8. **N. D.**—*Rev. Code*, §9973, subd. 8. **Okla.**—*Rev. Laws*, §5859, subd. 8. **Ore.**—*Lord's Laws*, §1521, subd. 6. **S. D.**—*Code Crim. Proc.*, §339, subd. 8. **Utah.**—*Comp. Laws*, §4834, subd. 9. **Wash.**—*Rem. & Bal. Code*, §2142.

33. *Marquez v. Territory*, 13 *Ariz.* 135, 108 *Pac.* 258; *Cluverius v. Com.*, 81 *Va.* 787.

[a] The object of the statute is to prevent persons going upon a jury who would refuse, from conscientious scru-

ples, to bring in a verdict of guilty where that would carry the death penalty. *Metzger v. State*, 18 *Fla.* 481.

[b] See statutes cited in last two notes and see as to "opinions" *Neb. Rev. St.*, §9109, subd. 3. **Ohio.**—*Gen. Code*, §13,653, subd. 3. **Wyo.**—*Comp. Law*, §6207, subd. 3.

[c] As to "conscientious scruples," see *Ill. Rev. St.*, ch. 38, §433; *Tex. Code Crim. Proc.*, art. 673, subd. 11.

[d] "Conscientious opinions," see *Burns' Ann. St. (Ind.)*, §2101, subd. 3.

[e] That statute is constitutional, see *Greenley v. State*, 60 *Ind.* 141.

34. **Ark.**—*Kirby's Dig.*, §2363, subd. 7. **Ky.**—*Code Crim. Proc.*, §210, subd. 7. **Utah.**—*State v. Kessler*, 15 *Utah* 142, 49 *Pac.* 293, 62 *Am. St. Rep.* 911.

And see statutes cited in last note but one.

[a] But see *State v. Garrington*, 11 *S. D.* 178, 76 *N. W.* 326, under statute providing that every person convicted of murder shall suffer death or life imprisonment "at the discretion of the jury," and that the "jury must designate in their verdict," which punishment, the entertaining of conscientious scruples is not ground for challenge for implied bias notwithstanding the code section, but it is proper to permit questioning along that line for the purpose of determining peremptory challenge.

35. *O'Rear v. State*, 188 *Ala.* 71, 66 *So.* 81; *Underwood v. State*, 179 *Ala.* 9, 60 *So.* 842; *Stalls v. State*, 28 *Ala.* 25.

[a] Proper Question.—"Are you opposed to capital punishment in a case of murder?" *Jarvis v. State*, 138 *Ala.* 17, 34 *So.* 1025.

36. *Murphy v. State*, 37 *Ala.* 142.

37. *Wesley v. State*, 61 *Ala.* 282;

Murphy v. State, 37 *Ala.* 142.

38. *Murphy v. State*, 37 *Ala.* 142.

Generally as to right of court to ex-

lenge is available to both the state and the defendant.³⁹

(B.) EXTENT OF OPPOSITION. — In the absence of statute mere opposition to capital punishment is not ground for excusing where the juror states he will not let that opinion interfere with his verdict.⁴⁰ If his conscientious scruples would cause him to hesitate to impose the penalty he might not be disqualified if he declared he could and would observe the law,⁴¹ or if his opinion only was that the law ought to be abolished.⁴² The distinction has been drawn between having "conscientious scruples" and belonging to a religious denomination opposed to capital punishment; the former disqualifying, and the latter not;⁴³ and under some statutes a distinction is made between "conscientious scruples" which a juror cannot lay aside and matters of opinion which he might.⁴⁴ The only test is that the jurors shall have no bias in favor of or prejudice against either form of punishment,⁴⁵ and that they shall stand indifferent between the parties on

cuse on own motion see *supra*, VII, D.

39. *Black v. State*, 46 Tex. Crim. 590, 81 S. W. 302; *Sawyer v. State*, 39 Tex. Crim. 557, 47 S. W. 650.

[a] The prosecution may make or withhold the challenge at its discretion. *Merkel v. State* (Tex. Crim.), 171 S. W. 738.

40. *Colo.*—*Stratton v. People*, 5 Colo. 276. *Mass.*—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711. *Neb.* *Rhea v. State*, 63 Neb. 461, 88 N. W. 789.

41. *State v. Comery* (N. H.), 95 Atl. 670.

42. *State v. Comery* (N. H.), 95 Atl. 670.

43. *State v. Vick*, 132 N. C. 995, 43 S. E. 626; *People v. Damon*, 13 Wend. (N. Y.) 351.

44. *People v. Stewart*, 7 Cal. 140, the statute reading "conscientious scruples," it was error to exclude a juror who was only opposed to the punishment "from principle."

[a] Distinction Between Scruples and Matters of Opinion.—In *Stephenson v. State*, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216, in discussing whether the juror came within the letter or spirit of the statute the court calls attention to the fact that while jurymen may lay aside opinions in cases arising under the rules as to expression of opinion, or even prejudices as in the case of prejudices against particular businesses, a conscientious scruple against capital punishment might well affect jurymen who were to assess the punishment, though they believed from the evidence defendant

was guilty and though they were inclined to act impartially. Nothing occurring at the trial could be expected to change a conscientious scruple. See also *Driskill v. State*, 7 Ind. 338; *Gross v. State*, 2 Ind. 329.

[b] Whether such scruples would control or bias his judgment must be left to the juror to decide. If "upon examination of his own heart" he is satisfied that he can fairly weigh the testimony and without bias render a true verdict he ought not to be excluded. Distinguishing the rule from that which obtains where the juror has expressed a disqualifying opinion which his mere statement that he is not biased is not permitted to overthrow. *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615. See also *Com. v. Henderson*, 242 Pa. 372, 89 Atl. 567 (it is discretionary with court to excuse juror who has made such statements); *Com. v. Gross*, 1 Ashm. (Pa.) 281. But see *O'Brien v. People*, 36 N. Y. 276, 3 Abb. Pr. (N. S.) 368; *Walter v. People*, 32 N. Y. 147.

[c] It is proper to ask the question, "Notwithstanding your opposition to capital punishment, do you believe if you should be sworn upon this jury you could give a verdict according to the evidence?" The juror had stated that he was "opposed to capital punishment," but he had not said that his opinions were such as to prevent him from conscientiously finding a verdict of guilty. *Savage v. State*, 18 Fla. 909.

45. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

this as on other questions.⁴⁶ If his scruples are such as to bias his judgment, influence his consideration of the evidence and retard his arriving at a verdict, he should be excluded;⁴⁷ as where his conscientious scruples are such that he would not inflict the death penalty even where the evidence justifies and the law authorizes it,⁴⁸ or no matter how strong the evidence,⁴⁹ or what the circumstances are.⁵⁰ The statute does not require that his conscientious scruples be so strong as to absolutely forbid him from inflicting the punishment.⁵¹ The competency of the juror depends not upon the necessity, but upon the possibility, that the death penalty may be inflicted.⁵² The statute

[a] **The juror cannot be questioned** as to whether he would require "mitigating circumstances" before rendering the qualified verdict. Even the court cannot prescribe rules for the jury to follow. *Funk v. United States*, 16 App. Cas. (D. C.) 478; *Snell v. United States*, 16 App. Cas. (D. C.) 501. See also *Horton v. United States*, 15 App. Cas. (D. C.) 310.

[b] **A juror is competent who says** he will not require any greater evidence to convict a man for murder in the first degree where the penalty is death, than to convict him where the penalty is life imprisonment. The whole examination showed a willingness to receive the law from the court who stated that the evidence must convince beyond a reasonable doubt in either case. *State v. Boyce*, 24 Wash. 514, 64 Pac. 719.

[c] **Proper to ask juror whether he** would as readily vote for the death sentence as for life imprisonment should he find defendant guilty from all the evidence. *Coppenhaver v. State*, 160 Ind. 540, 67 N. E. 453, followed in *Smith v. State*, 165 Ind. 180, 74 N. E. 983.

46. *Snell v. United States*, 16 App. Cas. (D. C.) 501; *Funk v. United States*, 16 App. Cas. (D. C.) 478; *Horton v. United States*, 15 App. Cas. (D. C.) 310.

[a] **Jurors must be free to impose** either the death penalty, or life imprisonment, as the evidence shall in their judgment warrant. The state is entitled to a jury untrammelled in this respect by conscientious scruples, and the prisoner can demand no more. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948. See also *State v. Shaw*, 73 Vt. 149, 50 Atl. 863.

47. *Rhea v. State*, 63 Neb. 461, 88 N. W. 789.

[a] **Must Not Make Him "Unduly**

Hesitate."—*Haddix v. State*, 76 Neb. 369, 107 N. W. 781.

48. *Reed v. State*, 2 Okla. Crim. 589, 103 Pac. 1042.

[a] **Would Not Though Convinced Beyond Reasonable Doubt.**—*State v. Vann*, 162 N. C. 534, 77 S. E. 295.

49. **La.**—*State v. Vines*, 34 La. Ann. 1073; *State v. Nolan*, 13 La. Ann. 276. **Neb.**—*Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361; *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371. **N. H.**—*Pierce v. State*, 13 N. H. 536.

50. *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *Johnson v. State*, 88 Neb. 565, 130 N. W. 282, Ann. Cas. 1912B, 965.

51. *Rhea v. State*, 63 Neb. 461, 88 N. W. 789; *State v. Comery* (N. H.), 95 Atl. 670.

[a] **Juror who answered affirmatively a question couched practically in the language of the statute is properly excused on the state's challenge.** *Johnson v. State*, 34 Neb. 257, 51 N. W. 835.

[b] **Juror Inclined That Way.**—The court in its discretion properly excluded a juror who when asked if he was opposed to capital punishment said, "Well, I am inclined that way." *State v. McIntosh*, 39 S. C. 97, 17 S. E. 446.

[c] **A juror who says he has scruples "to a certain extent" is properly excluded.** *People v. Abbott*, 66 Cal. xviii, 4 Pac. 769.

[d] **Juror in Doubt as to Convicting.**—Where the juror said he had "conscientious scruples" about capital punishment and did not know whether he would convict the prisoner even if the evidence proved murder in the first degree, he was properly rejected on the commonwealth's challenge. *Clore v. Com.*, 8 Gratt. (49 Va.) 606.

52. **Ark.**—*Bell v. State*, 120 Ark. 530, 180 S. W. 186. **Cal.**—*People v.*

makes no distinction as between unusually aggravated, or ordinary homicides,⁵³ nor between different crimes punishable with death.⁵⁴

(C.) WHERE JURY FIXES PUNISHMENT. — The rule authorizing challenge because of aversion to the death penalty has been recognized as being peculiarly applicable where the jury fixes the punishment,⁵⁵ even where the juror says he will be governed by the law and evidence,⁵⁶ or though he says his opinion will not prevent his finding defendant guilty and imposing life imprisonment.⁵⁷ The fact that the statute authorizes the jury to fix the punishment does not remove this objection to a juror.⁵⁸ Even where he says he has no conscientious scruples the juror should be excused if he indicates his unwillingness to inflict the death penalty.⁵⁹

(D.) EVIDENCE. — The juror's own testimony is admissible on the question of his scruples against capital punishment.⁶⁰ To ask whether he has conscientious scruples against the death penalty is not objectionable as

Majors, 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295. *Vt.*—*State v. Shaw*, 73 *Vt.* 149, 50 *Atl.* 863.

53. *Kirk v. Territory*, 10 *Okl.* 46, 60 *Pac.* 797, the court is allowed no discretion and should not question the jurors along that line, nor in such a manner as might raise the juror's vindictiveness.

54. *Sawyer v. State*, 39 *Tex. Crim.* 557, 47 *S. W.* 650, juror having stated that, he had conscientious scruples against the penalty except in extreme cases of murder, the court properly excused him where he was not certain whether he had such scruples or not in a case of rape which was the case at bar.

55. *Demato v. People*, 49 *Colo.* 147, 111 *Pac.* 703, *Ann. Cas.* 1912A, 783, 35 *L. R. A. (N. S.)* 621; *Jones v. People*, 6 *Colo.* 452, 45 *Am. Rep.* 526.

56. *State v. Greer*, 22 *W. Va.* 800.

57. *Leigh v. Territory*, 10 *Ariz.* 129, 85 *Pac.* 948; *Fahnestock v. State*, 23 *Ind.* 231; *Driskill v. State*, 7 *Ind.* 338. [a] That in a case of willful and deliberate murder juror says he would be in favor of life imprisonment, but that he is opposed to hanging, is sufficient to exclude him. *People v. Abbott*, 66 *Cal. xviii*, 4 *Pac.* 769.

58. *Spain v. State*, 59 *Miss.* 19 (re-viewing the statutes at length); *State v. Comery (N. H.)*, 93 *Atl.* 670.

[a] Reason for Rule. — "Jurors should possess such qualifications as would enable them to fully conform to the provisions of the statute, and if the testimony developed upon the trial should show a case of such an aggra-

vated character as demanded the infliction of the highest punishment they would do so." *State v. Wooley*, 215 *Mo.* 620, 115 *S. W.* 417.

[b] The object of the statute giving the jury the right to qualify the verdict in capital cases was not intended to satisfy the scruples of jurymen but to qualify the verdict if the jury believed there were extenuating circumstances. *State v. Stewart*, 45 *La. Ann.* 1164, 14 *So.* 143.

[c] Such a statute passed subsequent to the statute providing for the challenge does not repeal the latter. *Rhea v. State*, 63 *Neb.* 461, 88 *N. W.* 789; *Hill v. State*, 42 *Neb.* 503, 60 *N. W.* 916. See also *Smith v. Com.*, 100 *Ky.* 133, 37 *S. W.* 586.

59. *State v. Stewart*, 45 *La. Ann.* 1164, 14 *So.* 143, juror said he "would always qualify his verdict, and would not hang any man if he could help it."

60. *Ark.*—*Jones v. State*, 58 *Ark.* 390, 24 *S. W.* 1073. *La.*—*State v. Mullen*, 14 *La. Ann.* 570. *Neb.*—*Taylor v. State*, 86 *Neb.* 795, 126 *N. W.* 752; *Dinsmore v. State*, 61 *Neb.* 418, 85 *N. W.* 445; *Hill v. State*, 42 *Neb.* 503, 60 *N. W.* 916. *N. H.*—*State v. Comery*, 95 *Atl.* 670. *Tenn.*—*Ray v. State*, 108 *Tenn.* 282, 67 *S. W.* 553.

See also cases cited *supra*, this discussion.

[a] Question Held Proper. — "Then you believe that a killing which is murder may be surrounded by such circumstances as to make it the duty of the jury to return a verdict of murder in the first degree and fix the death

tending to his disgrace or dishonor,⁶¹ and for the purpose of determining peremptory challenges he may be asked as to his attitude regarding capital punishment.⁶² Nor is it any objection that some jurors were so questioned in the presence of others already chosen.⁶³ The juror having at first given answers which leave the matter in doubt the court may permit further questioning and excuse him as the result of the whole examination,⁶⁴ and it is harmless to merely repeat the question in another form after the jurors have said they had no conscientious scruples.⁶⁵ Where the juror's answers do not go so far as to render him incompetent the court before excluding him should give defendant an opportunity to examine him further.⁶⁶ Where the

penalty and hang the defendant?" The question properly states the law and does no harm to defendant. *Rodriguez v. Territory*, 14 Ariz. 166, 125 Pac. 878.

[b] Proper to ask jurors "if they had such scruples against capital punishment as would prevent them from finding the defendant guilty where their verdict would mean his execution." *Bell v. State*, 120 Ark. 530, 180 S. W. 186.

[c] A question practically in the words of the statute is proper. *Greenley v. State*, 60 Ind. 141; *Johnson v. State*, 34 Neb. 257, 51 N. W. 835.

[d] Question on Circumstantial Evidence Not Proper.—A question as to whether a venireman would find defendants guilty on circumstantial evidence is not properly framed to elicit facts rendering him incompetent under this section. *Lambright v. State*, 34 Fla. 564, 16 So. 582.

61. *Jones v. State*, 2 Blackf. (Ind.) 475.

[a] Case is not analogous to that of a witness whom it is sought to disqualify on account of atheism. Also if the juror does not object to answering the prisoner cannot complain. *State v. Mullen*, 14 La. Ann. 570.

62. *State v. Dooley*, 89 Iowa 584, 57 N. W. 414.

[a] Question Held Proper.—"Have you any preconceived opinions or notions against capital punishment, when the statute prescribes it, and the evidence is sufficient to warrant it?" *State v. Foster*, 91 Iowa 164, 59 N. W. 8.

63. *Ray v. State*, 108 Tenn. 282, 67 S. W. 553, the juror questioned was peremptorily challenged on the court's overruling challenge for cause.

64. *State v. Ward*, 39 Vt. 225, state-

ments contradictory as to whether his scruples would lead him to decide contrary to the evidence.

[a] Juror first stated he was opposed to the punishment in case of extreme youth but having been put upon the court as trier, there was no error in permitting further questions and finally excusing him upon his explaining that he was conscientiously opposed to such punishment even though the accused was over fourteen years of age. *Bell v. State*, 91 Ga. 15, 16 S. E. 207.

[b] Juror's State of Mind Left Doubtful.—Juror who first said he had scruples, then said if the evidence warranted he would render a verdict which would carry the penalty, but finally in answer to question by the court said he was opposed to hanging, showed such a state of mind as justified his exclusion. *State v. Jackson*, 42 La. Ann. 1170, 8 So. 297.

[c] The overruling of a proper question on cross-examination directed toward a question the prosecution had propounded to test juror's scruples, is not reversible error unless prejudice appears. *State v. Garner*, 135 La. 746, 66 So. 181.

That challenge is to be determined from whole examination see *supra*, VII, E, 4, k.

65. *Jones v. Com.*, 14 Ky. L. Rep. 223, 19 S. W. 844, permitted to answer the question whether they would inflict the death penalty, if the proof justified it.

66. *Smith v. State*, 55 Miss. 410, all the juror said was "I would not like for a man to be hung."

[a] But after challenge has been allowed against a juror who states that he has conscientious scruples against the death penalty the court may refuse

statute disqualifies him, evidence of his previous statements may be received to show his opinion.⁶⁷

(E.) DETERMINATION. — Whether the scruples or opinions of the juror are such as disqualify him for a juryman presents a non-reviewable question of fact,⁶⁸ and where the scruples are only made a ground of challenge, the determination of the juror's competency is left to the trial court's discretion,⁶⁹ not being subject to review unless that discretion be abused.⁷⁰ Thus where the juror's answers did not bring him strictly within the statute the court's action in excusing him will not be disturbed,⁷¹ and conceding that the circumstances would have warranted overruling the challenge, excusing is no ground for reversal in doubtful cases,⁷² though there is authority for the proposition that excluding a juror for a reason beyond the statutory one is reversible error.⁷³ It seems that retaining a juror who had conscientious scruples would not prejudice the prisoner.⁷⁴

14. Interest in Case at Bar.⁷⁵ — a. *In Subject-Matter of Suit.* At common law no person having any interest in the outcome of the suit was competent to sit as a juror therein,⁷⁶ and if he had any direct interest he was subject to principal challenge,⁷⁷ and by statute in some states it is made a principal cause for challenge, that one has an interest in the cause or action,⁷⁸ while other statutes disqualify jurors who are directly or indirectly interested in the subject-matter

to permit defendant to examine him further. *People v. Collins*, 105 Cal. 504, 39 Pac. 16; *People v. Goldenson*, 76 Cal. 328, 19 Pac. 161, it is no abuse of discretion.

67. *Metzger v. State*, 18 Fla. 481, juror was properly excused who had stated before two witnesses that if he were on the jury "he would not go for capital punishment."

68. *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *State v. Ward*, 39 Vt. 225.

69. *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

70. *Davidson v. State*, 135 Ind. 254, 34 N. E. 972.

71. *Stephenson v. State*, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

[a] A juror who did not have any conscientious scruples but who said in effect that he "would hate to vote for the death penalty but, if the evidence warranted such a verdict, he could vote for it" having been excused on the state's challenge, the supreme court refused to reverse on the theory that defendant had no right to the particular juror, and that the court properly excuses any juror on its reasonable doubt as to his qualifications. *State v. Buralli*, 27 Nev. 41, 71 Pac. 532.

72. *Rhea v. State*, 63 Neb. 461, 88

N. W. 789. See *Stephenson v. State*, 110 Ind. 358, 11 N. E. 360, 59 Am. Rep. 216.

73. *People v. Stewart*, 7 Cal. 140, where under statute reading "conscientious scruples" a juror who was only "opposed from principle" to capital punishment, was held improperly excluded.

74. *State v. Ford*, 42 La. Ann. 255, 7 So. 696, so suggests. The error, if one it was, was harmless because the juror did not sit.

75. Relationship to persons interested in case see *infra*, VII, F, 18 to 22, inclusive.

76. *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

[a] So in *Hearn v. Greensburgh*, 51 Ind. 119, speaking of jury trial the court says, "during all the period of its history, there has been no time when interest in the suit did not disqualify a juror."

77. Ill.—*Bradshaw v. Hubbard*, 6 Ill. 390. N. J.—*Peck v. Essex*, 21 N. J. L. 656. Va.—*Jaques v. Com.*, 10 Gratt (51 Va.) 690.

78. Kan.—Gen. St., §§5876, 6778 Ohio.—Gen. Code, §11437, subd. 2. Okla.—Rev. Laws, §4997.

of the suit,⁷⁹ when they are subject to challenge under the general rule.⁸⁰ By other statutes the court is required to examine the jurors and excuse all who have any interest in the cause.⁸¹ Interest in the event of the action or in the main question involved is ground for challenge under many statutes,⁸² being cause for challenge for "implied bias" in some states.⁸³ By statute the injured party is not competent in some states,⁸⁴ and even without a statute he is subject to principal challenge in a criminal prosecution for the infliction of the injury.⁸⁵ It has been said that the better practice is to permit a general inquiry as to the direct or even contingent interest of jurors in the result of the litigation, or in the parties to it, when there appears to be any reasonable ground to believe some of them may have such an interest,⁸⁶ and the court should exclude the juror if there is reasonable ground to believe he has such an interest as will render him not impartial,⁸⁷ and a more rigid rule of exclusion is recognized as to jurors than as to magistrates.⁸⁸ The smallest degree of interest is said to be a decisive objection to a juror in a criminal case,⁸⁹ and pecuniary interest, however slight, has been called disqualifying in civil cases.⁹⁰ It is recognized, however, that the interest may be so

79. **Ariz.**—Civ. Code, §3517, subd. 2. **Fla.**—Gen. St., §§1492, 1572, subd. 4. **Haw.**—Organic Act, §24. **Tex.**—Vernon Sayles' Civ. St., art. 5117, subd. 2. **Vt.** Pub. St., §1224.

[a] In **Tennessee**.—By Shannon's Code, §5814, no person can act in a case in which he is interested "except by consent of all the parties interested." *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263. "Except by consent of all the parties," means plaintiff and defendant must consent. *Cleage v. Hyden*, 6 Heisk. 73.

80. See *supra*, VII, F, 1.

81. **Haw.**—Acts 1905, ch. 5. **Me.** Rev. St., ch. 84, §94. **N. H.**—Pub. St., ch. 209, §25. **R. I.**—Gen. Laws, ch. 279, §37. **S. C.**—Civ. Code, §2944. **Va.** Code, 1904, §3154. **W. Va.**—Code, §4656. **Wis.**—St., 1898, §2849.

82. **Ariz.**—Civ. Code, §3558, subd. 5. **Cal.**—Code Civ. Proc., §602, subd. 5. **Idaho.**—Code Civ. Proc., §4830, subd. 5, "pecuniary interest." **Ind.**—Burns' Ann. St., §2101, subd. 14, "that he has a personal interest in the result of the trial." **Mont.**—Rev. Code, §6741, subd. 5. **Nev.**—Rev. Laws, §5206, subd. 5. **N. D.**—Rev. Code, §7017, subd. 5. **S. D.**—Code Civ. Proc., §252, subd. 5. See *Rogers v. Gladiator Gold Mining Co.*, 21 S. D. 412, 113 N. W. 86. **Utah.**—Comp. Laws, §3144, subd. 5, "pecuniary interest." **Wyo.**—Comp. Laws, §4496, subd. 5.

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[a] In **Alabama**, code §7276, subd. 6, makes it good ground for challenge "That he has an interest in the conviction or acquittal of the defendant."

[b] In **Iowa** a personal pecuniary interest is of itself sufficient to justify a finding that a state of mind exists such as to preclude a just verdict, within code §3688, subd. 9, making that a ground for challenge. *Wilson v. Wapello*, 129 Iowa 77, 105 N. W. 363.

83. **Lord's Laws (Ore.)**, §122, subd. 4; **Rem. & Bal. Code (Wash.)** §330, subd. 4.

84. **Kan. Gen. St.**, §6778; **Mo. Rev. St.**, 1909, §5217.

85. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690, though technically not a party to the record, and has no pecuniary interest in the result.

86. *Clay v. Western Maryland R. Co.*, 221 Pa. 439, 70 Atl. 807.

87. *Evans v. State*, 13 Ga. App. 700, 79 S. E. 916.

Best rule is to resolve all doubts in favor of exclusion, see *supra*, VII, E, 4, k.

88. *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315, it is an easy matter to supply another juror without delay or expense, while it may be practically impossible to obtain a qualified judge or magistrate.

89. *Evans v. State*, 13 Ga. App. 700, 79 S. E. 916.

90. *Page v. Contoocook Val. R. R.*, 21 N. H. 438.

remote that it ought not to be considered as rendering a person incompetent.⁹¹ In every case the question is to be determined not by specific instances and mere precedents but by the broad general rules of human experience.⁹² Where the proposed jurors are stockholders of corporations who are directly or indirectly interested in the result they are not competent.⁹³ A depositor of a bank which defendant is charged with defrauding has a direct interest, and should be excluded on challenge,⁹⁴ and persons who are particularly interested in the contemplated improvement are not competent to sit on the jury to condemn land taken therefor.⁹⁵ Also a person who is living on the land involved in the controversy would be subject to challenge.⁹⁶

b. *Bail or Surety for Party*.—The prisoner's bail is properly excluded on the state's challenge for cause,⁹⁷ and the surety or recognizance of a joint defendant is properly excluded although he is indifferent as to the other defendant.⁹⁸ Any person who is security on any bond or obligation for either party is also subject to challenge,⁹⁹

91. *Doyal v. State*, 70 Ga. 134.

Interest of taxpayers as being too remote, see *infra*, VII, F, 14, c.

92. *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777.

93. *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157, stockholder liable for his proportion of costs during time he held stock.

[b] *By Statute in Some States*. Cal. Code Civ. Proc., §602, subd. 3; N. Y. Code Civ. Proc., §1180.

[b] *Members of a mutual fire insurance company* and so liable to pay if the case went against it, are incompetent to sit on the jury though they state they have no bias or prejudice. *Martin v. Farmers Mut. Fire Ins. Co.*, 139 Mich. 148, 102 N. W. 656.

[c] *Stockholder of Company Interested Though Not a Party*.—A juror who owned stock in a corporation which had agreed to a division of the net income of itself and another corporation, based on the proportion of the cost of each corporation's road, is pecuniarily interested and cannot sit as a juror to award damages for the taking of land by such other corporation. *Page v. Contocook Val. R. R.*, 21 N. H. 438.

[d] *Juror who was a stockholder and director of the company* who owned the store which defendant was accused of burglarizing is incompetent. *State v. Thompson*, 24 Utah 314, 67 Pac. 789.

[e] *Director Who Is Not Stockholder Is Competent*.—That a juror is a director of the bank on which a

counterfeit bill was drawn is not ground for challenge in a criminal action for passing said bill. The juror owned no stock in the bank and had no other interest other than that common to all citizens. *Billis v. State*, 2 McCord (S. C.) 12.

[f] *But the mere pecuniary interest may not disqualify*, as where the corporation was assisting in the prosecution of one accused of attempting to murder its caretaker. The stockholder's interest would not disqualify. *Taylor v. State*, 13 Ga. App. 715, 79 S. E. 924.

94. *Carr v. State*, 104 Ala. 43, 16 So. 155; *Carr v. State*, 104 Ala. 4, 16 So. 150.

95. *Almand v. Rockdale*, 78 Ga. 199, cited with approval in *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777; *Kundinger v. City of Saginaw*, 59 Mich. 355, 26 N. W. 634, juror who expects to derive some benefit not common to the community.

96. *Veramendi v. Hutchins*, 56 Tex. 414.

97. *Brazleton v. State*, 66 Ala. 96; *Anderson v. State*, 63 Ga. 675; *Temples v. Central of Georgia Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777.

[a] *Statutory Ground*.—Ariz.—Pen. Code, §1023, subd. 11. Iowa.—Code, §5360, subd. 12. Ore.—Lord's Laws, §122, subd. 2. Wash.—Rem. & Bal. Code, §330, subd. 2, implied bias.

98. *State v. Prater*, 26 S. C. 198, 2 S. E. 108, and says he is sensible of no bias as to any defendant.

99. Ariz.—*Vincent v. Smith*, 13 Ariz.

except where the result of the trial in no manner affects the surety on the bond.¹

c. *Taxpayers, Residents and Citizens.*—At common law, the weight of authority is that a resident taxpayer of a municipality which is a party to a suit is incompetent because of his interest,² but there is authority that the interest in suits against a city for damages is too remote to render them incompetent.³ In the absence of a statute making them competent they are properly excluded on challenge according to many authorities,⁴ and there is clearly no abuse of discretion in excluding jurors who admit their interest might influence them,⁵

346, 114 Pac. 557, cost bond. **Ga.** Glover v. Woolsey & Co., Dudley 85, security on appeal. **Ill.**—Bradshaw v. Hubbard, 6 Ill. 390, cost bond.

[a] **Juror liable on forthcoming bond** where the defendant was insolvent. Ferriday v. Selser, 4 How. (Miss.) 506.

[b] **Statutory provisions**, see **Ariz.** Civ. Code, §3558, subd. 3. **Cal.**—Code Civ. Proc., §602, subd. 3. **Idaho.**—Rev. Code, §4380, subd. 3. **Mont.**—Rev. Code, §6741, subd. 3. **Nev.**—Rev. Laws, §5206, subd. 3. **N. D.**—Rev. Code, §7017, subd. 3. **Ore.**—Lord's Laws, §122, subd. 2. **S. D.**—Code Civ. Proc., §252, subd. 3. **Wash.**—Rem. & Bal. Code, §330, subd. 2. **Wyo.**—Comp. Laws, §4496, subd. 3.

1. Daniel v. Guy, 23 Ark. 50.

2. **Ind.**—Hearn v. Greensburgh, 51 Ind. 119. **Kan.**—Gibson v. Wyandotte, 20 Kan. 156. **N. Y.**—Hildreth v. Troy, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686. **Okla.**—Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698; Oklahoma City v. Meyers, 4 Okla. 686, 46 Pac. 552. **Cre.**—Portland v. Kamm, 5 Ore. 362; Garrison v. Portland, 2 Ore. 123. **R. I.** Watson v. Tripp, 11 R. I. 98, 33 Am. Rep. 420. **Wis.**—Davey v. Janesville, 111 Wis. 628, 87 N. W. 813.

3. **City of Marshall v. McAllister**, 18 Tex. Civ. App. 159, 43 S. W. 1043, following **City of Dallas v. Cooper** (Tex. Civ. App.), 34 S. W. 321, and **City of Dallas v. Peacock**, 89 Tex. 58, 33 S. W. 220, wherein after an extended review of the English and American cases it is held that the better rule is that the interest of both judges and jurors "is so indirect, remote, and contingent" that the fundamental principle, no one shall be judge in his own case, does not apply.

[a] In **Detroit v. Detroit Ry.**, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411,

104 Am. St. Rep. 600, it is said there is a conflict of authority where the question is not dependent on statute and that "perhaps numerically the weight of authority sustains the contention" that taxpayers are not competent.

[b] In **Wilson v. Wapello**, 129 Iowa 77, 105 N. W. 363, it is questioned whether the cases go farther than to hold it is not error to exclude jurors on this ground.

4. **Ind.**—Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230; Hearn v. Greensburgh, 51 Ind. 119. **Kan.**—Abilene v. Hendricks, 36 Kan. 196, 13 Pac. 121; Gibson v. Wyandotte, 20 Kan. 156. **Mo.** Fulweiler v. St. Louis, 61 Mo. 479; O'Brien v. Vulcan Iron Works, 7 Mo. App. 257. **Okla.**—Guthrie v. Shaffer, 7 Okla. 459, 54 Pac. 698. See also **Oklahoma City v. Meyers**, 4 Okla. 686, 46 Pac. 552.

[a] In **Peck v. Freeholders of Essex**, 21 N. J. L. 656, reversing 20 N. J. L. 457, it was held ground for principal challenge that jurymen were taxpayers and directly interested in the outcome. It is not necessary that they be parties.

[b] **Applied to Personal Injury Suits.**—**City of Goshen v. England**, 119 Ind. 368, 21 N. E. 977, 5 L. R. A. 253; **Corlett v. Leavenworth**, 27 Kan. 673; **Gibson v. Wyandotte**, 20 Kan. 156.

5. **Wilson v. Wapello**, 129 Iowa 77, 105 N. W. 363.

[a] **There was no error in excluding in challenge a juror who said "I think I might,"** when asked whether his interest as a taxpayer of defendant municipal corporation might not influence his verdict" in a case of dubious or equally balanced evidence." **City of Omaha v. Cane**, 15 Neb. 657, 20 N. W. 101.

[b] **It was no abuse of discretion**

and even where the common-law rule has been abrogated the juror may be asked as to his being influenced, for the purpose of determining peremptories.⁶

Where the common-law rule has not been modified some courts say it is to be strictly observed,⁷ but many interests have been held too slight to affect the juror's judgment, both at common law and under the statute,⁸ and the disqualification has been said to be more theoretical than practical.⁹ Generally taxpayers of a county are not incompetent to try a case against a county even though there be no statute making them competent,¹⁰ but it has been held that where the county has a right to obtain a change of venue challenge for implied bias will lie.¹¹

The common-law disability has been abrogated by statute in many

to exclude a taxpayer resident of a certain ward where he said he did not think it fair inhabitants of that ward should pay taxes and get no gas, but that he had no opinion which would disqualify him in the case at bar, which was on a contract between the gas company and the city regarding street lighting. *Davenport Gas Light & C. Co. v. Davenport*, 13 Iowa 229.

6. *Davey v. Janesville*, 111 Wis. 628, 87 N. W. 813.

7. *Meyer v. San Diego*, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 41 L. R. A. 762; *Portland v. Kamm*, 5 Ore. 362, where the court says the mere remoteness or smallness of the probable recovery does not alter the rule.

8. *State v. Lynn*, 3 Penne. (Del.) 316, 51 Atl. 878, interest in fine.

[a] **Juror's interest in a fine or recognizance payable to the town**, is too small to overbalance the interest and feeling of all men fit to be jurors, to provide public justice and protect the innocent. *Treasurer of Middletown v. Ames*, 7 Vt. 166.

[b] **Smallness of Juror's Tax Considered**.—The court doubts whether the mere fact that the juror was the son of one whose total tax for the support of the poor was eighty cents a year was disqualified merely because the will he was to pass upon established a trust in favor of the poor of the town. *Fiske v. Paine*, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498.

[c] **Liability for Proportion of Attorney's Fee**.—Where a policeman had been murdered, and the mayor and council had employed counsel to prosecute the alleged murderer; this was not

sufficient to disqualify as jurors all persons residing within the corporate limits on the ground that they would be liable to taxation to satisfy the attorney's fee. *Doyal v. State*, 70 Ga. 134.

[d] **May try one charged with having embezzled the funds of the city**. *State v. Krug*, 12 Wash. 288, 41 Pac. 126.

9. *Fiske v. Paine*, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498.

10. *Wilson v. Wapello*, 129 Iowa 77, 105 N. W. 363; *Watson v. DeWitt Co.*, 19 Tex. Civ. App. 150, 46 S. W. 1061.

[a] **In an action against a county for services**, persons who are taxpayers and hence interested to a certain extent, have not such an interest as disqualifies them as jurors. *Rathbun v. Thurston County*, 8 Wash. 238, 35 Pac. 1102.

[b] **Reason for Different Rule**.—A different rule prevails not only because of the slight extent of the personal interest of the individual taxpayer, but because it would be almost impossible to get a jury of residents of the county who were not taxpayers. The Code §3505, subd. 1, gives the party the unqualified right to change of venue and this is a sufficient protection to the party. *Wilson v. Wapello*, 129 Iowa 77, 105 N. W. 363.

11. *Elliott v. Wallowa County*, 57 Ore. 236, 109 Pac. 130, *distinguishing Ford v. Umatilla County*, 15 Ore. 313, 16 Pac. 33, where plaintiff moved for a change of venue and it was disallowed.

See also *Va. Code*, 1904, §3159; *W. Va. Code*, §4656.

states,¹² and they are no longer subject to challenge,¹³ but a statute making residents of an interested county competent does not extend by implication to resident taxpayers of an interested city.¹⁴ A general statute prescribing that jurors shall be taxpayers does not abrogate the common-law disqualification.¹⁵ If a person be a resident and not a taxpayer he is competent,¹⁶ and that jurors are officers and councilmen of a city does not disqualify them to act as jurors in the hustings court of that city.¹⁷ The city as well as the adverse party may challenge.¹⁸ By statute citizenship does not disqualify one to act as a juror where the state is directly or indirectly a party.¹⁹

12. Ala.—Code, §4636. Cal.—Code Civ. Proc., §602, subd. 5. Colo.—Mills' St., §4220. Fla.—Gen. St., §1572, subd. 4. Ga.—Pen. Code, §§881, 882. Idaho. Code Civ. Proc., §4380, subd. 5. Me. Rev. St., ch. 84, §101. Minn.—Rev. Laws, 1905, §413. Mo.—Rev. St., 1909, §7288. Mont.—Rev. Code, §6741, subd. 5. Neb.—Rev. St., §8136. Nev.—Rev. Laws, §5206, subd. 5. N. Y.—Code Civ. Proc., §1179. N. D.—Rev. Code, §7017, subd. 5. Okla.—Rev. Laws, §4997. S. D.—Code Civ. Proc., §252, subd. 5. Utah.—Comp. Laws, §3144, subd. 5. Wash.—Rem. & Bal. Code, §330, subd. 4. W. Va.—Code, §4656. Wis.—St., 1898, §2850. Wyo.—Comp. Laws, §4496, subd. 5. Vt.—Pub. St., §1224.

[a] Statutes of this sort have been upheld upon the ground that the interest of the juror is so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment of the juror. *Meyer v. San Diego*, 121 Cal. 102, 53 Pac. 434, 66 Am. St. Rep. 22, 41 L. R. A. 762.

[b] Such a statute is not unconstitutional as depriving a party of his right to an impartial jury but is merely a legislative determination that the interest of the taxpayer is too slight, remote, and indirect to affect his judgment (*How. Stat.*, §950). *Smith v. German Ins. Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

[c] Statutes Applying Particularly to Penal Actions and Indictments.—R. I. Gen. Laws, ch. 279, §32; S. C. Civ. Code, §2945, Crim. Code §54.

13. *Hildreth v. Troy*, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 636.

14. *Gibson v. Wyandotte*, 20 Kan. 156.

[a] City Having Attributes of County.—Under previous statute applying only to counties, jurors who were

tax paying inhabitants of a city which had peculiar attributes as a quasi county were held competent. *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257.

[b] Provisions as to County and Penal Actions Construed Together in Assumpsit Action.—How. St., §12932, provides that it shall be no ground of challenge in penal actions that juror "liable to pay taxes in any county, city, village, township or district, which may be benefited by such recovery." How. St., §950. "On the trial of every action in which a county shall be interested, the electors and inhabitants of such county shall be competent . . . jurors." In *City of Detroit v. Detroit Railway*, 134 Mich. 11, 95 N. W. 992, 99 N. W. 411, 104 Am. St. Rep. 600, construing these statutes together and taking into consideration the fact that judges had always been held competent when similarly situated, notwithstanding section 12600 which provides that judges shall be disqualified on the same ground that jurors are excluded, it was held that one cannot be challenged on the ground of interest merely because he is a taxpayer of a city which is plaintiff in an action of assumpsit.

15. *Watson v. Tripp*, 11 R. I. 98, 33 Am. Rep. 420, the references in the statutes as to their being taxpayers is one merely making them generally liable to jury service. It does not cure their disability in particular cases.

16. *Abilene v. Hendricks*, 36 Kan. 196, 13 Pac. 121.

17. *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304.

18. *Kansas City v. Kirkham*, 9 Kan. App. 236, 59 Pac. 675.

19. R. I. Gen. Laws, ch. 279, §35. Citizenship as a necessary qualification see *supra*, VII, F, 8, c.

d. *Engaged in the Prosecution Generally.*²⁰ — One actively engaged in any way in the prosecution of one charged with crime is disqualified to sit as a juror in the case,²¹ but the mere fact that one may have procured affidavits favorable to the state on motion for change of venue does not disqualify him;²² nor is the fact that he has made such an affidavit himself.²³ It has been questioned whether one is disqualified as a matter of law merely by contributing to a defense fund.²⁴

c. *Person Who Is To Be Witness.* — At common law a juror was not incompetent because he was a witness in the cause,²⁵ but by statute it is made ground for challenge that the juror has been summoned as a witness, or that he is a witness for either side.²⁶ Though

20. Relationship to persons interested in prosecution, see *infra*, VII, F, 18 to 22, inclusive.

Bias or prejudice against crime or criminal acts as disqualifying, see *supra*, VII, F, 13, d.

That jurors were members of committees or societies interested in prosecution as disqualifying, see *supra*, VII, F, 10, b.

Juror who contributed to fund to carry on contested election over the prohibition law not disqualified in prosecution under that law, see *supra*, VII, F, 13, c.

21. *Johnson v. Mayor, etc. of Hazlehurst*, 8 Ga. App. 841, 70 S. E. 258; one may be shown to be prosecutor although he does not nominally appear as such.

[a] Justice of the peace who received the affidavit and issued the warrant which was the basis of the accusation should have been excused on challenge propter affectum. *Evans v. State*, 13 Ga. App. 700, 79 S. E. 916.

[b] Deputy prosecuting attorney stands as the representative of the state, as well as the attorney for the state and was "impliedly biased" against the defendant, and so was incompetent as a juror. *Block v. State*, 100 Ind. 357.

[c] Deputy sheriffs are incompetent to act as jurors since the sheriff is interested in the securing of convictions, his salary being payable out of fees earned and collected, and they are his employees. *Gaff v. State*, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235.

[d] Person engaged by sheriff to serve subpoenas in the particular case though he be not a regular deputy.

Zimmerman v. State, 115 Ind. 129, 17 N. E. 258.

22. *Patswald v. United States*, 5 Okla. 351, 49 Pac. 57, the affidavits were to the effect that no bias or prejudice existed in the county and so could not have prejudiced the juror.

23. *State v. Morse*, 35 S. D. 18, 150 N. W. 293, at most it is a question of actual bias, and the affidavits in the case at bar showing no bias against defendant the challenge was properly overruled.

24. *Campbell v. State*, 144 Ga. 224, 87 S. E. 277, assuming there may be quasi prosecutors the court doubts whether there can be any such thing as a voluntary defendant.

25. *Underwood v. State*, 179 Ala. 9, 60 So. 842; *Bell v. State*, 44 Ala. 393. *Compare State v. Underwood*, 2 Overt. (Tenn.) 92, which says it seems to be principal cause of challenge in a felony case.

26. *State v. Jordan*, 19 Idaho 192, 112 Pac. 1049.

[a] **Statutory Provisions.**—Ala. Code, §7276, subd. 11, "witness for the other party." **Ariz.**—Civ. Code, §3517, subd. 1; Pen. Code, §1023, subd. 12. **Ark.**—Kirby's Dig., §4492, civil cases. **Idaho.**—Rev. Codes, §4380, subd. 4 (civil cases); §7834, implied bias in criminal cases. **Ind.**—Burns' St., §2101, subd. 7, "subpoenaed in good faith." **Kan.**—Gen. St., §5876, "a witness in the action," principal cause); §6780, criminal case. **Mo.**—Rev. St., §5219 (criminal case); §7283, civil case. **Neb.** Rev. St., §9109, subd. 7, subpoenaed in good faith. **Nev.**—Rev. Laws, §5206, subd. 4, "being then a witness therein." **Ohio.**—Gen. Code, §11437, subd. 6 (civil case); §13653, subd. 7, criminal

the statute does not specifically mention the writ, one is clearly subject to challenge for cause who has been subpoenaed;²⁷ but it is not necessary that he should have been subpoenaed.²⁸ The mere fact that the prosecutor states he will not use the juror as a witness does not justify overruling defendant's challenge for implied bias of one who testified before the grand jury.²⁹ Nor is error in overruling a challenge cured by the fact that the juror was not actually called as a witness.³⁰ The statute does not apply to witnesses called on a motion for change of venue.³¹ Persons summoned merely as character witnesses have been held not to be disqualified,³² but such witness may be excluded on the state's challenge though he knows nothing about the merits of the case.³³

15. Interest in Other Litigation. — a. *Other Suits or Claims With Like Facts.*³⁴ — Prejudice because of being interested in similar questions has been recognized as ground for challenge under some statutes.³⁵ Also the juror may be examined as to his interest in or relation to claims or suits of the same character as the one being tried, for the purpose of exercising the right of peremptory challenge.³⁶ But except in so far as the statutes may provide otherwise,³⁷ where the claim or suit grew out of an entirely different transaction, he is not disqualified if he has no prejudice against the party because of such claim or suit.³⁸ Jurors who a short time before have been litigating

case. **Okla.**—Rev. Laws, §4997. **Tex.** Vernon Sayles' Civ. St., art. 5117, subd. 1; Code Crim. Proc., art. 673, subd. 6. **Utah.**—Comp. Laws, §3144, subd. 4. **Wyo.**—Comp. Laws, §4496, subd. 4; §6207, subd. 7.

27. Walker v. State, 153 Ala. 31, 45 So. 640; Baldwin v. State, 111 Ala. 11, 20 So. 528; Atkins v. State, 60 Ala. 45; Commander v. State, 60 Ala. 1.

28. Mundine v. Pauls, 28 Tex. Civ. App. 45, 66 S. W. 254.

29. State v. Stentz, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807, name was indorsed on indictment and he testified to material matters in dispute.

30. Atkins v. State, 60 Ala. 45.

31. State v. Hopkirk, 84 Mo. 278, witness summoned on application of a co-indictee, but never sworn.

[a] One not subpoenaed but called from among the bystanders who testified on defendant's motion for change of venue to the effect that he had heard no expressions of opinion in his neighborhood, that he knew of no prejudice against defendant in his township and that they had heard very little about the case there, was not incompetent because of having so testified. State v. Wisdom, 84 Mo. 177.

32. Edgar v. State, 59 Tex. Crim.

491, 129 S. W. 141, following Seals v. State, 35 Tex. Crim. 138, 32 S. W. 545.

33. State v. Barber, 113 N. C. 711, 18 S. E. 515.

34. Having been juror in another suit see *infra*, VII, F, 17.

35. Ind.—Burns' Ann. St., §554. Ia. Code, §3688, subd. 10; §5360, subd. 13. Me.—Rev. St., ch. 106, §37. Mass. Jeffries v. Randall, 14 Mass. 205. Tenn. Shannon's Code, §5821; Jenkins v. State, 99 Tenn. 569, 42 S. W. 263.

[a] "The fact that jurors are owners of similar bonds, that their validity is in question in this and in other suits pending, and that the decision or verdict in one is practically decisive of the other, is cause of bias and prejudice." Jefferson County v. B. C. Lewis & Sons, 20 Fla. 980.

36. Mithen v. Jeffery, 259 Ill. 372, 102 N. E. 778 (reversing 174 Ill. App. 602); Iroquois Furnace Co. v. McCrea, 191 Ill. 340, 61 N. E. 79, affirming 91 Ill. App. 337.

37. See *infra*, VII, F, 15, b, c.

38. City of San Antonio v. Diaz (Tex. Civ. App.), 62 S. W. 549, juror had a damage suit pending against same party.

[a] An unadjusted claim against

the same main issue with the parties are incompetent.³⁹

b. *Actions Between Juror and Party to Action at Bar.*—That another action was pending between the juror and a party to the action at bar, was ground for challenge at common law.⁴⁰ If the action was of such a nature as to imply malice or ill-will, the challenge was for principal cause, otherwise it was to the favor.⁴¹ Under some statutes it is ground for principal challenge that an action is pending between the juror and any party to the action on trial.⁴² And many statutes provide that it shall be ground for challenge in a criminal trial that the juror is a party adverse to the defendant in a civil action, or has complained against, or been accused by him, in a criminal prosecution,⁴³ being usually made ground for challenge for implied bias.⁴⁴

c. *Another Suit Pending at Same Term.*—By statute it is ground for challenge for cause in many states that the juror has an action pending in the same court at the term for which he is drawn.⁴⁵

defendant railroad company growing out of an independent matter in no way involved in the issues at trial is not disqualifying where his mind was not prejudiced and it appeared to the trial court that he could render a verdict according to the law and evidence. *Kaugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. 769.

[b] It is proper to exclude a question as to whether the fact that he had had trouble with his employers touching payment of wages would prejudice the juror against defendants in the case at bar which was by an employee on a contract for services. *Fish v. Glass*, 54 Ill. App. 655.

[c] That juror was a stockholder in another turnpike road in the same county, does not make him incompetent. Mere fact that case involves questions of interest to both companies is not controlling. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51.

[d] In a prosecution for arson it is proper to refuse the question "Has any one of you ever had his house burnt, or attempted to be burnt, by an incendiary? If so, would that fact tend to prejudice you against the defendant in making up your verdict herein?" *State v. Evans*, 55 Mo. 460.

39. *Little Rock, etc. Ry. Co. v. Wells*, 61 Ark. 354, 33 S. W. 208, 54 Am. St. Rep. 216, 30 L. R. A. 560; *Railway Co. v. Smith*, 60 Ark. 221, 29 S. W. 752.

40. *Burnett v. Burlington & M. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

41. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, giving as example of first class, trespass for assault and battery; of the second class, debt.

42. Kan.—Gen. St., §§5876, 6778. Ohio.—Gen. Code, §11437, subd. 3. Okla.—Rev. Laws, §4997. Tenn.—Shannon's Code, §5821. See *Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263.

43. Ariz. Pen. Code, §1023, subd. 6; Iowa Code, §3688, subd. 6, §5360, subd. 6.

44. Ark.—Kirby's Dig., §2363, subd. 2. Cal.—Pen. Code, §1074, subd. 3. Idaho.—Rev. Code, §7834, subd. 3. Ky. Code Crim. Proc., §210, subd. 2. Minn. Rev. Laws, 1905, §5391, subd. 3. Mont. Rev. Code, §9262, subd. 3. Nev.—Rev. Laws, §7148, subd. 3. N. Y.—Code Crim. Proc., §377, subd. 3. N. D. Rev. Code, §9973, subd. 3. Okla.—Rev. Laws, §5859, subd. 3. S. D.—Code Crim. Proc., §339, subd. 3. Utah. Comp. Laws, §4834, subd. 3.

45. Ala.—Code, §7276, subd. 11. Cal.—Code Civ. Proc., §602, subd. 8. Ill.—Chicago, R. I. & P. Ry. Co. v. Downey, 85 Ill. App. 175. Md.—Gen. Laws, art. 51, §5. Neb.—*Gran v. Houston*, 45 Neb. 813, 64 N. W. 245. N. H. Pub. St., ch. 209, §24. S. D.—Code Civ. Proc., §252, subd. 9; Code Crim. Proc., §339, subd. 9, implied bias. Tenn.—*Jenkins v. State*, 99 Tenn. 569, 42 S. W. 263. Vt.—Pub. St., §1585. Va.—Code, 1904, §3165. W. Va.—*Beck v. Thompson*, 31 W. Va. 459, 7 S. E. 447, 13 Am. St. Rep. 870.

[a] Rule in North Carolina.—(1) Under Revisal, §1960, "if any of the jurors drawn have a suit pending and

The time at which the case may be heard at the term does not affect the incompetency.⁴⁶ Some statutes have been construed as disqualifying jurors whose cases have been continued over the term.⁴⁷

d. *Witness in Other Suit or Proceeding*.—By statute in many states it is ground for challenge that the juror in a civil action has been a witness on a previous trial between the same parties for the same cause of action,⁴⁸ and witnesses either for or against the prisoner on the preliminary trial, or before the grand jury are subject to challenge under some statutes.⁴⁹ Even where there is no statute a witness in another case involving the same facts is incompetent because of the bias they must have produced in his mind.⁵⁰

16. **Member of Tribunal That Considered Same Matter.**—a. *Arbitrator*.—That one has been an arbitrator on either side is ground for challenge at common law,⁵¹ at least where he had declared an opinion,⁵² but if he was chosen jointly he is not subject to principal challenge.⁵³ By statute in some states arbitrators of the same controversy are subject to principal challenge.⁵⁴

at issue in the superior court," their names are taken off the list. The object of the statute is to disqualify one who has a suit which is triable at the term for which he is drawn. Hence the suit must not only be "pending" but must be "at issue," for if it became at issue during the term it would not be triable until the next term. In the case at bar the suit was not only not "at issue" but the juror had been granted time, until after the term, in which to answer. *State v. Snarr*, 121 N. C. 669, 28 S. E. 549. (2) This is the only specific ground of challenge prescribed by the statutes. *State v. Vick*, 132 N. C. 995, 43 S. E. 626. (3) Jurors are competent when drawn on special venire though they then have suits pending and at issue. *State v. Starnes*, 94 N. C. 973, following *State v. Carland*, 90 N. C. 668.

46. *Murphy v. State*, 9 Lea (Tenn.) 373, upholding state's challenge to juror tried and acquitted on previous day.

47. *Riley v. Bussell*, 1 Heisk. (Tenn.) 294.

48. **Ariz.**—Civ. Code, §3558, subd. 4. **Cal.**—Code Civ. Proc., §602, subd. 4. **Idaho.**—Code Civ. Proc., §4380, subd. 4. **Mont.**—Rev. Code, §6741, subd. 4. **Nev.**—Rev. Laws, §5206, subd. 4. **N. D.**—Rev. Code, §7017, subd. 4. **S. D.**—Code Civ. Proc., §252, subd. 4. **Utah.**—Comp. Laws, §3144, subd. 4. **Wyo.**—Comp. Laws, §4496, subd. 4.

49. **Ia.**—Code, §5360, subd. 15. **Nev.**—Rev. Laws, §7148, subd. 11. **Utah.**—Comp. Laws, §4834, subd. 11.

Witness before grand jury as being subject to challenge under statute aimed at witnesses in the case, see *supra*, VII, F, 14, e.

50. *Jacobs v. State*, 1 Ga. App. 519, 57 S. E. 1063, both cases were for vagrancy. Cited with approval in *Temples v. Central of Ga. Ry. Co.*, 15 Ga. App. 115, 82 S. E. 777.

[a] Other cases resting on the same fraudulent transactions, and the fraud in each case having been committed about the same time; having made up his mind that defendant was guilty in the other case, must have so biased his mind in the case at bar as to render him incompetent. *Carr v. State*, 104 Ala. 43, 16 So. 155; *Carr v. State*, 104 Ala. 4, 16 So. 150.

[b] But where it does not appear that the testimony was the same the mere fact that a juror was a witness in another case against the same defendant does not disqualify him. *Hannan v. State* (Tex. Crim.), 33 S. W. 538.

51. *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

52. *State v. Benton*, 19 N. C. 196.

53. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, but if he was chosen by one party only, the other party could challenge him when he was called as a juror, because he was in a manner counsel for the one who chose him.

54. **Kan.** Gen. St., §§5876, 6778; **Okla.** Rev. Laws, §4997.

b. *Member of Grand Jury That Found Indictment.*—Grand jurors who found the indictment were incompetent to try the case at common law,⁵⁵ and in the absence of statute that is still the rule,⁵⁶ and the juror is subject to principal challenge.⁵⁷ Those grand jurors who found the indictment are declared incompetent to serve on the trial thereof by some statutes,⁵⁸ and are consequently subject to challenge for cause under the general rule.⁵⁹ By other statutes it is specifically made a ground for challenge in criminal cases that the juror was one of those who found the indictment,⁶⁰ being ground for challenge for implied bias under many statutes.⁶¹ Under these statutes a juror who found the indictment is subject to challenge but not absolutely disqualified.⁶² The state may challenge though the defendant is willing to waive the objection.⁶³ Generally jurors who merely returned an

55. *Ind.*—Barlow v. State, 2 Blackf. 114, citing 2 Hawks 418. *N. H.*—See State v. Sawtelle, 66 N. H. 488, 32 Atl. 831. *N. C.*—State v. Perkins, 66 N. C. 126; State v. Benton, 19 N. C. 196. *Tenn.*—Gillespie v. State, 8 Yerg. 507, 29 Am. Dec. 137. *Wis.*—Bennet v. State, 24 Wis. 57.

[a] At common law the juror was subject to a fine for not "challenging himself" when drawn on the petit jury. Dilworth v. Com., 12 Gratt. (53 Va.) 689, 65 Am. Dec. 264; Bennet v. State, 24 Wis. 57.

56. *Ala.*—Harris v. State, 177 Ala. 17, 59 So. 205; Battle v. State, 54 Ala. 93; Birdsong v. State, 47 Ala. 68. *Ga.*—Cobb v. State, 45 Ga. 11. *La.*—State v. Smith, 41 La. Ann. 688, 6 So. 546. *Miss.*—Jefferson v. State, 52 Miss. 767, presumed to be prejudiced. *W. Va.*—State v. Cooper, 74 W. Va. 472, 82 S. E. 358; State v. McDonald, 9 W. Va. 456.

[a] Obvious reason for the rule is that the grand juror has formed a decided and fixed opinion after having heard witnesses testify on oath. Bennet v. State, 24 Wis. 57. See also United States v. Christensen, 7 Utah 26, 24 Pac. 618.

57. Bristow v. Com., 15 Gratt. (56 Va.) 634; Dilworth v. Com., 12 Gratt. (53 Va.) 689, 65 Am. Dec. 264.

58. *Kan.*—Gen. St., §6779, "shall not serve." *Mo.*—Rev. St., 1909, §7274 ("grand jurors shall not be compelled to serve on a petit jury during the same term"); §5216 (incompetent to serve where found indictment or presentment); State v. Brown, 119 Mo. 527, 24 S. W. 1027, 25 S. W. 200. *S. C.*—Crim. Code, §53 ("no member of the grand jury which has found an indict-

ment shall be put upon the jury for the trial thereof"); State v. O'Driscoll, 2 Bay 153.

59. See *supra*, VII, F, 1.

60. *Ariz.*—Pen. Code, §1023, subd. 7. *Fla.*—Gen. St., §3907. *Ind.*—Burns' Ann. St., §2101, subd. 1. *Ia.*—Code, §5360, subd. 7; State v. Munchrath, 78 Iowa 268, 43 N. W. 211, "conclusively presumed" to be disqualified. *Me.*—Rev. St., ch. 135, §20. *Mich.*—How. St., §15115. *Neb.*—Rev. St., §9109, subd. 1. *Ohio.*—Beck v. State, 20 Ohio St. 228. *Tex.*—Code Crim. Proc., art. 673, subd. 7. *Wis.*—St. (1915), §4688. *Wyo.*—Comp. Laws, §6207, subd. 1.

61. *Ark.*—Kirby's Dig., §2363, subd. 3. *Cal.*—Pen. Code, §1074, subd. 4. *Idaho.*—Rev. Code, §7834, subd. 4. *Ky.*—Code Crim. Proc., §210, subd. 3; O'Brian v. Com., 9 Bush 333, 15 Am. Rep. 715. *Minn.*—Rev. Laws, 1905, §5391, subd. 4. *Mont.*—Rev. Code, §9262, subd. 4. *Ne v.*—Rev. Laws, §7148, subd. 4. *N. Y.*—Code Crim. Proc., §377, subd. 4. *N. D.*—Rev. Code, §9973, subd. 4. *Okla.*—Rev. Laws, §5859, subd. 4. *Ore.*—Lord's Laws, §1521, subd. 3. *S. D.*—Code Crim. Proc., §339, subd. 4. *Utah.*—Comp. Laws, §4834, subd. 4.

[a] Where the prosecution is by information, one who is a member of the grand jury then on a recess is not disqualified under a statute directed at grand jurors who found the indictment. People v. Ebanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269.

62. Denmark v. State, 43 Fla. 182, 31 So. 269; Gavin v. State, 42 Fla. 553, 29 So. 405.

63. Williams v. State, 109 Ala. 64, 19 So. 530; Finch v. State, 81 Ala. 41, 1 So. 565.

indictment on another matter are not disqualified,⁶⁴ except where the statute disqualifies all grand jurors then serving.⁶⁵ A juror is not incompetent in a civil case because he has served as a grand juror in a criminal case involving the same transaction,⁶⁶ unless the statute so provides.⁶⁷

c. *Member of Coroner's Jury That Investigated.*—In the absence of statute it seems that one who had been foreman of the coroner's jury would be excluded on proper objection made.⁶⁸ And that one was a member of the coroner's jury which inquired into the cause of death is made by statute ground for challenge on the trial of the indictment for the killing,⁶⁹ being ground of challenge for implied bias under most statutes.⁷⁰

17. *Service on Other Petit Juries.*—a. *In General.*—The general rule is that one who, as juror, has given judgment upon the same matter is subject to challenge for cause.⁷¹

b. *On Former Jury in Same Case.*—At common law a juror who had given a verdict in a former trial of the same cause, could not sit on the jury on a new trial,⁷² for the rule is that it is a ground for challenge, even though there be no express statute to that effect, where the former jury rendered a verdict,⁷³ and by the weight of authority that is the rule upon a mistrial,⁷⁴ but the contrary has been held on the theory that the opinion to be disqualifying must have been

64. *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690.

65. Cal. Code Civ. Proc., §199, subd. 4.

66. *Mounce v. Crowson*, 59 Tex. Civ. App. 533, 126 S. W. 915, it was not claimed that the juror was biased or prejudiced.

67. Ia. Code, §3688, subd. 8.

68. *Johnson v. State*, 90 Md. 579, 45 Atl. 531.

69. *Ariz. Pen. Code*, §1023, subd. 7; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211, "conclusively presumed" to be disqualified.

70. Ark.—*Kirby's Dig.*, §2363, subd. 3. Cal.—*Pen. Code*, §1074, subd. 4. Idaho.—*Rev. Code*, §7834, subd. 4. Ky. *Code Crim. Proc.*, §210, subd. 3. Minn. *Rev. Laws*, 1905, §5391, subd. 4. Mont. *Rev. Code*, §9262, subd. 4. Nev.—*Rev. Laws*, §7148, subd. 4. N. Y.—*Code Crim. Proc.*, §377, subd. 4. N. D.—*Rev. Code*, §9973, subd. 4. Okla.—*Rev. Laws*, §5859, subd. 4. Ore.—*Lord's Laws*, §1521, subd. 3. S. D.—*Code Crim. Proc.*, §339, subd. 4. Utah.—*Comp. Laws*, §4834, subd. 4.

71. N. C.—*State v. Benton*, 19 N. C. 196. Tex.—*Vernon Sayles' Civ. St.*, art. 5117, subd. 5. Wash.—*Rem. & Bal. Code*, §330, subd. 3.

[a] Upon "Trial of Same Issues." Ia. Code, §3688, subd. 7.

72. *Burnett v. Burlington & M. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harvey*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344; *Baker v. Harris*, 60 N. C. 271, "it is a well established and ancient usage."

[a] Reason for Rule.—Not because he had formed or expressed an opinion, but having heard the evidence and determined the issue upon his oath he could not by a second verdict confess that in the former he was forsworn. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. But see *United States v. Burr*, 25 Fed. Cas. No. 14,692g.

[b] Jury on Inquisition Under Writ Ad Quod Damnum.—*Hunter v. Matthews*, 12 Leigh (39 Va.) 228.

73. *De Mateo v. Perano*, 80 N. J. L. 437, 78 Atl. 162; *State v. Benton*, 19 N. C. 196, though verdict reversed by writ of error or judgment arrested.

74. *Commander v. State*, 60 Ala. 1. [a] *Simpson v. People*, 47 Colo. 612, 108 Pac. 169, the court reversing for another reason, suggests that the interests of both public and prisoner would have been better served by sustaining a challenge for cause based on the fact that the juror had formerly

expressed.⁷⁵ By some statutes persons who sat on a former trial are disqualified,⁷⁶ and so subject to challenge under the general rule.⁷⁷ In civil actions having served as a juror on a previous trial between the same parties for the same cause of action is ground for challenge for cause under many statutes,⁷⁸ being a principal ground for challenge under some statutes,⁷⁹ and for implied bias under others.⁸⁰

In criminal prosecutions it is ground for challenge for cause under many statutes that the juror had served on a petit jury which was discharged after hearing evidence, or rendered a verdict that was set aside;⁸¹ it being frequently made ground for challenge for implied bias.⁸² The challenge is properly one to the individual juror and not to the array.⁸³ It does not matter whether any additional or different witnesses are to be examined.⁸⁴ But the rule has been held not to apply where the first jury was discharged without having heard any testimony,⁸⁵ or where the jurors were re-summoned after motion for a change of judge was granted,⁸⁶ or the jurors had tried merely defendant's plea in bar.⁸⁷ The rule does not apply as to jurors who

served in a partial trial of the same cause.

75. *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361, it holding that even though a juror sat in a former trial, he is not subject to challenge, because though he may have formed an opinion he has not expressed it, no verdict having been rendered.

76. *Vernon Sayles' Civ. St. (Tex.)*, art. 5117, subd. 5; *Tex. Code Crim. Proc.*, art. 673, subd. 8.

77. See *supra*, VII, F, 1.

78. *Ariz.*—*Civ. Code*, §3558, subd. 4. *Cal.*—*Code Civ. Proc.*, §602, subd. 4. *Idaho.*—*Code Civ. Proc.*, §4380, subd. 4. *Mont.*—*Rev. Codes*, §6741, subd. 4. *Nev.*—*Rev. Laws*, §5206, subd. 4. *N. D.*—*Rev. Code*, §7017, subd. 4. *S. D.*—*Code Civ. Proc.*, §252, subd. 4. *Utah.*—*Comp. Laws*, §3144, subd. 4. *Wyo.*—*Comp. Laws*, §4496, subd. 4.

79. *Kan.*—*Gen. St.*, §§5876, 6778. *Ohio.*—*Gen. Code*, §11437, subd. 4. *Okla.*—*Rev. Laws*, §4997.

80. *Lord's Laws (Ore.)*, §122, subd. 3; *Rem. & Bal. Code (Wash.)*, §330, subd. 3.

81. *Ariz.*—*Pen. Code*, §1023, subd. 9. *Ind.*—*Burns' Ann. St.*, §2101, subd. 5. *Ia.*—*State v. Munchrath*, 78 Iowa 268, 43 N. W. 211. *Neb.*—*Rev. St.*, §9109, subd. 5. *Ohio.*—*Gen. Code*, §13,653, subd. 5. *Wyo.*—*Comp. Laws*, §6207, subd. 5.

82. *Ark.*—*Kirby's Dig.*, §2363, subd. 5. *Cal.*—*Pen. Code*, §1074, subd. 6. *Idaho.*—*Rev. Code*, §7834, subd. 6. *Ky.*—*Code Crim. Proc.*, §210, subd. 5. *Minn.*

Rev. Laws, 1905, §5391, subd. 6. *Mont.*—*Rev. Code*, §9262, subd. 6. *Nev.*—*Rev. Laws*, §7148, subd. 6. *N. Y.*—*Code Crim. Proc.*, §377, subd. 6. *N. D.*—*Rev. Code*, §9973, subd. 6. *Okla.*—*Rev. Laws*, §5859, subd. 6. *Ore.*—*Lord's Laws*, §1521, subd. 4. *S. D.*—*Code Crim. Proc.*, §339, subd. 6. *Utah.*—*Comp. Laws*, §4834, subd. 6.

83. *State v. Barnes*, 54 Wash. 493, 103 Pac. 792, 23 L. R. A. (N. S.) 932.

See generally as to challenge to array or poll, *supra*, VII, E, 3, a, (V).

84. *Baker v. Harris*, 60 N. C. 271.

85. *Shelby v. Com.*, 91 Ky. 563, 16 S. W. 461.

86. *State v. Matthews*, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136.

87. *Careno v. State*, 3 Ohio Cir. Ct. (N. S.) 629, judgment affirmed, 69 Ohio St. 561, 70 N. E. 1116, no evidence tending to prove or disprove defendant's guilt was introduced.

[a] Jurors who have tried the special plea of *autrefois acquit*, and have found against the plea, may sit as jurors on the trial of the main issue. The jurors had heard nothing of the testimony except that one witness had spoken of the prisoner's "confession," but was told not to say anything about the confession, and the jurors all stated they had no impression of the guilt or innocence of the prisoner, and could give him a fair trial on the evidence. *Page v. Com.*, 27 Gratt. (68 Va.) 954.

have been excused at the former trial, on peremptory challenge.⁸⁸

c. *In Another Action or Prosecution Against Accused.*—By statute in many states one who has previously served as a juror in a civil case brought against the defendant for the act charged as a crime is subject to challenge for cause on the trial of the indictment,⁸⁹ it being ground for challenge for implied bias under many statutes.⁹⁰ The challenge is properly to the poll and not to the array.⁹¹ The general rule is that where a verdict in the former prosecution necessarily involved a determination of the main issue in the case at bar the juror is incompetent,⁹² though the evidence is to be different in some particulars,⁹³ and though the juror thinks he can find impartially.⁹⁴ But if the offense charged be entirely different in all its essential features, the juror is not incompetent,⁹⁵ even though it be for a similar offense.⁹⁶ But at least for the purpose of determin-

88. *Johnson v. State*, 130 Ga. 22, 60 S. E. 158, rejected by prisoner. And see *Nixon v. State*, 121 Ga. 144, 48 S. E. 966; *Blackman v. State*, 80 Ga. 785, 7 S. E. 626; *Carthaus v. State*, 78 Wis. 560, 47 N. W. 629, which suggests that juror excused on former trial might sit on later, but does not decide since juror was peremptorily challenged at latter trial.

[a] Reason for Rule.—The peremptory at the former trial only meant that at that time the prisoner preferred other jurors upon the panel. *Robertson v. State*, 4 Lea (Tenn.) 425.

89. *Ariz.*—Pen. Code, §1023, subd. 10. *Ind.*—Burns' Ann. St., §2101, subd. 6. See also *Burns' Ann. St.*, §1667. *Ia.*—*State v. Munchrath*, 78 Iowa 268, 43 N. W. 211. *Neb.*—Rev. St., §9109, subd. 6. *Ohio.*—Gen. Code, §13,653, subd. 6. *Wyo.*—Comp. Laws, §6207, subd. 6.

90. *Ark.*—Kirby's Dig., §2363, subd. 6. *Cal.*—Pen. Code, §1074, subd. 7. *Idaho.*—Rev. Code, §7834, subd. 7. *Ky.* Code Crim. Proc., §210, subd. 6. *Minn.* Rev. Laws, 1905, §5391, subd. 7. *Mont.* Rev. Code, §9262, subd. 7. *Nev.*—Rev. Laws, §7148, subd. 7. *N. Y.*—Code Crim. Proc., §377, subd. 7. *N. D.*—Rev. Code, §9973, subd. 7. *Okla.*—Rev. Laws, §5859, subd. 7. *Ore.*—Lord's Laws, §1521, subd. 5. *S. D.*—Code Crim. Proc., §339, subd. 7. *Utah.* Comp. Laws, §4834, subd. 7.

91. *Bullard v. State*, 14 Ga. App. 478, 81 S. E. 369.

See generally as to challenge to array or poll, *supra*, VII, E, 3, a, (V).

92. *Railway Co. v. Smith*, 60 Ark. 221, 29 S. W. 752; *Bullard v. State*, 14 Ga. App. 478, 81 S. E. 369, juror who

convicted defendant of fornication with prosecutrix is incompetent in bastardy case.

93. *Baker v. Harris*, 60 N. C. 271, fraud on creditors, only difference being as to the creditor defrauded.

[a] Different Instrument Forged. Jurors are subject to challenge for cause who had tried defendant for the forgery of a signature upon another instrument, the parties upon whom the forgery was practiced being the same, the instruments having been transferred at the same time, and the principal facts being the same in both cases. *Curtis v. State*, 118 Ala. 125, 24 So. 111.

[b] Evidence of Transaction Introduced in Former Case.—Juror who had served in another case against defendant, in which evidence of the transaction under consideration was introduced, is incompetent. *Jackson v. State*, 103 Ga. 417, 30 S. E. 251.

[c] Sale of Liquor at Different Time.—In a local option case jurors who had found defendant guilty of selling liquor to a particular person at one time were incompetent to try him in a second case for selling liquor to the same person at another time, all the evidence being practically the same. *Holmes v. State*, 52 Tex. Crim. 352, 106 S. W. 1160. See also *Barnes v. State* (Tex. Crim.), 88 S. W. 805. But see note 96, next following.

94. *Baker v. Harris*, 60 N. C. 271.

95. *State v. Maloney*, 118 Mo. 112, 23 S. W. 1084.

96. *Patterson v. State*, 48 N. J. L. 381, 4 Atl. 449, trial at same term.

[a] Members of a jury who tried defendant for selling liquor illegally to

ing peremptories, the juror may be asked whether if the facts are shown to be similar, he has a fixed opinion.⁹⁷

d. *On Trial of Another for the Offense Charged.*—One who has served on a jury which tried another for the offense charged against the prisoner is subject to challenge for cause under the statutes,⁹⁸ it being usually made ground for challenge for implied bias.⁹⁹ A juror is incompetent where he has sat on the jury that tried another jointly indicted defendant,¹ even though he says he has formed no opinion and can try defendant impartially.² Challenge to the poll and not motion for a continuance is the proper practice in such cases.³ Jurors are not incompetent who were on the panel to try a co-defendant but were excused on peremptory challenge by either state or defendant.⁴

e. *On Trial of Another for a Different Offense.*—That jurors by their examination in a similar case have shown themselves to be incompetent does not establish their incompetency in the case at bar.⁵ The statutes forbidding one to serve on a jury which has tried another for the offense charged⁶ do not have reference to the trial of another for a like offense.⁷ Hence where prosecutions are of differ-

one person are not disqualified to act on a jury to try the same defendant for sales made to another, the environments in the two cases being entirely different, the witnesses not being the same nor the issues the same. *Engman v. State* (Tex. Crim.), 180 S. W. 235, *distinguishing* *Edgar v. State*, 59 Tex. Crim. 252, 127 S. W. 1053, and *Edgar v. State*, 59 Tex. Crim. 488, 129 S. W. 140. See also *Ross v. State*, 56 Tex. Crim. 275, 118 S. W. 1034; *Arnold v. State*, 38 Tex. Crim. 1, 40 S. W. 734. But see note 93, next preceding.

97. *Barnes v. State* (Tex. Crim.), 88 S. W. 805, even assuming the facts were not exactly similar.

98. *Ariz. Pen. Code*, §1023, subd. 8; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211.

99. *Ark.*—*Kirby's Dig.*, §2363, subd. 4. *Cal.*—*Pen. Code*, §1074, subd. 5. *Idaho.*—*Rev. Code*, §7834, subd. 5. *Ky.* *Code Crim. Proc.*, §210, subd. 4. *Minn.* *Rev. Laws*, 1905, §5391, subd. 5. *Mont.* *Rev. Code*, §9262, subd. 5. *Nev.*—*Rev. Laws*, §7148, subd. 5. *N. Y.*—*Code Crim. Proc.*, §377, subd. 5. *N. D.*—*Rev. Code*, §9973, subd. 5. *Okla.*—*Rev. Laws*, §5859, subd. 5. *S. D.*—*Code Crim. Proc.*, §339, subd. 5. *Utah.* *Comp. Laws*, §4834, subd. 5.

1. *Wells v. State*, 2 Ga. App. 658, 29 S. E. 442; *McKay v. State*, 6 Ga. App. 527, 65 S. E. 306; *Paulk v. State*, 2 Ga. App. 662, 58 S. E. 1109; *State*

v. Sheeley, 15 Iowa 404.

[a] *Trial of an accomplice*, where both are charged as accessories before the fact. The material issue in both cases is the guilt of the principal. *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724.

Trial of another for offense growing out of offense charged, see *infra*, VII, F, 17, e.

2. *McKay v. State*, 6 Ga. App. 527, 65 S. E. 306.

3. *Humphries v. State*, 100 Ga. 260, 28 S. E. 25.

4. *State v. Matthews*, 98 Mo. 119, 10 S. W. 30, 11 S. W. 1136.

5. *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895.

6. See *supra*, VII, F, 17, d.

7. *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059.

[a] *Offense of illegal voting* is single and cannot be jointly committed, so statute does not apply. *State v. Sheeley*, 15 Iowa 404.

[b] *On an indictment for gaming* after juror stated he had just sat upon a jury which tried another for the same kind of an offense, it was held proper to refuse to permit him to be asked "if the evidence in this case should be the same as in that just decided," whether his mind was made up as to the guilt or innocence of defendant. *State v. Leicht*, 17 Iowa 28.

ent persons for different offenses, the jurors are competent to sit in both cases though the prosecutions are for the same kind of crime.⁸ The mere fact that the prosecuting witness is the same does not change this rule,⁹ nor does the fact that the crimes were committed on the same person.¹⁰ But where all the evidence and circumstances were the same, and the cases turned on the credibility of the chief witness, the only difference being the different defendants, a juror who had convicted one was held incompetent to try the other.¹¹ Also if the main issue is the same jurors who tried the one defendant are incompetent to try the other.¹² But generally where there is no connection between the two cases except that they grew out of the same controversy the juror is competent,¹³ and where the offenses are of an entirely different nature the mere fact that some of the witnesses

[c] **Service in Another Jurisdiction.** The mere fact that a juror had been a member of a jury who tried and found guilty one charged with murder in another jurisdiction, does not disqualify him from sitting in a murder trial in this state. *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059.

8. *Bailey v. State*, 56 Tex. Crim. 226, 120 S. W. 419.

[a] **Not Proper To Ask as to Verdict in Other Case.**—Though in some cases proper questions may be asked to show prejudice as to certain offenses, it was not error in a rape case to refuse to permit a juror who had stated he had been a juror in a criminal assault case, to be asked what verdict had been rendered in that case. A verdict in a particular case having no connection with the case at bar would not be material to show his bias or prejudice. *Wragg v. State*, 65 Tex. Crim. 131, 145 S. W. 342.

9. *Irvine v. State*, 55 Tex. Crim. 347, 116 S. W. 591. But see *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497.

10. *State v. Van Waters*, 36 Wash. 358, 78 Pac. 897.

11. *Roberts v. State*, 4 Ga. App. 378, 61 S. E. 497 (the principal witness in all the cases was the same person and his credibility had been unsuccessfully attacked in the other cases); *Smith v. State*, 61 Tex. Crim. 328, 135 S. W. 154; *Green v. State*, 54 Tex. Crim. 3, 111 S. W. 933, intoxicating liquors sold by different persons.

12. *People v. Craig*, 48 Mich. 502, 12 N. W. 675.

[a] **In a prosecution for selling liquor to an habitual drunkard jurors who have tried another defendant for selling to the same person are incom-**

petent. The fact of the selling was not in dispute and whether the buyer was a drunkard was one of the main issues in the case. *Smith v. State*, 55 Ala. 1.

[b] **Other defendant convicted of playing game at same time and place at which defendant is charged with committing like offense.** *Wickard v. State*, 109 Ala. 45, 19 So. 491. See also *Bryan v. State*, 124 Ga. 79, 52 S. E. 298; *Lewis v. State*, 118 Ga. 803, 45 S. E. 602.

[c] **One Defendant Buyer and Other Seller of Vote.**—*Brown v. State*, 104 Ga. 736, 30 S. E. 951.

[d] **Triers of Briber Incompetent To Try Taker of Bribe.**—*People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871.

[e] **Triers of Thief Cannot Try Receiver of the Stolen Goods.**—*Clark v. State*, 44 Tex. Crim. 536, 72 S. W. 591.

13. *Gruesendorf v. State* (Tex. Crim.), 56 S. W. 624.

[a] **Murder Committed in Same Riot.**—On the trial of one of two persons jointly indicted for riot, a juror is not incompetent because he was a juror on a prosecution for murder, against the person jointly indicted for the riot, although the murder was perpetrated during the riot. There was nothing in the record to show that the testimony on the two trials was the same or that anything developed in the other trial which would disqualify the juror in the present trial, and the juror stated on his voir dire that he entertained no disqualifying opinions and could try the case fairly and impartially. *State v. Seeley*, 51 Ore. 131, 94 Pac. 37.

are the same does not make the jurors incompetent.¹⁴ If counsel believe that criticism by the judge of the jury in another case, has influenced the jurors in the case at bar, he may ask as to service in that other case in order to determine as to peremptories.¹⁵

f. *In Actions Between Different Parties.*—By statute it is sometimes provided that one shall not serve within a certain time after he has been a juror in a suit by or against either of the parties,¹⁶ and some statutes provide that one cannot sit as a juror in a civil case who has served as a juror in a criminal action against either party upon substantially the same facts or transaction,¹⁷ but generally it is not proper to ask jurors as to their feeling in another case against the same party by a different plaintiff.¹⁸ Jurors are not necessarily incompetent because they have served in an action of a similar nature where only one of the parties is the same.¹⁹ The mere fact that some of the facts involved in both cases are the same, does not make the juror subject to challenge.²⁰ It has been held that a juror who has tried another case growing out of the same condemnation proceedings is not competent,²¹ but jurors who have been impaneled to try the entire issue in condemnation proceedings do not become disqualified to determine the damages as to some parcels because they have already determined as to others.²²

14. *People v. Wright*, 170 Mich. 154, 135 N. W. 912, the case at bar was for larceny and the other case was against another defendant for keeping a house of ill-fame.

15. *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089.

16. Cal. Code Civ. Proc., §602, subd. 4.

17. Ia.—Code, §3688, subd. 8. Ore. Lord's Laws, §122, subd. 3. Wash. Rem. & Bal. Code, §330, subd. 3.

18. *Natchez J. & C. R. R. Co. v. Bolls*, 62 Miss. 50, jurors having affirmatively shown impartiality.

19. *Natchez J. & C. R. R. Co. v. Bolls*, 62 Miss. 50; *Chariton Plow Co. v. Deusch*, 16 Neb. 384, 20 N. W. 268, action on two promissory notes, fraud set up as defense in each.

[a] **Civil Damage Suits Against Different Defendants.**—The supreme court refused to reverse the discretion of the trial court, finding jurors competent who had sat as jurors in the trial of an action between the plaintiff and another defendant, the gist of each action being the sale of liquor to plaintiff's husband to plaintiff's damage. *Dew v. McDivitt*, 31 Ohio St. 139.

[b] **Former suit against another indorser of the same note on the indorsement of which defendant was be-**

ing sued. Juror is not necessarily incompetent. *Nugent v. Trepagnier*, 2 Mart. O. S. (La.) 205.

20. *Algier v. The Maria*, 14 Cal. 167, jurors had tried other cases involving negligence of same defendant brought by other plaintiffs.

[a] **In an action to enforce a fire insurance policy**, the mere fact that some of the jurors had acted as jurors in another case growing out of the same fire, would not disqualify them; the court finding that they could determine the case at bar independently of ideas entertained with reference to the other case. *Granite State F. Ins. Co. v. Buckstaff Bros. Mfg. Co.*, 53 Neb. 123, 73 N. W. 544.

[b] **The court could not know on the counsel's mere suggestion** that the case then before it was to be similar, nor could the individual jurors know what the facts would be, though they did know their opinion in the previous case. *Algier v. The Maria*, 14 Cal. 167.

Similarity of issues in criminal case, see preceding section.

21. *Hunt v. Columbia*, 122 Mo. App. 31, 97 S. W. 955.

22. *Kundinger v. Saginaw*, 59 Mich. 355, 26 N. W. 634; *Manhattan Bldg. Co. v. Seattle*, 52 Wash. 226, 100 Pac. 330.

18. **Acquaintanceship and Friendship.**²³ — Mere acquaintance of jurors with a party litigant does not imply any bias by them in his favor, nor raise any presumption of prejudice against him,²⁴ nor is friendship toward the party disqualifying of itself,²⁵ but if a juror admits that his friendship is such that it would bias his judgment, he is properly excluded on challenge.²⁶ Whether mere friendship with deceased would disqualify one in trial of person charged with murder has been doubted,²⁷ but it is error to overrule a challenge to such a juror who had expressed an opinion of the defendant's guilt;²⁸ and friendship for the accused may be such as to render the juror subject to challenge.²⁹ And for the purpose of determining as to peremp-

23. **Friendship or acquaintance with attorney,** see *infra*, VII, F, 20, a.

Friendship toward one of state's principal witnesses as not constituting bias, see *supra*, VII, F, 13, g.

24. *Perkins v. Sunset Tel. & T. Co.*, 155 Cal. 712, 103 Pac. 190; *Brennan v. O'Brien*, 121 Mich. 491, 80 N. W. 249, "close acquaintanceship."

[a] **A mere "intimate acquaintance"** with a party is not sufficient ground for challenge for cause. *Moore v. Cass*, 10 Kan. 288.

25. *Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749, though friendly feelings are based on past favors.

[a] **"Jurors, like the court, are expected to forget their personal friendship for the parties on the trial of a cause, and upon their solemn oaths, render an impartial verdict according to the evidence."** *Lavender v. Hudgens*, 32 Ark. 763.

[b] **Friendship for Principal Stockholder of Interested Corporation.**—That jurors were in the employ of certain corporations the principal stockholder of which was also the principal stockholder in the corporation whose goods defendant was accused of taking, and which corporation was taking an active interest in the prosecution; coupled with the fact that the jurors were on terms of friendly intimacy with said stockholder and had received many favors from him and desired to retain his friendship and good will, while all having a bearing upon their indifference are not disqualifying as a matter of law, and hence the trial court's determination that they were indifferent despite such relationship will not be disturbed on appeal. *Territory v. Robello*, 20 Hawaii 7.

26. *Stinson v. Sachs*, 8 Wash. 391,

36 Pac. 287, would believe his friend when contradicted by a stranger.

[a] **A bias is shown** making the juror incompetent where he admits that if the evidence was evenly balanced his friendship and acquaintance with one of the parties is such that he would be inclined to give him a verdict, notwithstanding he also says that he would try to lay aside his bias and decide according to the evidence and the instructions. *Lombardi v. California St. Cable R. Co.*, 124 Cal. 311, 57 Pac. 66.

[b] **Notwithstanding Expressed Ability To Be Impartial.**—One who was an old friend of decedent whose minor children were seeking to enforce a life insurance policy, and who stated that while he could sit impartially, and decide according to the law and evidence, and was not affected by bias or prejudice, also said he would not do anything to injure decedent's children, and while he would not consciously favor them, he might unconsciously do so, and it was probable that he would, and that plaintiff and defendant would not enter upon the trial of the case evenly balanced; should have been excused on defendant's challenge for cause. *Grand Lodge A. O. U. W. v. Taylor*, 44 Colo. 373, 99 Pac. 570.

27. *State v. Nocton*, 121 Mo. 537, 26 S. W. 551.

28. *State v. Jackson*, 37 La. Ann. 768, the court said, "We can scarcely conceive it possible a man should have no bias against one whom he firmly believed had wantonly killed his close friend." Defendant's peremptories having been exhausted reversal followed overruling challenge for cause.

As to expressions of opinion generally, see *infra*, VII, F, 23.

29. *State v. Caron*, 118 La. 349, 42

tories one may be asked as to his acquaintance with persons claimed to have some interest in the case.³⁰

19. Business or Contractual Relationship.³¹ — a. *In General.* That a juror has had business dealings with a party does not necessarily render him incompetent,³² nor is he subject to challenge merely because he is a competitor of a party and interested in a rival company,³³ or because he holds a policy of life insurance in the same com-

So. 960, where a neighbor of accused had talked about the case with persons who knew something about it, and the court believed him biased.

30. With attorneys interested in case, see *infra*, VII, F, 19, a.

As to surety companies, see *infra*, VII, F, 19, g.

31. Of fiduciary character, see *infra*, VII, F, 20.

32. Rumping v. Arkansas Nat. Bank, 121 Ark. 202, 180 S. W. 749 (juror had borrowed money of defendant bank in due course of business); *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087, plaintiff was regular customer at juror's store.

[a] That the juror and party and other persons had purchased a threshing machine for their common use and not for profit "is at best a business relationship theoretic or imaginary in its character," and is so remote as not to be capable of influencing the mind and conduct of juror. *Maffenfeier v. Koenig*, 59 Ind. App. 518, 108 N. E. 594.

[b] **Possession of Free Tickets Given by Party.**—In *Shepard v. Lewiston, etc. St. Ry.*, 101 Me. 591, 65 Atl. 20, it was held that the mere possession by a jurymen of tickets entitling him to ride free, issued to him as trustee of a certain society and of trivial value, was not of itself indicative of bias or prejudicial feeling in favor of defendant, there being nothing to show any corrupt motive on the part of anyone.

[c] That the juror had received passes from defendant railroad company, and might receive others, said passes being issued to him as the employe of another road and only on the request of the officials thereof, he not being at the time of the trial the holder of any pass nor the recipient of any present favor from defendant, does not disqualify him. *Temples v. Central of Ga. Ry. Co.* (Ga. App.), 91 S. E. 502.

[d] **A contracting freight agent of**

a corporation of which defendant corporation was a large customer was competent though he stated that he wanted to keep in the good graces of defendant and would do it any little favor that would not be against his conscience, but that he had no prejudice against plaintiff and that if selected as a juror he would try the case according to the law and evidence. His rejection went beyond the limit of judicial discretion and amounted to giving plaintiff an additional peremptory. *Joyce v. Metropolitan St. Ry. Co.*, 219 Mo. 344, 118 S. W. 21.

[e] That a party is president and principal owner of a bank of which jurors are depositors or debtors, is too indirect a relationship to make them incompetent as a matter of law. *Twitchell v. Thompson*, 78 Ore. 285, 153 Pac. 45; *Harrison v. Pacific Ry. & N. Co.*, 72 Ore. 553, 144 Pac. 91.

[f] **Unfriendly Feeling Growing Out of Business Relation.**—An action being against a corporation, the mere fact that a juror had an unfriendly feeling growing out of business difficulties he had had with the president of the corporation, which feeling was personal to the president and did not extend to the corporation, does not make him incompetent. *Heucke v. Milwaukee City Ry. Co.*, 69 Wis. 401, 34 N. W. 243.

[g] **Both Parties Formerly Physicians of Juror.**—Where two physicians were being sued for malpractice the fact that each of them had previously been the juror's physician either for himself or his family, and that he was on friendly terms with both, though neither had been employed by him for eighteen months, does not render the juror incompetent where the juror says he can try fairly despite his acquaintance with defendants. *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295.

33. Rogers Grain Co. v. Tanton, 136 Ill. App. 533, he said he did not know the party and could try fairly.

panty as deceased.³⁴ But business relationships between the juror and one of the parties, if of such a nature as is calculated to influence his verdict, make him incompetent.³⁵ The matter is one for the trial court's discretion.³⁶ By statute it is sometimes made ground for challenge for cause that the juror is "united in business" with either party to a civil action,³⁷ or in a criminal prosecution, that the juror is "engaged in business" with the defendant, or the person injured, or on whose complaint the prosecution was instituted.³⁸

b. *Debtor or Creditor*.—The mere fact that a juror is debtor or creditor to a party does not necessarily disqualify him;³⁹ at most it gives rise to a challenge in the nature of the common-law challenge to the favor.⁴⁰ By statute in many states it is cause for challenge in civil suits that the juror stands in the relation of debtor or creditor

34. *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

Interest in result of action because holder of policy in, or member of company which is being sued, see *supra*, VII, F, 14, a.

35. *Maffenbeier v. Koenig*, 59 Ind. App. 518, 103 N. E. 594.

[a] Juror who said that it was to his interest to keep in favor with the defendant railroad company as he was an extensive shipper of grain and had received many favors from the defendant for which he felt under obligation to it, was properly excluded. *Omaha, etc. R. Co. v. Cook*, 37 Neb. 435, 55 N. W. 943.

[b] That juror disposed to favor railroad company because of business dealings and would give it benefit of doubt if evenly balanced is ground for challenge. This did not amount to statement that he would decide on preponderance of the testimony. *Denver S. P. & P. R. Co. v. Driscoll*, 12 Colo. 520, 21 Pac. 708, 13 Am. St. Rep. 243.

36. *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087.

[a] It is a question of fact to be determined by the trial court from all the evidence. *Twitchell v. Thompson*, 78 Ore. 285, 153 Pac. 45; *Harrison v. Pacific Ry. & N. Co.*, 72 Ore. 553, 144 Pac. 91.

37. *Idaho*.—Rev. Code, §4380, subd. 3. *Nev.*—Rev. Laws, §5206, subd. 3. *Utah*.—Comp. Laws, §3144, subd. 3.

[a] The expression "united in business" means any business relation which in the court's discretion indicates that the juror might be interested, biased, influenced or embarrassed in his verdict. *Sherman v. Southern*

Pac. Co., 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, so it is broad enough to include landlord and tenant.

38. *Ariz. Pen. Code*, §1023, subd. 11.

39. *Rumping v. Arkansas Nat. Bank*, 121 Ark. 202, 180 S. W. 749, juror indebted to defendant bank.

[a] Mere indebtedness to defendant bank is not a disqualifying relationship. "To hold, as a legal presumption, that such relationship would be likely to warp the judgment would be, in our opinion, to estimate too cheaply integrity under the sanction of an oath." *Richardson v. Planters' Bank*, 94 Va. 130, 26 S. E. 413.

[b] That juror was creditor of bank which prisoner was accused of defrauding does not disqualify him. The assets of the bank would be neither increased nor diminished by conviction or acquittal. *Imboden v. People*, 40 Colo. 142, 90 Pac. 608.

[c] Proper to ask him if he is drawer or indorser of any note in defendant bank. *Mechanics' & Farmers' Bank v. Smith*, 19 Johns. (N. Y.) 115.

[d] Indebtedness Held Disqualifying.—Juror to whom defendant in execution was indebted in a small amount, and who was contingently liable for a judgment on a forthcoming bond, the said defendant being insolvent, was clearly not competent, especially where he said he felt himself unfit to sit on the jury. *Ferriday v. Selser*, 4 How. (Miss.) 506.

40. *Thompson v. Douglass*, 35 W. Va. 337, 13 S. E. 1015, if the juror were shown to be so greatly indebted that he felt under special obligation, or at his mercy, it might be ground for exclusion. But it was improper to exclude jurors on a mere showing of

to either party,⁴¹ and in criminal prosecutions it is ground for challenge for implied bias that the juror is debtor or creditor to the defendant, or to the person injured, or to the person on whose complaint the prosecution was instituted.⁴²

c. *Partners*.⁴³—A member of a commercial partnership is incompetent to sit as a juror when his partner is a party,⁴⁴ and by statute it is ground for challenge for cause in civil actions that the juror is a partner;⁴⁵ so, being partner of defendant, or person injured, or on whose complaint the prosecution was instituted, is also ground for challenge for implied bias under some statutes.⁴⁶

d. *Fellow Employes*.—A juror is not rendered incompetent by the mere fact that both he and plaintiff are employed by the same concern.⁴⁷

e. *Master and Servant, Employer and Employe, Principal and Agent*.—At common law if the relationship of master and servant existed between the juror and a party challenge would lie,⁴⁸ and it is generally held that an employe is incompetent to act in any trial involving the rights or interests of his employer,⁴⁹ notwithstanding he

indebtedness without showing the amounts and the relative pecuniary standing of the parties.

41. *Cal.*—Code Civ. Proc., §602, subd. 3, or to officer of corporation party. *Idaho*.—Rev. Code, §4380, subd. 3. *Mont.*—Rev. Code, §6741, subd. 3. *Nev.*—Rev. Laws, §5206. *Utah*.—Comp. Laws, §3144, subd. 3. *Wyo.*—Comp. Laws, §4496, subd. 3.

[a] Query whether customers of gas company occupy relation of debtors thereto in absence of showing that they then owe it money. *McKernan v. Los Angeles Gas & E. Co.*, 16 Cal. App. 280, 116 Pac. 677.

42. *Mont.*—Rev. Code, §9262, subd. 2. *Nev.*—Rev. Laws, §7148, subd. 2, to defendant. *N. D.*—Rev. Code, §9973, subd. 2, to defendant. *Utah*.—Comp. Laws, §4834, subd. 2.

43. *Friendship of business partner of juror for counsel of adverse party as ground for challenge*, see *infra*, VII, F, 20, a.

44. *Maffenbeier v. Koenig*, 59 Ind. App. 518, 108 N. E. 594.

45. *Ala.*—Code, §7276, subd. 11. *Ariz.*—Civ. Code, §3558, subd. 3. *Cal.* Code Civ. Proc., §602, subd. 3. *Idaho*. Rev. Code, §4380, subd. 3. *Nev.*—Rev. Laws, §5206, subd. 3. *N. D.*—Rev. Code, §7017, subd. 2. *S. D.*—Code Civ. Proc., §252, subd. 3. *Utah*.—Comp. Laws, §3144, subd. 3. *Wyo.*—§4496, subd. 3.

[a] *For Implied Bias*.—Lord's Laws

(*Ore.*), §122, subd. 2; *Rem. & Bal. Code* (*Wash.*), §330, subd. 2.

46. *Lord's Laws* (*Ore.*), §1521, subd. 2.

47. *Simmons v. McConnell's Admr.*, 86 Va. 494, 10 S. E. 838, they were in different departments, plaintiff was a foreman but had no control over juror.

48. *U. S.*—*Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, servants or "stewards." *Ala.*—*Citizens' Light, H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199. *Ga.* *Atlantic Coast Line Ry. Co. v. Bunn*, 2 Ga. App. 305, 58 S. E. 538, following *Central Ry. Co. v. Mitchell*, 63 Ga. 173. *Ind.*—*Block v. State*, 100 Ind. 357. *Neb.*—*Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344, juror party's master.

[a] *Principal Challenge or to the Favor*.—*U. S.*—*Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, says it was ground for principal challenge. But in *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, the court says that Blackstone is in error in saying it was a principal cause of challenge at common law that the juror is the party's master.

49. *Ala.*—*Louisville & N. R. Co. v. Cook*, 168 Ala. 592, 53 So. 190. *Miss.* *Louisville, N. O. & T. Ry. Co. v. Mask*, 64 Miss. 738, 2 So. 360; *Hubbard v.*

swears he can try the case impartially,⁵⁰ this applying not only to individual employers but to partnerships,⁵¹ and corporations,⁵² but that a juror is in the employ of a stockholder of a corporation does not of itself disqualify him,⁵³ whether it will or not depending upon circumstances of which the trial court must judge.⁵⁴ It has been held that the employer of deceased should be excluded on challenge by a

Rutledge, 57 Miss. 7. **N. C.**—Blevins v. Erwin Cotton Mills Co., 150 N. C. 493, 64 S. E. 428.

[a] "A close relative is a less dangerous juror, if not a dependent kinsman, than one who is dependent on his employer." Central Ry. Co. v. Mitchell, 63 Ga. 173.

[b] Deputy sheriffs are not competent in a proceeding against the sheriff, since they were employes of the sheriff and his salary was derived from fees earned and collected from convictions. Gaff v. State, 155 Ind. 277, 58 N. E. 74, 80 Am. St. Rep. 235.

[c] Principal and agent cannot be qualified jurors in a case concerning the agency. Citizens' Light, H. & P. Co. v. Lee, 182 Ala. 561, 62 So. 199.

[d] **Though Employment Might Not Be Affected.**—A druggist whose store was a postal substation of which he was the clerk in charge, being technically a clerk in the city post-office, and receiving the lump sum of \$300 for all clerk hire and rent, and his employment being valuable to him not so much for the salary as for the prospective increase in his drug store business from persons who might at first come there to purchase stamps, etc., is, within the rule of the common law, incompetent in a case in which the government is involved, though it be assumed that no cessation of his employment would follow a verdict against the government. It is enough that it might possibly be the case. And he is subject to challenge as for implied bias though he says he is without any prejudice because of his relationship or otherwise. Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, reversing 30 App. Cas. (D. C.) 1.

50. Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. ed. 465, reversing 30 App. Cas. (D. C.) 1.

[a] Within the discretion of the court to exclude him, though he answers the statutory questions in the negative. Gunter v. Graniteville Mfg. Co., 18 S. C. 262.

51. Atlantic Coast Line R. Co. v. Bunn, 2 Ga. App. 305, 58 S. E. 538.

52. **Ga.**—Central Ry. Co. v. Mitchell, 63 Ga. 173; Temples v. Central of Georgia R. Co., 15 Ga. App. 115, 82 S. E. 777. **Neb.**—Burnett v. Burlington & M. R. R. Co., 16 Neb. 332, 20 N. W. 280. **N. Y.**—Code Civ. Proc., §1180.

[a] **Employment by Another Corporation.**—A juror is properly excluded who states that the fact of his employment by another railroad company might influence his verdict in condemnation proceedings by a railroad. Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 Pac. 238.

[b] **Employes of other corporations** whose president is president of defendant corporation are not subject to challenge therefor. Tucker v. Buffalo Cotton Mills, 76 S. C. 539, 57 S. E. 626, 121 Am. St. Rep. 957.

[c] **But if corporation has no pecuniary interest**, as where it was participating in the prosecution of one accused of attempted murder of a caretaker, the employe's interest is too remote to disqualify him. Taylor v. State, 13 Ga. App. 715, 79 S. E. 924.

53. Sansouwer v. Glenlyon Dye Works, 28 R. I. 539, 68 Atl. 545; Dimmack v. Wheeling Traction Co., 58 W. Va. 226, 52 S. E. 101.

[a] **But in California** see Code Civ. Proc., §602, which reads "or to an officer of a corporation which is a party."

54. Sansouwer v. Glenlyon Dye Works, 28 R. I. 539, 68 Atl. 545.

[a] **A juror is incompetent** who is an employe of a corporation in which the defendant corporation was largely interested though a minority stockholder, where his sole means of income depended upon his position which was terminable at his employer's pleasure. Defendant would have some voice in determining whether the juror would retain his position and it did not appear juror knew how much influence defendant might have or might exercise should it feel the verdict was

defendant charged with murder,⁵⁵ but that the employe of one who contributed to pay counsel to defend accused is not disqualified as a matter of law.⁵⁶

By statute it is ground for challenge for cause in many states that the juror and a party occupy the relation of master and servant, principal and agent, or employer and clerk,⁵⁷ and that the juror is employer, employe or agent of either party is ground for principal challenge in some states.⁵⁸ In criminal prosecutions it is usually ground for challenge for implied bias that the juror and defendant are in the relation of master and servant or employer and employe on wages,⁵⁹ this being extended by some statutes to include the person injured, or on whose complaint the prosecution is instituted.⁶⁰ Mere occasional employment to do odd jobs is not sufficient to disqualify the juror,⁶¹ and that he has been in the employ of a party at a time prior to the date of trial is not ground for challenge.⁶²

f. *Landlord and Tenant*. — At common law a juror who was tenant of a party was not competent to sit.⁶³ Whether the challenge at common law was principal or to the favor depended upon whether the juror was liable to be distrained for rent,⁶⁴ but the disqualification has

unjust or excessive. *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777.

55. *State v. Coella*, 3 Wash. 99, 28 Pac. 28.

56. *Campbell v. State*, 144 Ga. 224, 87 S. E. 277.

57. *Ariz.*—Civ. Code, §3558, subd. 3. *Cal.*—Code Civ. Proc., §602, subd. 3. *Idaho.*—Rev. Code, §4380, subd. 3. *Ia.* Code, §3688, subd. 5. *Mont.*—Rev. Code, §6741, subd. 3. *Nev.*—Rev. Laws, §5206. *N. Y.*—Code Civ. Proc., §1180. *N. D.*—Rev. Code, §7017, subd. 3. *S. D.* Code Civ. Proc., §252, subd. 3. *Utah.* Comp. Laws, §3144. *Wyo.*—Comp. Laws, §4496, subd. 3.

[a] *For Implied Bias*. — *Lord's Laws (Ore.)*, §122, subd. 2; *Rem. & Bal. Code (Wash.)*, §330, subd. 2.

58. *Kan.*—Gen. St., §5876, 6778. *Ohio.*—Gen. Code, §11437, subd. 5 (or steward). *Okla.*—Rev. Laws, §4997, or steward.

59. *Idaho.*—Rev. Code, §7834, subd. 2. *Ia.*—Code, §5360, subd. 5, challenge for cause. *Ky.*—Code Crim. Proc., §210, subd. 1. *Nev.*—Rev. Laws, §7148. *N. Y.*—Code Crim. Proc., §377, subd. 2. *N. D.*—Rev. Code, §9973, subd. 2. *S. D.* Code Crim. Proc., §339, subd. 2.

60. *Ariz.*—Pen. Code, §1023, subd. 5, challenge for cause. *Ark.*—Kirby's Dig., §2363, subd. 1. *Cal.*—Pen. Code, §1074, subd. 2. *Minn.*—Rev. Laws, 1905, §5391, subd. 2. *Mont.*—Rev. Code, §9262, subd. 2. *Okla.*—Rev.

Laws, §5859, subd. 2. *Ore.*—*Lord's Laws*, §1521, subd. 2. *Utah.*—Comp. Laws, §4834.

61. *Thompson & Co. v. C. C. C. & I. Ry. Co.*, 9 Ohio Dec. (Reprint) 209, 11 Law Bul. 211, his answers having been frank and nothing disclosed which showed any prejudice the overruling of the challenge is not reversible error.

[a] The mere fact that one has acted as consulting engineer for one of the parties does not render him incompetent, there being no showing that he was in the regular employ or service of such party. *Coppersmith v. Mound City Ry. Co.*, 51 Mo. App. 357.

62. *Murphy v. Southern Pac. Co.*, 31 Nev. 120, 101 Pac. 322; *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607.

[a] But the action of the trial court in sustaining a challenge to a juror who had been in defendant's employ for fifteen years, and was an employe when the accident occurred, was not reversible error. *Murphy v. Southern Pacific Co.*, 31 Nev. 120, 101 Pac. 322.

63. *Citizens' Light, H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199; *Sherman v. Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 115 Pac. 909, Ann. Cas. 1914A, 287.

"United in business" as used in statute, broad enough to include the relation of landlord and tenant, see *supra*, VII, F, 19, a.

64. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

not been removed by the statute abolishing distraint.⁶⁵ A tenant under a crop lease, who has delivered the stipulated share of the crop prior to trial, is not disqualified,⁶⁶ but it has been held ground for principal challenge that one is tenant of a stockholder of plaintiff bank.⁶⁷ By statute in some states it is ground for challenge for implied bias in a civil action that the juror stands in the relation of landlord or tenant to the adverse party,⁶⁸ and in criminal cases it is usually ground for challenge for implied bias that the juror stands in that relationship to the defendant,⁶⁹ the statutes being sometimes extended to include the person injured or on whose complaint the prosecution was instituted.⁷⁰

g. *With Surety Companies.*⁷¹—If an insurance company is liable for any part of the judgment which may be rendered, its stockholders, officers and servants are subject to challenge,⁷² and if a proposed juror is a stockholder or otherwise interested in such company he is disqualified as a matter of law.⁷³ Therefore, within certain limits, it is proper to question jurors as to whether they have any interest, own any stock, or are officers, agents, or employes, of a certain named company, which has a pecuniary interest in the case,⁷⁴ and it is proper

65. *Hathaway v. Helmer*, 25 Barb. (N. Y.) 29.

66. *Arnold v. Producers' Fruit Co.*, 141 Cal. 738, 75 Pac. 326, he is neither the partner nor the agent of the plaintiff and is not disqualified as such.

67. *Harrisburg Bank v. Forster*, 8 Watts (Pa.) 304.

68. Ia.—Code, §3688, subd. 5, for cause. Ore.—Lord's Laws, §122, subd. 2. Wash.—Rem. & Bal. Code, §330, subd. 2.

69. Idaho.—Rev. Code, §7834, subd. 2. Ia.—Code, §5360, subd. 5, for cause. Ky.—Code Crim. Proc., §210, subd. 1. Minn.—Rev. Laws, 1905, §5391, subd. 2. Nev.—Rev. Laws, §7148, subd. 2. N. Y.—Code Crim. Proc., §377, subd. 2. N. D.—Rev. Code, §9973, subd. 2. S. D.—Code Crim. Proc., §339, subd. 2.

70. Ariz.—Pen. Code, §1023, subd. 5. Ark.—Kirby's Dig., §2563, subd. 1. Cal. Pen. Code, §1074, subd. 2. Mont.—Rev. Code, §9262, subd. 2. Okla.—Rev. Laws, §5859, subd. 2. Ore.—Lord's Laws, §1521, subd. 2. Utah. Comp. Laws, §4834, subd. 2.

71. Being a surety or bail for party as constituting an interest in the case, see *supra*, VII, F, 14, b.

Generally as to interest of stockholders in suits to which the corporation is a party, see *supra*, VII, F, 14, a.

72. *Citizens' Light, H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199.

73. *Spoonick v. Backus-Brooks Co.*,

89 Minn. 354, 94 N. W. 1079.

[a] Under the statute making interest of the juror in the action ground for challenge for implied bias (Lord's Laws, §122, subd. 4), a stockholder, or one who has an interest in the surety company involved, is clearly incompetent as a matter of law. *Putnam v. Pacific Monthly Co.*, 68 Ore. 36, 130 Pac. 986, 136 Pac. 835, Ann. Cas. 1915C, 256, 45 L. R. A. (N. S.) 338.

74. Ind.—See *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312, explaining *Annadall v. Union Cement, etc. Co.*, 42 Ind. App. 264, 84 N. E. 359, as upholding the propriety of the question, but refusing to reverse because the record did not show any prejudice. *Kan.*—*Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635. *Ky.*—*Duncan Coal Co. v. Thompson's Admr.*, 157 Ky. 304, 162 S. W. 1139. *Tex.*—*Gordon Jones Const. Co. v. Lopez* (Tex. Civ. App.), 172 S. W. 987. See also *Cooper v. Hall* (Tex. Civ. App.), 168 S. W. 465, distinguishing *Harry Bros. Co. v. Brady* (Tex. Civ. App.), 86 S. W. 615. *Wis.*—*Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049.

Compare Harts v. Chicago & A. R. Co., 184 Ill. App. 123.

[a] *New York Code and Cases*. Code Civ. Proc., §1180. "In actions for damages for injuries to person or property, that he is a shareholder,

to ascertain whether there is such a relationship between the persons called and the insurance company as would bias them by implication,⁷⁵ or so as to intelligently exercise peremptories.⁷⁶ Also jurors may be questioned as to their acquaintance with agents and officers of surety companies who are indemnitors of one of the parties,⁷⁷ and as to their business dealings with such companies.⁷⁸

Where the connection of the surety company with the case is admitted,⁷⁹ or it is obvious that the company is so connected,⁸⁰ questions

stockholder, director, officer, or employe, or in any manner interested in any insurance company issuing policies for protection against liability for damages for injury to person or property, shall constitute a good ground for a challenge to the favor as to such juror." (1) Under this section it is permissible to ask him whether he is interested in a particular named surety company (*Dulberger v. Gimbel Bros.*, 76 Misc. 225, 134 N. Y. Supp. 574. For a similar holding before this clause was added to the code, see *Rinklin v. Acker*, 125 App. Div. 244, 109 N. Y. Supp. 125); (2) or they could be asked whether or not they were stockholders or officers in any such company (*Blair v. McCormick Const. Co.*, 123 App. Div. 30, 107 N. Y. Supp. 750, *affirmed*, 195 N. Y. 521, 88 N. E. 1115), (3) or interested as agents therein. *Grant v. National R. Spring Co.*, 100 App. Div. 234, 91 N. Y. Supp. 805. All of these cases turn upon the theory that being directly interested in such companies or an employe thereof comes within the provision of the code regarding stockholders and employes of corporations. (4) But it is improper to bring in the fact that one of the parties is indemnified. *Odell v. Genesee Const. Co.*, 145 App. Div. 125, 129 N. Y. Supp. 122, approving the rulings in the cases above cited.

75. *Viou v. Brooks-Scanlon Lumb. Co.*, 99 Minn. 97, 108 N. W. 891; *Antletz v. Smith*, 97 Minn. 217, 106 N. W. 517; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079.

76. *Viou v. Brooks-Scanlon Lumb. Co.*, 99 Minn. 97, 108 N. W. 891. So in *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079, it being contended that the plaintiff might save his rights by use of peremptories, the court suggests, "It is his right first to learn the facts, and he must do so to exercise intelligently his right to challenge peremptorily."

77. *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312.

[a] **Question Held Proper.**—"Are you acquainted with" certain named insurance agencies and companies, "or with any member of that company" was held proper, under the rules theretofore laid down, but two of the judges dissented on the ground that the practice of questioning as to mere acquaintance was carrying the rule too far. *Northwestern Fuel Co. v. Minneapolis St. Ry. Co.* (Minn.), 159 N. W. 832.

78. *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312.

79. *Meyer v. Gundlach-Nelson Mfg. Co.*, 67 Mo. App. 389, counsel for defendant having virtually admitted that a certain surety company was the real defendant, it was proper both for the purpose of challenging for cause and peremptorily, to ask questions to ascertain fully the situation of jurors as respected that company.

[a] In *Girard v. Grosvenordale Co.*, 82 Conn. 271, 73 Atl. 747, it was held a proper exercise of the court's discretion to permit inquiry as to whether the jurors were stockholders, officers, agents, or employes of the company which defendant's counsel admitted had insured defendant. But plaintiff's counsel brought the matter out in the absence of the jury and it appeared that he was acting in good faith "for the genuine purpose of learning whether any of the jurors were disqualified by interest, and not for the purpose of getting before the jurors a fact not in issue in the case for the purpose of prejudicing them."

80. *Kinney v. Metropolitan St. R. Co.*, 261 Mo. 97, 169 S. W. 23, it is proper to ask jurors whether they are connected in a business way with a specified insurance company, the attorney of which is in court ostensibly as attorney for the defendant making a defense which was really in behalf of

along this line are clearly proper, at least for the purpose of determining peremptories.⁸¹ It is not necessary that the insurance company be named as a party to the suit.⁸² Some cases hold that if the record fails to show any connection or claim of connection between insurance companies named, and the suit being tried, questions as to the business relations of jurors, with those companies and their agents is wholly immaterial.⁸³

By some authorities the jurors may be questioned as to their interest in a certain named company, though it does not yet appear that particular company is interested,⁸⁴ but other courts hold it is particularly objectionable to limit the questions as to a certain company, and then call defendant's counsel to prove that particular company is the indemnitor,⁸⁵ and some courts permit the jurors to be asked generally with respect to their connection with any indemnity company,⁸⁶ even though the record does not show that any such company

his company which was not a party to the proceeding. See also *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79, affirming 91 Ill. App. 337, where the question was permitted, an attorney of the company being present at the trial.

81. *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340, 61 N. E. 79, affirming 91 Ill. App. 337; *Meyer v. Gundlach-Nelson Mfg. Co.*, 67 Mo. App. 389.

82. *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079, it is the interest the company has in the result that governs.

[a] Though there is some conflict the better rule is that counsel have a right to ascertain just what, if any, relationship does exist between jurors and an insurance company who is interested in the case though not a party thereto. *Egner v. Curtis, T. & P. Co.*, 96 Neb. 18, 146 N. W. 1032, L. R. A. 1915A, 153.

83. *Dixon v. Russell*, 156 Wis. 161, 145 N. W. 761.

84. *Walters v. Durham Lumb. Co.*, 165 N. C. 388, 81 S. E. 453; *Featherstone v. Lowell Cotton Mills*, 159 N. C. 429, 74 S. E. 918; *Norris v. Holt-Morgan Mills*, 154 N. C. 474, 70 S. E. 912.

[a] In *Vindicator Consol. G. M. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, followed in *Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794, the rule is stated that while the jurors may be asked as to their interest even in a particular company it must not be done in a manner calculated to prejudice the insured party, but such

questions may be asked in good faith.

[b] **Good Faith of Question.**—In *Duncan Coal Co. v. Thompson's Admr.*, 157 Ky. 304, 162 S. W. 1139, the court says in effect that owing to its liability to abuse the question should never be asked except in good faith "and the good faith of plaintiff's counsel will depend on whether or not he has reasonable grounds to believe that defendant carries indemnity insurance, and that one or more of the jurors are in some way interested in the insurance company."

85. *Odell v. Genesee Const. Co.*, 145 App. Div. 125, 129 N. Y. Supp. 122, it was held improper to limit the inquiry as to whether the juror was a stockholder or director in any insurance company, to a particular company and then call defendant's counsel to prove that defendant was insured therein.

[a] It is reversible error to compel defendant's attorney to testify as a part of the examination of the juror, whether a certain insurance company is interested in the litigation. This gives too much prominence to the matter and brings into the case an immaterial matter. *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357.

86. *Brusseau v. Loner Brick Co.*, 133 Iowa 245, 110 N. W. 577, following *Foley v. Cudahy Packing Co.*, 119 Iowa 246, 93 N. W. 284; *Dow Wire Works Co. v. Morgan*, 29 Ky. L. Rep. 854, 96 S. W. 530.

[a] "There is no doubt that the

was in any way interested,⁸⁷ at least for the purpose of determining as to peremptories.⁸⁸

How far the juror may be interrogated as to his connection with surety companies depends largely upon the spirit in which it is done.⁸⁹ There must be nothing which indicates any lack of good faith,⁹⁰ and all inquiry along this line is excluded if it appears that the questions are propounded merely for the purpose of influencing the verdict, by bringing prominently before the jurors, the fact that the party is indemnified against loss, through the judgment founded on their verdict.⁹¹ The line between prejudicial and non-prejudicial remarks can-

right exists to ascertain whether any of the jurors own stock in or are employed by an insurance company writing employes' liability insurance in cases in which a party to the suit carries such insurance." *Gordon Jones Const. Co. v. Lopez* (Tex. Civ. App.), 172 S. W. 987.

[b] It was proper to ask jurors whether they were connected with any insurance or indemnity company, and whether they carried accident insurance, and as to one who was an insurance agent it was proper to ask whether he handled indemnity insurance. There was no further attempt to advise the jury that the defendant carried liability insurance. *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233, *distinguishing* numerous previous Washington cases as being cases in which it was attempted to bring out the fact that the insurance company and not defendant would have to pay any damages, and *approving and following* *Hoyt v. Independent Asphalt Paving Co.*, 52 Wash. 672, 101 Pac. 367, where questions, as in the case at bar, were upheld as being but a reasonable necessity to enable counsel to exercise peremptories intelligently.

87. *Dow Wire Works Co. v. Morgan*, 29 Ky. L. Rep. 854, 96 S. W. 530, counsel may have had information and were within their rights in asking whether jurors were engaged in or connected with the accident insurance business.

[a] A general question addressed to the jury as a body whether any of them "had ever been employed as an agent of an employer's liability insurance company," having been permitted without any preliminary questions having been asked, the supreme court, reversing on other grounds, said they were not entirely agreed upon

a disposition of the question as presented, and so left the matter without further discussion, other than to say that while the existence of an immaterial fact should never be suggested to the jurors, "a plaintiff is . . . entitled to put a question like the one objected to if found essential to his protection, even though prejudicial to the defendant." *Fowlie's Admx. v. McDonald, etc. Co.*, 85 Vt. 438, 82 Atl. 677.

88. *Foley v. Cudahy Packing Co.*, 119 Iowa 246, 93 N. W. 284.

89. *Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Vindicator Consol. G. M. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313.

90. *Ind.—Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312. *Kan.—Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635. *Ky.—Duncan Coal Co. v. Thompson's Admr.*, 157 Ky. 304, 162 S. W. 1139. *Minn.* *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079. *N. C.* *Walters v. Durham Lumb. Co.*, 165 N. C. 388, 81 S. E. 453; *Featherstone v. Lowell Cotton Mills*, 159 N. C. 429, 74 S. E. 918; *Norris v. Holt-Morgan Mills*, 154 N. C. 474, 70 S. E. 912.

91. *Colo.—Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Vindicator Consol. G. M. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313. *Conn.* *Girard v. Grosvenordale Co.*, 82 Conn. 271, 73 Atl. 747. *Ill.—Crowley v. Stretsenreuter*, 174 Ill. App. 538; *Eckhart & Swan Milling Co. v. Schaefer*, 101 Ill. App. 500. *Ind.—Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312. *Kan.—Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635. *Ky.—Duncan Coal Co. v. Thompson's Admr.*, 157 Ky. 304, 162 S. W. 1139; *Owensboro Wagon Co. v. Boling*, 32 Ky. L. Rep. 816, 107 S. W. 264; *Dow*

not be drawn readily, as each case depends largely on its own circumstances.⁹² No exact rule can be laid down as to the best method to be pursued in presenting the matter.⁹³

Wire Works Co. v. Morgan, 29 Ky. L. Rep. 854, 96 S. W. 530.

[a] **The evident purpose being to advise the jurymen** that one of the parties is indemnified against loss, the question is improper. *Crowley v. Stretsenreuter*, 174 Ill. App. 538. See also *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778 (*reversing* 174 Ill. App. 602); *Aetitis v. Spring Valley Coal Co.*, 150 Ill. App. 497 (where similar questions were upheld as not tending to intimate to the jury that appellant was indemnified. The question was general, no particular company being named and the court said the questions "did appellant no harm"), *distinguishing* *McCarthy v. Spring Valley Coal Co.*, 232 Ill. 473, 83 N. E. 957.

[b] **It must not be made a cloak** to get before the jury by indirection what could not be directly brought to their notice, *i. e.*, that the defendant is insured against liability. *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778, *reversing* 174 Ill. App. 602.

[c] **Under guise of such examination** counsel must not make prominent the fact that a party is indemnified, and seek to influence and prejudice the jurymen against that party because of that fact. *Cripple Creek Min. Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Vindicator Consol. G. M. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313.

92. *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049, so the statement by plaintiff's counsel that a certain named insurance company had insured defendant, having been made in answer to the court's inquiry, and the court having ruled and instructed in reference to the whole matter, there was no reversible error.

93. *Gordon Jones Const. Co. v. Lopez* (Tex. Civ. App.), 172 S. W. 987.

[a] **No Fixed Rule Between the Extreme Views.**—"Many authorities hold flatly that it is reversible error to bring before the jury in any form, even by examination on the voir dire, the fact that the defendant is insured against any adverse result of the action on trial. (Citing cases.) On the other extreme, some precedents allow them to question the jurors not only about

their possible interest in a given insurance company, but also as a basis therefor to show that the defendant is insured in that particular concern. (Citing cases.) Between the two extremes are many varieties of opinion shading into each other like the colors of the spectrum so that it is impossible to deduce from them any fixed rule by which all disputes may be mathematically settled." *Putnam v. Pacific Monthly Co.*, 68 Ore. 36, 130 Pac. 986, 136 Pac. 835, Ann. Cas. 1915C, 256, 45 L. R. A. (N. S.) 338.

[b] **Presenting by Motion to Court To Examine.**—In *Citizens' L., H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199, plaintiff presented a motion in writing setting forth the name of the insurance company claimed to be interested and asking the court to qualify the jurors "as to their being employees, stockholders, or interested in" said company. Defendant's counsel objected to the motion's being read in presence of jury; to its being filed; and to evidence being introduced in support thereof. Before hearing evidence the court gave defendant an opportunity to agree to the facts which was refused, and the plaintiff then proved the existence of the policy. The supreme court, while holding that any attempt to prejudice the jury by getting before them the fact that other persons than the parties would be benefited or injured by their verdict also held that the purpose of the motion and evidence was proper, under the circumstances, and there being no showing of any improper motive there could be no reversal. It would be presumed that the trial court gave the jury a proper cautionary in *Ala.* 561, 62 So. 199.

[c] Plaintiff should proceed in a proper way under the direction of the trial judge as pointed out in *Camp v. Churchill*, 186 Ala. 173, 65 So. 336; *Citizens' L., H. & P. Co. v. Lee*, 182 Ala. 561, 62 So. 199.

[d] **Serving Notice on Defendant's Counsel To Produce Policy.**—The good faith of counsel in asking questions was held to appear where he had served notice on defendant's attorney

The examination should be kept strictly within the limits of the right,⁹⁴ by direct questions and without any suggestion or comment from counsel which may convey improper and prejudicial information to the jurors.⁹⁵ The court will assume that the jurors will obey their oaths and will be guided solely by the testimony without regard to the question of indemnity,⁹⁶ and if the question be asked in a prejudicial manner the court has discretion to remove that prejudice.⁹⁷ Mere discussion of the question in the juror's presence, is non-prejudicial where the trial court did not permit the question to be put.⁹⁸

The determination as to good faith is one within the sound discretion of the trial court,⁹⁹ and his rulings will not be disturbed unless

to produce any insurance policy. Had defendant's counsel then wished to keep the matter from the jury he might have taken it up in a manner analogous to that followed where prejudicial matter is offered in evidence. That is by requiring offer in writing or orally to the court out of the jury's hearing. The vice of raising the question orally and then objecting lies in the fact that even if the jury be excluded the matter is brought to its attention which is the very thing sought to be avoided. *Vion v. Brooks-Scanlon Lumb. Co.*, 99 Minn. 97, 108 N. W. 891.

[e] It is often possible to avoid the use of the word "insurance" altogether, and to get at the facts indirectly by questioning each juror separately as to his occupation, past and present, and by general questions ascertain in what companies or corporations he owns an interest. His acquaintance with employes of insurance companies may be probed by asking as to particular persons by name. *Gordon Jones Const. Co. v. Lopez* (Tex. Civ. App.), 172 S. W. 987.

[f] **Preliminary Basis Condemned.** It is not necessary to affirmatively lay a basis, as well as make a showing of good faith on the part of counsel, before questioning along this line. On the contrary the practice is to be condemned as tending to impress the jurors unduly with the importance of the insurance company's connection with the case. The proper practice is to ask the juror, without any announcement to the court, whether he is directly or indirectly concerned in any casualty company. While such a preliminary announcement with an extended colloquy between the court and counsel for both sides in which defendant's

counsel charged bad faith on plaintiff's counsel and plaintiff claimed that an assistant of defendant's counsel was in fact an insurance company's adjuster, was condemned as bad practice, the court refused to reverse for that error alone. *Howard v. Beldenville Lumb. Co.*, 129 Wis. 98, 108 N. W. 48.

94. *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833, 7 L. R. A. (N. S.) 357; *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049.

95. *Faber v. C. Reiss Coal Co.*, 124 Wis. 554, 102 N. W. 1049.

96. *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079.

97. *Walters v. Durham Lumb. Co.*, 165 N. C. 388, 81 S. E. 453; *Featherstone v. Lowell Cotton Mills*, 159 N. C. 429, 74 S. E. 918.

98. *Antletz v. Smith*, 97 Minn. 217, 106 N. W. 517.

[a] **The mere asking of the question** and the refusal to permit it to be answered or repeated is not prejudicial. *Egner v. Curtis, T. & P. Co.*, 96 Neb. 18, 146 N. W. 1032, L. R. A. 1915A, 153; *El Paso Elect. Ry. Co. v. Shaklee* (Tex. Civ. App.), 138 S. W. 188, *distinguishing* *Harry Bros. Co. v. Brady* (Tex. Civ. App.), 86 S. W. 615, and *Lone Star Brew. Co. v. Voith* (Tex. Civ. App.), 84 S. W. 1100.

99. *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

[a] **The only reasonable principle to be laid down** is that in taking testimony the scope of the examination is subject to the discretion of the court which should exclude any attempt to prejudice the jury against foreign corporations, and at the same time permit such proper inquiry as to the interest, direct and indirect, of the jury as will avoid a packed jury. *Putnam v. Pacific Monthly Co.*, 68 Ore. 36, 130

the discretion is abused.¹ Where the questions should have been permitted a refusal to allow them has been held reversible error.² Permitting counsel to go further than the rule allows despite the objection and exception of the other party may alone constitute sufficient ground for reversal,³ but it has been held harmless error where no person was excused because of his connection with the company, and the appellant did not exhaust his peremptories.⁴

20. Fiduciary Relationships.—a. *Attorney and Client.*⁵—That the juror and a party stand in the relation of attorney and client is ground for challenge at common law.⁶ Some statutes make it ground for challenge for cause in civil actions,⁷ being ground for principal challenge under some statutes,⁸ and for implied bias under others.⁹ Also it is ground for challenge for implied bias in criminal prosecutions that the relation exists as to the defendant,¹⁰ or as to the person injured or on whose complaint the prosecution was instigated.¹¹

Pac. 986, 136 Pac. 835, Ann. Cas. 1915C, 256, 45 L. R. A. (N. S.) 338.

[b] **Discharging the Panel Because of Bad Faith.**—Where the trial court entertains any doubt as to the good faith of the question, the proper practice is to discharge the panel at the offending party's cost. *Duncan Coal Co. v. Thompson's Admr.*, 157 Ky. 304, 162 S. W. 1139.

1. *Walters v. Durham Lumb. Co.*, 165 N. C. 388, 81 S. E. 453; *Featherstone v. Lowell Cotton Mills*, 159 N. C. 429, 74 S. E. 918.

2. *Goff v. Kokomo Brass Works*, 43 Ind. App. 642, 88 N. E. 312, *distinguishing* *Annadall v. Union Cement, etc. Co.*, 42 Ind. App. 264, 84 N. E. 359, where reversal was refused because record did not show prejudice.

3. See *Swift & Co. v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; *Gordon Jones Const. Co. v. Lopez* (Tex. Civ. App.), 172 S. W. 987.

[a] **Practice Condemned Without Reversing.**—Without deciding that it was sufficient alone to cause reversal the court holds that it was an indiscretion for the trial court to permit the inquiry to become "a feature in the examination of every juror, in various forms, from asking whether the juror was acquainted with the corporation, to whether he was a stockholder in it." It would have served every legitimate purpose to ask the jurors whether they had any interest in the result of the case, or in the principal question involved, considering the remoteness of probability that the average juror of that county was a stock-

holder of, or interested in, a corporation of London, England. *Putnam v. Pacific Monthly Co.*, 68 Ore. 36, 130 Pac. 986, 136 Pac. 835, Ann. Cas. 1915C, 256, 45 L. R. A. (N. S.) 338.

4. *Walters v. Durham Lumb. Co.*, 165 N. C. 388, 81 S. E. 453; *Norris v. Holt-Morgan Mills*, 154 N. C. 474, 70 S. E. 912.

5. **Related to attorneys by consanguinity or affinity**, see *infra*, VII, F, 22, f.

6. *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 237, 53 L. ed. 465 (principal challenge); *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

7. Ia. Code, §3688, subd. 5.

8. Kan.—Gen. St., §§5876, 6778.

Ohio.—Gen. Code, §11,437, subd. 5 and

8. Okla.—Rev. Laws, §4997.

9. Ore. Lord's Laws, §122, subd. 2; Rem. & Bal. Code (Wash.), §330, subd. 2.

10. Idaho.—Rev. Code, §7834, subd.

2. Ia.—Code, §5360, subd. 5, for cause.

Ky.—Code Crim. Proc., §210, subd. 1.

Minn.—Rev. Laws, 1905, §5391, subd.

2. Nev.—Rev. Laws, §7148, subd. 2.

N. Y.—Code Crim. Proc., §377, subd.

2. N. D.—Rev. Code, §9973, subd. 2.

S. D.—Code Crim. Proc., §339, subd. 2.

11. Ariz.—Pen. Code, §1023, subd. 5,

for cause. Ark.—Kirby's Dig., §2363,

subd. 1. Cal.—Pen. Code, §1074, subd.

2. Mont.—Rev. Code, §9262, subd. 2.

Ore.—Lord's Laws, §1521, subd. 2.

Okla.—Rev. Laws, §5859, subd. 2. Utah. Comp. Laws, §4834, subd. 2.

It is the personal relationship that constitutes the ground of challenge.¹²

Where the relationship has terminated, no ground for challenge remains.¹³ The statute does not apply to the relation of attorney and client existing between the juror and the prosecuting attorney,¹⁴ nor does the fact that an attorney in the case is the juror's attorney in some other proceeding constitute ground for challenge,¹⁵ except where the statute so provides,¹⁶ though it is proper to inquire as to such relationship, and it is proper to ask whether the attorneys of record in the case were in the employ of the juror in order to determine as to peremptories,¹⁷ or as to the juror's acquaintance with the attorneys,¹⁸ as an aid in the exercise of peremptories.

Mere acquaintance with one party's counsel is not ground for challenge for cause by the other party,¹⁹ nor is a good opinion of him, or of his ability;²⁰ neither is prejudice against or aversion to the chal-

12. *State v. Gorden*, 5 Idaho 297, 48 Pac. 1061; *Collins v. State* (Tex. Crim.), 178 S. W. 345.

[a] That a juror, as supervisor of a town, has employed plaintiff's attorney to act as the town's attorney in certain litigation then pending is no ground for challenge for implied bias by defendant. *Lerum v. Geving*, 97 Minn. 269, 105 N. W. 967.

[b] Official Adviser.—That a juror was a justice of the peace and that the prosecuting attorney is his legal adviser as a county officer, and may have prosecuted cases before him as such justice, is too remote to disqualify him. Some special or personal relations which would seem to make it imprudent for him to act, should also be shown. *State v. Lewis*, 31 Wash. 75, 71 Pac. 778.

13. *Payne v. Waterloo, C. F. & N. Ry. Co.*, 153 Iowa 445, 133 N. W. 781.

[a] That juror had once employed party's counsel to do certain legal business is no ground for challenge for cause by the other party. *Fairbanks v. Irwin*, 15 Colo. 366, 25 Pac. 701.

[b] That on an occasion not connected with the trial, juror had advised with defendant's counsel, is no ground for challenge by the state. *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

14. *People v. Conte*, 17 Cal. App. 771, 778, 122 Pac. 450, 457, opinion by supreme court in denying petition for hearing before it.

[a] But in *Lyens v. State*, 133 Ga. 587, 600, 66 S. E. 792, it is held that one who contributes to a fund by which a special prosecutor is employed, is in

effect a volunteer prosecutor and is disqualified to sit as a juror.

15. *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186, explaining *State v. Boyce*, 24 Wash. 514, 64 Pac. 719, so far as it may seem to the contrary.

16. N. H. Pub. St., ch. 209, §25, Vt. Pub. St., §1224.

17. Ill.—*Vandalia v. Seibert*, 47 Ill. App. 477. Ky.—*Lowe v. Webster*, 19 Ky. L. Rep. 1208, 43 S. W. 217. Wash. Northern Pac. R. R. Co. v. Holmes, 3 Wash. Ter. 202, 14 Pac. 688.

[a] While the fact that jurors owed money to the attorney of adverse party would not be ground for challenge it is a proper question to ask for purpose of exercising peremptories. *Missouri, K. & T. Ry. Co. v. Rogers* (Tex. Civ. App.), 141 S. W. 1011.

18. *O'Hare v. Chicago, M. & N. R. Co.*, 139 Ill. 151, 28 N. E. 923, it was proper, after a conference between the attorneys and the court out of the juror's presence for the court to permit questions as to the juror's acquaintance with a certain lawyer who did not appear of record.

Compare *supra*, VII, F, 19, g.

19. Colo.—*Fairbanks v. Irwin*, 15 Colo. 366, 25 Pac. 701. Mo.—*Vojta v. Pelikan*, 15 Mo. App. 471. N. Y.—*People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273.

[a] That juror's business partner was a friend of adverse party's counsel is no ground of objection. *Santee v. Standard Pub. Co.*, 36 App. Div. 555, 55 N. Y. Supp. 361.

20. *Tolles v. Meyers*, 65 Neb. 704, 91 N. W. 505.

[a] That juror has a high opinion

lenging party's counsel.²¹ So it is not proper to ask the juror whether he is prejudiced in favor of one attorney, and against the other.²² That the juror is a client of an attorney who is to be a witness in the case in no manner affects his competency.²³

In a civil case whether the relationship is disqualifying is for the trial court to determine in its discretion where the statute does not make it ground for challenge.²⁴

b. *Guardian and Ward.*—By statute the relationship of guardian and ward between the juror and a party to a civil action is ground for challenge for cause,²⁵ constituting implied bias under some statutes.²⁶ It is also ground for challenge for implied bias that the relationship exists between the juror and the defendant in a criminal prosecution,²⁷ or between him and the person injured or on whose complaint the prosecution was instigated.²⁸

21. *Member of Family.*—By statute in some states it is ground for challenge for cause in civil actions that the juror is a "member of the family" of one of the parties.²⁹ It is also made a ground for

of attorney for the prosecution and would consult with him if he needed the services of an attorney is not ground for challenge for cause by defendant. *State v. Boyce*, 24 Wash. 514, 64 Pac. 719.

21. *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113.

[a] *Not Actual Bias.*—Actual bias must be "against the party challenging." (Rev. Code, §7836.) It is no ground for challenge that the juror is biased against defendant's counsel. *State v. Gorden*, 5 Idaho 297, 48 Pac. 1061.

[b] *Attorney in Litigation Against Juror.*—The mere fact that defendant's counsel may have been involved in litigation against the juror is not ground for challenge. *Goodall v. State* (Tex. Crim.), 47 S. W. 359.

22. *Collins v. State* (Tex. Crim.), 178 S. W. 345.

23. *State v. Smith*, 72 Vt. 366, 48 Atl. 647.

24. *Border v. Carrabine*, 30 Okla. 740, 120 Pac. 1087, that plaintiff's attorney was juror's regular attorney, and that he had also employed one of defendant's counsel in matters then pending does not necessarily make him incompetent.

[a] *Party's Attorney Also Attorney for Juror's Employer.*—Discretion of court was not abused where juror was permitted to serve though defendant's attorney was also attorney for juror's employer, a company which did some work for one of the defendants.

The juror stated the work "didn't amount to much, and that he would not let it interfere with his duty." *Healer v. Inkman*, 94 Kan. 594, 146 Pac. 1172.

25. *Ariz.*—Civ. Code, §3558, subd. 3. *Cal.*—Code Civ. Proc., §602, subd. 3, or officer of corporation. *Idaho.*—Rev. Code, §4380, subd. 3. *Ia.*—Code, §3688. *Mont.*—Rev. Code, §6741, subd. 3. *Nev.*—Rev. Laws, §5206, subd. 3. *N. D.*—Rev. Code, §7017, subd. 3. *S. D.*—Code Civ. Proc., §252, subd. 3. *Wyo.*—Comp. Laws, §4496, subd. 3.

26. *Lord's Laws* (Ore.), §122, subd. 2; *Rem. & Bal. Code* (Wash.), §330, subd. 2.

27. *Idaho.*—Rev. Code, §7834, subd. 2. *Ia.*—Code, §5360, subd. 5, for cause. *Ky.*—Code Crim. Proc., §210, subd. 1. *Minn.*—Rev. Laws, 1905, §5391, subd. 2. *Nev.*—Rev. Laws, §7148, subd. 2. *N. Y.*—Code Crim. Proc., §377, subd. 2. *N. D.*—Rev. Code, §9973, subd. 2. *S. D.*—Code Crim. Proc., §339, subd. 2.

28. *Ariz.*—Pen. Code, §1023, subd. 5, challenge for cause. *Ark.*—*Kirby's Dig.*, §2363, subd. 1. *Cal.*—Pen. Code, §1074, subd. 2. *Mont.*—Rev. Code, §9262, subd. 2. *Okla.*—Rev. Laws, §5859, subd. 2. *Ore.*—*Lord's Laws*, §1521, subd. 2. *Utah.*—Comp. Laws, §4834, subd. 2.

29. *Ariz.*—Civ. Code, §3558, subd. 2. *Cal.*—Code Civ. Proc., §602, subd. 2. *Idaho.*—Rev. Code, §4380, subd. 3. *Mont.*—Rev. Code, §6741, subd. 3. *Nev.*—Rev. Laws, §5206, subd. 3. *N. D.*—Rev. Code, §7017, subd. 3. *Utah.*—Comp.

implied bias in criminal prosecutions that the juror is a member of the family of defendant or of the person injured or on whose complaint the prosecution was instigated.³⁰

22. Related by Consanguinity or Affinity.—a. *In General.*—Relationship is ground for individual challenge and not for quashing the panel.³¹ The method of computing the relationship is by the civil and not by the canon law.³² The relationship between one spouse and those who are related by affinity only to the other spouse, or “affinitas affinitatis” as it is sometimes called, is not recognized,³³ but the court

Laws, §3144, subd. 3. **Wyo.**—Comp. Laws, §4495, subd. 3.

[a] **Implied Bias.**—Lord’s Laws (Ore.), §122, subd. 2; Rem. & Bal. Code (Wash.), §330, subd. 2.

30. Ariz.—Pen. Code, §1023, subd. 5, for cause. **Ark.**—Kirby’s Dig., §2363, subd. 1. **Cal.**—Pen. Code, §1074,

subd. 2. **Idaho.**—Rev. Code, §7834, subd. 2. **Ia.**—Code, §5360, sub. 5, for cause. **Minn.**—Rev. Laws, 1905, §5391,

subd. 2. **Mont.**—Rev. Code, §9262, subd. 2. **Nev.**—Rev. Laws, §7148, subd. 2.

N. Y.—Code Crim. Proc., §377, subd. 2. **N. D.**—Rev. Code, §9973, subd. 2. **Okla.**

Rev. Laws, §5859, subd. 2. **Ore.** Lord’s Laws, §1521, subd. 2. **S. D.**

Code Crim. Proc., §339, subd. 2. **Utah.** Comp. Laws, §4834, subd. 2.

31. Veramendi v. Hutchins, 56 Tex. 414.

32. Ala.—Code, §7276, subd. 4. **Ga.** Smith v. State, 2 Ga. App. 574, 59

S. E. 311. **Ind.**—Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549. **Ohio.**

Kahn v. Reedy, 8 Ohio Cir. Ct. 345, 4 Ohio Cir. Dec. 284. **Tenn.**—Shannon’s Code, §5814. **Vt.**—Churchill v.

Churchill, 12 Vt. 661.

[a] **Examples of Persons Incompetent Because Within Prohibited Degrees.**—(1) Cousin of prosecutor. Brown

v. State, 28 Ga. 439. (2) Cousin in third degree to wife of accused. State

v. Caron, 118 La. 349, 42 So. 960. (3) Juror who is first cousin to accused is

related within fourth degree. Marion v. State, 20 Neb. 233, 29 N. W. 911,

57 Am. Rep. 825. (4) Juror whose father was a second cousin to defendant’s mother. State v. Walton, 74 Mo.

270. (5) Brother-in-law. Houston & T. C. R. Co. v. Terrell, 69 Tex. 650,

7 S. W. 670. (6) That juror’s wife’s father was cousin to defendant makes

juror and defendant second cousins and related only in the fifth degree and

so competent. Churchill v. Churchill, 12 Vt. 661.

[b] **Examples of Persons Not Within Prohibited Degrees.**—Juror who was “second cousin once removed” of the wife of a party. Kahn v. Reedy, 8 Ohio Cir. Ct. 345, 4 Ohio Cir. Dec. 284. And see cases under affinitas affinitatis rule in next paragraph.

33. Ala.—Kirby v. State, 89 Ala. 63, 8 So. 110. **Ind.**—Tegarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549. **Mich.** Bliss v. Caille Bros. Co., 149 Mich. 601, 113 N. W. 317. **Va.**—Doyle v. Com., 100 Va. 808, 40 S. E. 925.

[a] **Examples of Persons Not Disqualified.**—(1) A kinsman of a brother-in-law of a party. Campbell v. State,

144 Ga. 224, 87 S. E. 277. (2) Brother of brother-in-law of wife of party.

Chesapeake & O. R. Co. v. Jesse, 159 Ky. 450, 167 S. W. 407. (3) Juror

whose brother married a sister of one of the parties. Chase v. Jennings, 38

Me. 44. (4) Juror’s sister was the second wife of one whose daughter by

his first wife, married the defendant’s nephew. Boyd v. State, 14 Lea (Tenn.)

161. (5) Sister of juror married brother of prosecutor’s wife; trial of one

charged with murder of the prosecutor’s child. Miller v. State, 139 Ga.

716, 78 S. E. 181. (6) Defendant was a brother to one who married a sister

of a woman who married the juror’s father. Patterson v. State, 48 N. J.

L. 381, 4 Atl. 449. (7) Grandmother of the wife of the juror was second

cousin to the mother of the wife of defendant. Danzey v. State, 126 Ala.

15, 28 So. 697. (8) Grandmother of the juror’s wife was sister to the

grandmother of the wife of defendant’s nephew. Boyd v. State, 14 Lea

(Tenn.) 161. (9) The juror being cousin of the step-father of deceased

was related by affinity to the mother of deceased but not to deceased himself. Kirby v. State, 89 Ala. 63, 8

So. 110. (10) First cousin of the prisoner had married a second cousin of

may in its discretion exclude jurors who are only so related.³⁴ The relationship by affinity ceases on dissolution by death of the marriage through which the relationship exists,³⁵ unless there is issue of the marriage then living.³⁶

That a juror may not know of his disqualification by relationship is not material where the relationship is shown to exist,³⁷ and where one is so disqualified, the fact that he might not be biased in the particular case does not warrant retaining him on the jury.³⁸ But

the juror. *State v. Fuller*, 114 N. C. 885, 19 S. E. 797. (11) Husband of niece of wife of counsel. *Miller v. Louisville, N. A. & C. Ry. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416.

34. *Ia.*—*Geiger v. Payne*, 102 Iowa 581, 69 N. W. 554, 71 N. W. 571, juror had discussed merits of case with his son-in-law who was related to defendant. *La.*—*State v. Kellogg*, 104 La. 580, 29 So. 285, it was within the court's discretion to excuse a juror, on the state's challenge, whose wife was the prisoner's wife's aunt. *Tex.*—*Holmes v. State*, 70 Tex. Crim. 423, 157 S. W. 487, juror's sister married to defendant's brother.

35. *Ind.*—*Gillespie v. State*, 168 Ind. 298, 80 N. E. 829. *Tenn.*—*Goodall v. Thurman*, 1 Head 209. *Vt.*—*Blodgett v. Brinsmaid*, 9 Vt. 27.

[a] If both wives are living at time of trial juror is clearly incompetent where he and plaintiff married sisters. *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670.

36. *Fla.*—*Walsingham v. State*, 61 Fla. 67, 56 So. 195. *Tex.*—*Stringfellow v. State*, 42 Tex. Crim. 588, 61 S. W. 719. *Va.*—*Jaques v. Com.*, 10 Gratt. (51 Va.) 690. *Can.*—*Hart v. Pryor*, 10 Nova Scotia 53.

[a] Husband of a sister of decedent who left issue is not competent in an action brought by the widow. *Dearmond v. Dearmond*, 10 Ind. 191, following *Trullinger v. Webb*, 3 Ind. 198.

37. *Lyens v. State*, 133 Ga. 587, 600, 66 S. E. 792; *Hudspeth v. Herston*, 64 Ind. 133.

[a] The reason of the rule is that it is against public policy to permit testimony in denial of a fact which everyone must be presumed to know—as his relationship. *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777, following *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501.

[b] That jurors did not know that

their kinsmen were members of the mutual insurance company whose policy was being sued on is immaterial. *Moore v. Farmers' Mut. Ins. Assn.*, 107 Ga. 199, 209, 33 S. E. 65.

[c] Ignorance of Interest of Relative.—In an action on a promise by defendant's testator to plaintiff's intestate, that juror was related to one whose claim had been allowed against the intestate's estate, is not ground for new trial where the juror had no knowledge of the existence of such claim until after the trial. *McLellan v. Crofton*, 6 Greenl. (Me.) 307. But see *Lyens v. State*, 133 Ga. 587, 600, 66 S. E. 792, where ignorance both of the relationship and the fact that the relatives had contributed to a fund by which a special prosecutor was employed, was held immaterial, and it was held that a new trial should be granted. *Compare Hardy v. Sprowle*, 32 Me. 310.

38. *Hardy v. Sprowle*, 32 Me. 310.

[a] He may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice. *Per Marshall, C. J.*, in *United States v. Burr*, 25 Fed. Cas. No. 14,692g.

[b] Though juror may never have seen the party. *United States v. Burr*, 25 Fed. Cas. No. 14,692g.

[c] That the juror does not have any personal acquaintance with the party, does not affect his disqualification by relationship to the party. *Hardy v. Sprowle*, 32 Me. 310.

[d] Juror Not Excused But Precedent Not To Be Followed.—A juror having said plaintiff was a second or third cousin of his wife and that he might be inclined to listen more favorably to plaintiff's evidence, but that he could try the case impartially, the supreme court said it would hesitate

where the juror is not able to say just what the relationship is the ground of challenge may not be sufficiently established.³⁹

b. *To Party*.—At common law, relationship by consanguinity or affinity, within the ninth degree, to a party to the action, is good ground for challenge.⁴⁰ And according to the strict common-law rule even a remoter relationship might be disqualifying,⁴¹ but if it was within the ninth degree it was ground for principal challenge.⁴² In the absence of statute the common-law rules have been applied in some states,⁴³ but where a lesser degree is declared disqualifying as to judges and justices the same rule has been followed as to jurors,⁴⁴ and a general statute as to degrees of relationship for persons required to be disinterested, applies to jurors.⁴⁵

In civil cases many statutes provide that consanguinity, or affinity, within a specified degree to either party to the suit shall be disqualifying,⁴⁶ and so subjects the juror to challenge under the general

to reverse for the mere overruling of the challenge for cause but that the precedent should not be followed. *Mahaney v. St. Louis & H. R. Co.*, 108 Mo. 191, 18 S. W. 895.

39. *Shaffstall v. Downey*, 87 Ark. 5, 112 S. W. 176; *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407, 419.

[a] **Juror in Doubt May Be Excluded.**—Juror who stated he believed he was nearly related to prisoner by marriage; that his wife was kin, he did not know in what degree but it might be fifth cousin, was properly excluded as being within the ninth degree. *State v. Potts*, 100 N. C. 457, 6 S. E. 657.

40. **Fla.**—*Morrison v. McKinnon*, 12 Fla. 552; *O'Connor v. State*, 9 Fla. 215. **La.**—*State v. Caron*, 118 La. 349, 42 So. 960. **Mich.**—*Bliss v. Caille Bros. Co.*, 149 Mich. 601, 113 N. W. 317. **Neb.**—*Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280. **Vt.**—*Churchill v. Churchill*, 12 Vt. 661. **Va.**—*Jaques v. Com.*, 10 Gratt. (51 Va.) 690. **Can.**—*Lynds v. Hoar*, 10 Nova Scotia 327.

41. *Fiske v. Paine*, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498.

[a] **According to Sir Edward Coke** (Co. Litt. 157a), relationship in any degree is sufficient to disqualify. *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777, citing *Watkins v. State*, 125 Ga. 143, 53 S. E. 1024. See also *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473; *Lynds v. Hoar*, 10 Nova Scotia 327.

42. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690.

43. *Bliss v. Caille Bros. Co.*, 149

Mich. 601, 113 N. W. 317, "we have no statute presumptions of disqualification of jurors on the ground of relationship."

[a] **In Georgia** the statute (Pen. Code, §999) reads, "so near of kindred as to disqualify him by law." The rule is within ninth degree, computed according to the civil law. *Smith v. State*, 2 Ga. App. 574, 59 S. E. 311, citing *Ledford v. State*, 75 Ga. 856, and stating "our examination has failed to discover any ruling in this state to the contrary." See also *Watkins v. State*, 125 Ga. 143, 53 S. E. 1024.

44. *State v. Brock*, 61 S. C. 141, 39 S. E. 359 (while not legal ground of objection, consanguinity and affinity within sixth degree is a salutary rule of exclusion being the same as that governing judges); *Churchill v. Churchill*, 12 Vt. 661, judges and justices within fourth degree are disqualified. A juror, who is but a branch of the court, should not be excluded for that which would not affect the court, judge or justice.

45. *Hudspeth v. Herston*, 64 Ind. 133; *Tegarden v. Phillips*, 14 Ind. App. 27, 42 N. E. 549; *Jewell v. Jewell*, 84 Me. 304, 24 Atl. 858, 18 L. R. A. 473; *Lyon v. Hamor*, 73 Me. 56; *Tilton v. Kimball*, 52 Me. 500; *Lane v. Goodwin*, 47 Me. 593; *Hardy v. Sprowle*, 32 Me. 310.

46. **Ariz.**—Civ. Code, §3517, subd. 3. **Ark.**—*Kirby's Dig.*, §4491. **Haw.** Organic Act, §24. **Mo.**—Rev. St., 1909, §7283. **Tenn.**—Shannon's Code, §5814. **Tex.**—*Vernon Sayles' Civ. St.*, art. 5117, subd. 3.

rule.⁴⁷ Other statutes specifically make such relationship ground for challenge for cause,⁴⁸ being for "implied bias" under some statutes,⁴⁹ and principal cause for challenge under others.⁵⁰ In criminal cases it is made by statute ground for challenge for cause that the juror is related, by consanguinity, or affinity, to the defendant,⁵¹ the challenge being usually for "implied bias."⁵²

Under some statutes persons of kin to the defendant are absolutely disqualified.⁵³ But under others the court on motion examines the jurors as to their relationship to either party and excludes those who appear not indifferent.⁵⁴ Under the latter statutes the challenge is in effect one to the favor,⁵⁵ and the court need not inquire into the

47. See *supra*, VII, F, 1.

48. Ala.—Code, §7276, subd. 11. Ariz.—Civ. Code, §3558, subd. 2. Cal. Code Civ. Proc., §602, subd. 2. Idaho. Code Civ. Proc., §4380, subd. 2. Ind. Teggarden v. Phillips, 14 Ind. App. 27, 42 N. E. 549, construing Burns' St., §240, subd. 11. Ia.—Code, §3688, subd. 4. Mont.—Rev. Code, §6741, subd. 2. Nev.—Rev. Laws, §5206, subd. 2. N. D. Rev. Code, §7017, subd. 2. S. D.—Code Civ. Proc., §252, subd. 2. Utah.—Comp. Laws, §3144, subd. 2. Vt.—Pub. St., §1224. Wyo.—Comp. Laws, §4495, subd. 2.

49. Lord's Laws (Ore.), §122, subd. 1; Rem. & Bal. Code (Wash.), §330, subd. 1.

50. Kan.—Gen. St., §5876. Ohio. Gen. Code, §11,437, subd. 7. Okla. Rev. Laws, §4997.

51. Ala.—Code, §7276, subd. 4. Ariz.—Pen. Code, §1023, subd. 4. Ga. Pen. Code, §999. Ind.—Burns' Ann. St., §2101, subd. 4. Ia.—Code, §5360, subd. 4. Neb.—Rev. St., §9109, subd. 4. Ohio.—Gen. Code, §13,653, subd. 4. Tex.—Code Crim. Proc., art. 673, subd. 9. Wyo.—Comp. Laws, §6207, subd. 4.

[a] It is proper to interrogate jurors as to their relationship by blood or marriage with the defendant. Jarvis v. State, 138 Ala. 17, 34 So. 1025.

52. Ark.—Kirby's Dig., §2363, subd. 1. Cal.—Pen. Code, §1074, subd. 1. Idaho.—Rev. Codes, §7834, subd. 1. Ky.—Code Crim. Proc., §210, subd. 1. Minn.—Rev. Laws, 1905, §5391, subd. 1. Mont.—Rev. Codes, §9262, subd. 1. Nev.—Rev. Laws, §7148, subd. 1. N. Y. Code Crim. Proc., §377, subd. 1. N. D. Rev. Code, §9973, subd. 1. Okla.—Rev. Laws, §5859, subd. 1. Ore.—Lord's Laws, §1521, subd. 1. S. D.—Code Crim. Proc., §339, subd. 1. Utah. Comp. Laws, §4834, subd. 1.

53. Kan. Gen. St., §6778; Mo. Rev. St., 1909, §5217.

See statutes cited in preceding notes.

54. Fla.—Gen. St., §1492. Haw. Acts 1905, ch. 5. La.—Act 135, 1898, §1. Me.—Rev. St., ch. 84, §94. N. H. Pub. St., ch. 209, §25. R. I.—Gen. Laws, ch. 279, §37. S. C.—Civ. Code, §2944. Va.—Code, 1904, §3154. W. Va. Code, §4656. Wis.—St., 1898, §2849.

55. State v. Porter, 45 La. Ann. 661, 12 So. 832.

[a] Relationship does not disqualify as of course but it lies within the discretion of the court to determine that the relationship is so remote that it could not affect the verdict. Fiske v. Paine, 18 R. I. 632, 28 Atl. 1026, 29 Atl. 498.

[b] Relationship Within Sixth Degree Unknown to Juror.—The supreme court refused a new trial where the relationship to deceased was by consanguinity in the sixth degree, it not clearly appearing that the juror knew of the relationship nor there being anything to show the defendant did not have a fair trial. State v. Congdon, 14 R. I. 458.

[c] A mere mistake of the judge is harmless where he excused the juror, as the matter was one for his discretion. State v. Brock, 61 S. C. 141, 39 S. E. 359. See also Sims v. Jones, 43 S. C. 91, 20 S. E. 905; State v. Merriam, 34 S. C. 16, 12 S. E. 619.

[d] Jurors Not Clear as to Exact Relationship.—(1) The court properly excludes from the panel persons who are related to the accused by blood or marriage to a degree that might influence them although they do not seem clear as to the exact relationship. State v. Hatfield, 48 W. Va. 561, 37 S. E. 626. (2) One who stated that he was a cousin of prisoner's but was

relationship unless requested to, in which case he must do so.⁵⁶

c. *To Guardian Ad Litem.*—The guardian ad litem is not a party within the statute disqualifying persons who are related by consanguinity or affinity to a party.⁵⁷

d. *To Employers or Employees.*—Relationship to the employer or employe of party does not of itself disqualify the juror,⁵⁸ nor is the employer or employe of a relative incapacitated.⁵⁹

e. *To Person Injured or Prosecutor.*—At common law the disqualification by relationship extended to those who were related to the person injured,⁶⁰ whether it also extended to relationships with the deceased in a prosecution for murder has been doubted.⁶¹ By statute persons of kin to the injured party or prosecutor are sometimes disqualified,⁶² and so are subject to challenge under the general rule;⁶³ and by specific statute in many states relationship by consanguinity or affinity to the prosecutor or person alleged to be injured is ground for challenge for cause,⁶⁴ it being usually made ground for challenge for implied bias.⁶⁵ The effect of these statutes is to make the prosecutor a party to the proceeding in so far that his relatives cannot sit.⁶⁶ And the statute has been held to extend to those related to persons who contributed to a fund with which special counsel was employed to aid in the prosecution,⁶⁷ though this latter rule does

not certain just whether he was second or third cousin was properly excluded on state's challenge. *O'Connor v. State*, 9 Fla. 215.

56. *Robinson v. Howell*, 66 S. C. 326, 44 S. E. 931 (the judge commits reversible error if he fails to ask the question on request); *State v. Merriam*, 34 S. C. 16, 12 S. E. 619.

[a] Where the accused was colored it was clearly not error to fail to ask a white juror whether he was related to defendant. *State v. Nance*, 25 S. C. 168.

Generally as to necessity to ask statutory questions, or to question on request, see *supra*, VII, E, 5, i, (III), (G).

57. *Bryant v. Livermore*, 20 Minn. 113.

58. *Simmons v. McConnell's Admr.*, 86 Va. 494, 10 S. E. 838, the sons, of whom he was entirely independent, worked in the department of a large concern of which plaintiff was the foreman.

Compare *infra*, VII, F, 22, f.

59. See *Campbell v. State*, 144 Ga. 224, 87 S. E. 277, employe of brother-in-law not disqualified.

60. *Jaques v. Com.*, 10 Gratt. (51 Va.) 690, there is some doubt whether it was ground for "principal challenge" or for "challenge to the favor

apparent," a distinction of no importance where triers have been abolished.

61. *Walsingham v. State*, 61 Fla. 67, 56 So. 195.

62. Kan. Gen. St., §6778; Mo. Rev. St., 1909, §5217.

63. See *supra*, VII, F, 1.

64. Ala.—Code, §7276, subd. 4. Ariz.—Pen. Code, §1023, subd. 4. Ga. Pen. Code, §999. Ind.—Burns' Ann. St., §2101, subd. 4. Neb.—Rev. St., §9109, subd. 4. Ohio.—Gen. Code, §13,653, subd. 4. Tex.—Code Crim. Proc., art. 673, subd. 10. And see *Stringfellow v. State*, 42 Tex. Crim. 588, 61 S. W. 719. Wyo.—Comp. Laws, §6207, subd. 4.

65. Ark.—Kirby's Dig., §2363, subd. 1. Cal.—Pen. Code, §1074, subd. 1. Idaho.—Rev. Codes, §7834, subd. 1. Ky. Code Crim. Proc., §210, subd. 1. Minn. Rev. Laws, 1905, §5391, subd. 1. Mont. Rev. Code, §9973, subd. 1. Okla.—Rev. Laws, §7148, subd. 1. N. Y.—Code Crim. Proc., §377, subd. 1. N. D. Rev. Code, §9973, subd. 1. Okla.—Rev. Laws, §5859, subd. 1. Ore.—Lord's Laws, §1521, subd. 1. S. D.—Code Crim. Proc., §339, subd. 1. Utah. Comp. Laws, §4834, subd. 1.

66. *Campbell v. State*, 144 Ga. 224, 87 S. E. 277.

67. *Lyens v. State*, 133 Ga. 587, 600,

not permit an extended inquiry into the question as to who hired counsel, for the purpose of tracing relationship.⁶⁸ Relationship to one who has offered a reward for conviction of the perpetration of the offense has been held no ground of challenge by the prisoner.⁶⁹

f. *To Persons, Not Parties, Interested in Result.*—Relationship to one not a party to the suit but directly interested in the outcome thereof is generally disqualifying.⁷⁰ Thus where a corporation is directly interested in the suit one related to the stockholders thereof may be incompetent,⁷¹ but it has been held otherwise where the stockholders

66 S. E. 792 (persons within fourth degree, though they took no personal part in the prosecution), cited with approval in *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777.

68. *Moore v. State* (Tex. Crim.), 38 S. W. 356, private counsel employed in assisting the state are properly not required to disclose who has employed them, the examination of the jurors disclosing that they had not themselves employed or assisted in the employment of private counsel, and did not know who had, nor whether they were related to such persons.

[a] A motion to require the state to disclose who was employing private counsel to assist in the prosecution, so that the jurors may be interrogated as to their relationship to such persons, is properly overruled. *McGee v. State*, 37 Tex. Crim. 668, 40 S. W. 967, following *McInturf v. State*, 20 Tex. App. 335; and *Heacock v. State*, 13 Tex. App. 97.

69. *King v. Ah Ko*, 4 Hawaii 301, because the offeror has no pecuniary interest adverse to the prisoner. If he has paid the reward the transaction is ended. If not the prisoner's acquittal will absolve him from the payment.

70. *Zarate v. Villareal* (Tex. Civ. App.), 155 S. W. 328, relationship to one who had made improvements on the land in controversy, permission of plaintiff, which would probably be lost if defendant won. See also *Davidson v. Wallingford* (Tex. Civ. App.), 30 S. W. 286.

[a] To one who is to have a percentage of the amount of the recovery though not a party to the action. *Mono v. Flanigan*, 130 Cal. 105, 62 Pac. 293, brother of juror interested.

[b] Juror who was half-brother of a witness that had been promised a position as overseer if certain planta-

tions should be recovered though his testimony was incompetent. *Beall v. Clark*, 71 Ga. 818. See also *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777.

Relationship to prosecuting witness or to one who has offered reward for conviction, see *supra*, VII, F, 22, e.

Relationship to one who has contributed to employ special prosecuting attorney, see *supra*, VII, F, 22, e.

71. *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501 (though corporation not actual prosecutor); *Georgia R. Co. v. Cole*, 73 Ga. 713, though corporation was indemnified.

[a] Defendant was charged with mutilating books of the corporation. *McElhannon v. State*, 99 Ga. 672, 26 S. E. 501, cited with approval in *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777.

[b] To members of a mutual insurance company liable to be assessed to pay the loss, on suit on policy. *Moore v. Farmers' Mut. Ins. Assn.*, 107 Ga. 199, 209, 33 S. E. 65.

[c] Bank which was being sued to recover a penalty for demanding and receiving usurious interest. One juror was half-brother and another father of heavy stockholders. *National Bank v. Ragland* (Tex. Civ. App.), 51 S. W. 661.

[d] The son and heir of a stockholder of a corporation, the funds and records of which defendant was accused of embezzling and concealing, is subject to defendant's challenge for cause. *Miller v. United States*, 38 App. Cas. (D. C.) 361.

[e] That the juror was cousin of the wife of a stockholder in defendant corporation is not such a relationship as disqualifies him as a matter of law. *Butler v. Glen Falls, etc. R. R. Co.*, 121 N. Y. 112, 118, 24 N. E. 187.

had no real pecuniary interest in the outcome of the suit,⁷² though even then the juror may be interrogated as to relationship for the purpose of determining peremptories.⁷³ Statutes sometimes disqualify relatives of an officer of a corporation party.⁷⁴ Jurors related within the prohibited degree, to persons indicted for their participation in the act for which defendant is being tried are subject to challenge by the state.⁷⁵

Except in so far as the statutes otherwise provide,⁷⁶ that the juror is related to the prosecuting attorney is not ground for challenge,⁷⁷ nor is one who is related to counsel engaged in a civil case,⁷⁸ but where a juror is related to an attorney whose fee is contingent upon a recovery he is incompetent.⁷⁹

23. Knowledge, Information and Opinion.⁸⁰ — a. *In General.* — It has been well said that perhaps upon no one question of civil and criminal practice have the decisions of the courts been more inharmonious than upon the question of disqualification arising out of the formation or expression of an opinion,⁸¹ and some courts have said that it is useless to attempt to analyze the cases.⁸² So much depends upon the peculiar circumstances affecting the opinions of particular jurors, that the decisions while they set forth general principles and rules, cannot be relied upon as infallible guides.⁸³ It is impossible to give a definition of disqualifying opinion that will fit all cases.⁸⁴ The

72. *Stone v. Monticello Const. Co.*, 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978.

73. *Stone v. Monticello Const. Co.*, 135 Ky. 659, 117 S. W. 369, 40 L. R. A. (N. S.) 978.

74. Cal. Code Civ. Proc., §602, subd. 2.

75. *Thomas v. State*, 133 Ala. 139, 32 So. 250.

76. Ala.—Code, §7276, subd. 11. Minn.—Rev. Laws, 1905, §5391, subd. 1. Ohio.—Gen. Code, §11437, subd. 7.

77. Ala.—*Washington v. State*, 58 Ala. 355. Mo.—*State v. Jones*, 64 Mo. 591, father-in-law. Mont.—*State v. Cadotte*, 17 Mont. 315, 42 Pac. 857, brother-in-law whose examination on voir dire shows no bias or prejudice either actual or implied.

78. *Funk v. Ely*, 45 Pa. 444, juror was brother-in-law.

79. *Roberts v. Roberts*, 115 Ga. 259, 261, 41 S. E. 616, 90 Am. St. Rep. 108; *Crockett v. McLendon*, 73 Ga. 85, cited with approval in *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777.

[a] Brothers and cousins of the counsel in the case whose contract was contingent upon recovery and who had a lien on recovery, are incompetent.

Melson v. Dickson, 63 Ga. 682, 36 Am. Rep. 128, cited with approval in *Temples v. Central of Georgia R. Co.*, 15 Ga. App. 115, 82 S. E. 777.

80. On Motion for New Trial. Conclusiveness of juror's affidavit on motion for new trial, and weight to be given to affidavits controverting same, on question as to whether juror did form or express an opinion prior to the trial, see the title "New Trial."

Expressions of opinion during trial as misconduct of juror, see *infra*, IX, G, 5.

81. *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698.

82. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

[a] "The law . . . is in such a state of confusion, that no success can be hoped for in reconciling conflicting opinions, or arraying the decisions in logical order." *Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637.

[b] "The cases upon this subject are almost without number, and they are not to be reconciled." *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

83. *Dejarnette v. Com.*, 75 Va. 867.

84. *State v. Stewart*, 85 Kan. 404, 116 Pac. 489.

trend of modern decisions is in the direction of limiting rather than extending the disqualification,⁸⁵ and it is now generally conceded that if the opinion or impression is derived from mere rumor or newspaper reports, and is merely hypothetical or conditional, and the juror is free from any actual bias or prejudice he is competent.⁸⁶ The mere formation of an opinion does not disqualify,⁸⁷ if the verdict would not be influenced thereby.⁸⁸

The real question in every case is can the juror act fairly and impartially despite the opinion he holds,⁸⁹ or is the opinion so strong of itself, or impliedly, because of the grounds upon which it is based,

[a] **No Fixed Rule Can Be Laid Down.**—*Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. 769.

[b] **Each case must be judged for itself** (1) and no definite rule can be laid down to be followed. *Cook v. State*, 90 Miss. 137, 43 So. 618; *Gammoms v. State*, 85 Miss. 103, 37 So. 609; *Sam v. State*, 13 Smed. & M. (Miss.) 189. (2) As said in *State v. Kinney*, 45 Wash. 165, 87 Pac. 1123: "Jurors possess so many degrees of intelligence that it is difficult to lay down a uniform rule in regard to their qualifications. An answer made by one juror may mean one thing. The same answer made by another juror may disclose an entirely different state of mind on the part of the juror. The different manner in which questions are propounded by attorneys and by courts elicits different answers from the jurors, although the same subject-matter is under discussion."

[c] **Each Case Is To Be Determined by Its Own Facts and Circumstances** *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

[d] **It is difficult in language, to express the exact line of demarkation between an opinion which disqualifies and one which does not.** *State v. Meaker*, 54 Vt. 112.

[e] **As Between Matter of Principal Challenge or to the Favor.**—"It is very difficult . . . to determine upon that degree, or depth, or strength of impression or opinion which shall become matter of principal challenge, or to the favor. The practical line is almost imperceptible, though theoretically, it may be distinct enough." *Shoefler v. State*, 3 Wis. 823.

Character of opinion, see *infra*, VII, F, 23, i.

85. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

86. *United States v. Schneider*, 10 Mackey (D. C.) 381.

Further as to newspaper reports and rumors, see *infra*, VII, F, 23, j, (VII). **As to distinction between fixed and hypothetical opinions**, see *infra*, VII, F, 23, i, (I).

Bias, prejudice or ill-will as affecting, see *infra*, VII, F, 23, h.

87. *State v. Foster*, 91 Iowa 164, 59 N. W. 8; *Henry v. State*, 4 Humph. (Tenn.) 270.

[a] "The law does not require that a juror should be perfectly free from all impressions and opinions as to the issue." *State v. Hayes*, 69 S. C. 295, 48 S. E. 251.

[b] **One otherwise competent is not disqualified by the fact alone that he has an opinion as to the guilt or innocence of the accused.** *Gammoms v. State*, 85 Miss. 103, 37 So. 609; *Klyce v. State*, 79 Miss. 652, 31 So. 339.

[c] **Not Within Constitutional Guaranties.**—"The federal and state constitutions guarantee to an accused the right to be tried, not by a jury who have formed no opinions, but by an impartial jury." *United States v. Schneider*, 10 Mackey (D. C.) 381.

Necessity that opinion be expressed, see *infra*, VII, F, 23, e.

[d] **One who has read or heard reports and formed an opinion is not necessarily disqualified.** *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211. See *infra*, VI, F, 23, j.

88. *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871; *State v. Evans*, 55 Mo. 460, the opinion itself, to be disqualifying, must be of a material fact and of a nature to influence the juror's decision.

89. *Leigh v. Territory*, 10 Ariz. 129,

that the juror's mind is in a state prejudicial to the substantial rights of the party.⁹⁰ So the rule has sometimes been stated that a preconceived opinion, if fixed and determinate, though not characterized by malice or ill-will, is generally regarded as a ground of principal challenge, while an opinion based upon rumor and which does not appear to have taken firm hold of the juror's mind, is regarded as cause for challenge to the favor only.⁹¹

By the weight of modern authority the mere formation and expression of an opinion does not necessarily render the juror incompetent,⁹² or disqualified.⁹³ Incompetency depends more upon the character of the opinion, than upon the formation and expression of it,⁹⁴ and it is not the existence, but the strength of the opinion as shown by the grounds on which it is formed, that is decisive.⁹⁵ But there are cases holding that the formation and expression of an opinion disqualifies the juror per se.⁹⁶ By most of the authorities, at common law it was ground for principal challenge that the juror had formed and declared his opinion touching the matter in controversy,⁹⁷ and by

85 Pac. 948; *Territory v. Johnson*, 16 Hawaii 743.

90. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

91. See *Solander v. People*, 2 Colo. 48; *Union Gold M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565.

92. *Thomas v. State*, 144 Ga. 298, 87 S. E. 8; *Blackman v. State*, 80 Ga. 785, 7 S. E. 626; *Nesbit v. State*, 43 Ga. 238; *Wright v. State*, 18 Ga. 383; *Griffin v. State*, 15 Ga. 476.

[a] *Palmer v. State*, 42 Ohio St. 596, reviewing the history of the legislation, the court says that for a long time it was assumed that a person who had formed or expressed an opinion as to the guilt or innocence of accused was not impartial. That it is strong evidence of a prejudice inconsistent with impartiality has never been doubted, but it is not necessarily equivalent to partiality.

93. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Long v. State*, 86 Ala. 36, 5 So. 443.

[a] **Reason for Rule.**—If the mere formation and expression of an opinion disqualified there would be an end to the trial and punishment of persons accused of crime, for every intelligent person forms an opinion of some kind about matters he reads about and discusses with others. *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407.

94. *Thomas v. State*, 144 Ga. 298, 87 S. E. 8.

95. *Alfred v. State*, 2 Swan (Tenn.) 581.

Character of opinion, see *infra*, VII, F, 23, i.

Sources of information, see *infra*, VII, F, 23, j.

96. *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Com. v. Sushinskie*, 242 Pa. 406, 89 Atl. 564.

[a] **Publicly declared opinion held sufficient to summarily dismiss juror**, see *Com. v. Cleary*, 148 Pa. 26, 23 Atl. 1110.

97. **U. S.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. **Colo.** *Minich v. People*, 8 Colo. 440, 9 Pac. 4; *Solander v. People*, 2 Colo. 48; *Union Gold M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565. **Conn.**—*State v. Allen*, 46 Conn. 531. **Ill.**—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. **N. Y.**—*People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1.

[a] "A half a century ago, when jurors were easily obtained, who had heard nothing of the cause, or so little as to have no fixed opinions upon the guilt of the prisoners, the rule was held strictly to exclude all who had in any manner formed and expressed an opinion." *Staup v. Com.*, 74 Pa. 458. See also similar language in *Union Gold M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565.

[b] That a juryman "had declared his opinion on either side" was a principal cause of challenge at common law on the ground that he was not

the early cases it was ground for principal challenge,⁹⁸ but there is authority that even where a juror expressed his opinion upon the merits and indicated ill-will or malice, the challenge was only to the favor,⁹⁹ but the effect of the modern view and of the statutes is to change the character of the objection from a ground of principal challenge, to a ground of challenge to the favor.¹ The statutes do not imply that one who has an opinion is competent,² nor is it intended that everyone who has heard or read of an alleged crime shall be barred from the jury.³

The sources of the information are important,⁴ but it is the character, nature, or strength of the opinion, rather than the sources of information from which the opinion was derived, which is controlling,⁵ except in so far as otherwise provided by statute,⁶ and the

"impartial." *Eason v. State*, 6 Baxt. (Tenn.) 466.

98. *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. (N. Y.) 1, citing *People v. Allen*, 43 N. Y. 28, and *People v. Vermilyea*, 7 Cow. (N. Y.) 108; *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216.

[a] From an early period, in this country, that a juror had formed an opinion as to the issue to be tried was held good ground for challenge for principal cause. *United States v. Schneider*, 10 Mackey (D. C.) 381.

99. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, reviewing many cases English and American. To same effect, see *State v. Howard*, 17 N. H. 171.

Generally as to necessity of showing ill-will or malice, see *infra*, VII, F, 23, h.

1. *Minich v. People*, 8 Colo. 440, 9 Pac. 4; *Jones v. People*, 2 Colo. 351.

[a] It is not the opinion, formed or expressed, that is of itself the disqualifying circumstance, but if it produce a condition of mind, amounting to unindifference, the juror is disqualified, and the court is to determine whether the opinion has produced that result. *Solander v. People*, 2 Colo. 48.

[b] "This is the only important statutory exception to the common-law rule excluding jurors for actual bias." *People v. Landis*, 139 Cal. 426, 73 Pac. 153, quoting with approval, *Lombardi v. California St. C. R. Co.*, 124 Cal. 311, 318, 57 Pac. 66. See also *People v. Miller*, 125 Cal. 44, 57 Pac. 770; *People v. Wells*, 100 Cal. 227, 34 Pac. 718.

[c] **Statute Changes Common-Law Rule.**—*People v. McGonegal*, 136 N. Y.

62, 32 N. E. 616; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 272; *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. 194.

[d] Though the act declares what shall not be ground for challenge for principal cause it does not say that the same or other facts shall not be ground of challenge to the favor. Though challenges for cause and for favor have been abolished the challenge when made should be regarded by the court as covering the whole ground and the decision should be whether or not the juror is indifferent. *Stephens v. People*, 38 Mich. 739.

2. *Klyce v. State*, 79 Miss. 652, 31 So. 339.

3. *State v. Stewart*, 85 Kan. 404, 116 Pac. 489; *State v. Spaulding*, 24 Kan. 1; *State v. Medlicott*, 9 Kan. 257; *State v. Bane*, 1 Kan. App. 537, 42 Pac. 376.

4. *People v. Quimby*, 134 Mich. 625, 96 N. W. 1061; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. See *infra*, VII, F, 23, j.

5. **Colo.**—*Solander v. People*, 2 Colo. 48. **Fla.**—*Brown v. State*, 40 Fla. 459, 25 So. 63; *Olive v. State*, 34 Fla. 203, 15 So. 925; *English v. State*, 31 Fla. 340, 356, 12 So. 689; *Andrews v. State*, 21 Fla. 598. **Ga.**—*Boon v. State*, 1 Ga. 631; *Reynolds v. State*, 1 Ga. 222. **Ind.**—*Brown v. State*, 70 Ind. 576; *Guetic v. State*, 58 Ind. 182; *Goodwin v. Blachley*, 4 Ind. 438. **Kan.**—*State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *State v. Beatty*, 45 Kan. 492, 25 Pac. 899. **La.**—*State v. Ford*, 37 La. Ann. 443.

6. See *supra*, this section, and see

juror's own statement under oath as to his then state of mind may become a controlling factor.⁷ It follows that in all cases the court should consider the character of the expression, the sources of the information and the circumstances under which the expression was used.⁸

b. *Statutory Rules Generally.*—Under statutes permitting challenge for any ground that unfits for jury service one may be challenged for having expressed an opinion about the merits of the case, though the statutes do not specifically mention that ground.⁹ Some statutes merely provide that it shall be good ground for challenge that the juror has a fixed opinion as to the guilt or innocence of defendant which would bias his verdict.¹⁰ This merely re-affirms the common-law rule,¹¹ and has been held to apply to both criminal and civil cases.¹² Under some statutes, having formed or expressed an opinion from rumor merely is specifically stated to be no ground for challenge.¹³

The statutes of some states provide in terms that having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged is ground for challenge for implied bias.¹⁴ This provision has been said to be only a simplification of the common-law rule,¹⁵ and under it the belief of the juror as to his ability to try the case fairly in spite of such opinion, is not a proper subject for inquiry.¹⁶ He is disqualified if the expression of the opinion be unqualified in form, though in the mind or thought of the juror the opinion was qualified.¹⁷

Many statutes provide that, in civil cases, having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them is ground for challenge for cause.¹⁸ Another form of statute makes it good cause for challenge that the juror has expressed an opinion as to which party ought

further, *infra*, VII, F, 23, b and j.

7. See *infra*, VII, F, 23, k.

8. *Nesbit v. State*, 43 Ga. 238.

9. *Couts v. Neer*, 70 Tex. 468, 473, 9 S. W. 40; *Houston & T. C. R. Co. v. Terrell*, 69 Tex. 650, 7 S. W. 670; *Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612.

10. Ala.—Code, §2726, subd. 7. Ariz.—Pen. Code, §1025. Ark.—Kirby's Dig., §4492.

11. *Long v. State*, 86 Ala. 36, 5 So. 443. See also *Bales v. State*, 63 Ala. 30; *Carson v. State*, 50 Ala. 134.

12. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

13. Kirby's Dig. (Ark.), §2366. See *infra*, this section, and VII, F, 23, j, (VII).

14. Idaho.—Pen. Code, §7834, subd. 8. Nev.—Rev. Laws, §7148, subd. 8. Utah.—Comp. Laws, §4834, subd. 8.

15. *People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653.

16. *People v. Edwards*, 41 Cal. 640. See also *People v. Weil*, 40 Cal. 268.

The California statute has been repealed and similar statutes are sometimes modified by provisions permitting jurors to make such statement, see *infra*, this section.

17. *People v. Brotherton*, 43 Cal. 520; *People v. Edwards*, 41 Cal. 640; *People v. Weil*, 40 Cal. 268; *People v. Cottle*, 6 Cal. 227.

18. Cal.—Code Civ. Proc., §602, subd. 6. Idaho.—Code Civ. Proc., §4380, subd. 6. N. D.—Rev. Code, §7017, subd. 6. S. D.—Code Civ. Proc., §252, subd. 6.

As to source of opinion, see *infra*, VII, F, 23, j.

As to character of opinion, see *infra*, VII, F, 23, i.

[a] In construing this statute the

to prevail,¹⁹ or on the merits of the controversy,²⁰ or on the issue, or any material fact to be tried,²¹ unless founded only on newspaper reports or rumors and which are not such as to bias or prejudice the juror.²² The opinion must be such as will influence the juror's judgment in his consideration of the cause.²³

In many states the statutes provide for an examination of the juror under oath as to whether he has expressed or formed any opinion or is sensible of any bias or prejudice and the court excludes him if he appears not indifferent,²⁴ sometimes with a special provision as to opinions based on newspaper reports or rumor.²⁵ The theory of these statutes is that citizens who are fit to serve will not permit their previous opinions to control and that it is properly left to the trial court to determine their fitness, despite that opinion,²⁶ and, whether or not they are merely declaratory of the common law, the word "indifferent" is used in the common law sense.²⁷ And this has been held to be the

general rule has been applied that a juror is disqualified who has formed an opinion on the issues unless it appear that he can find an impartial verdict on the evidence without being influenced by his opinion. *Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. 769.

[b] But under a similar statute not mentioning the juror's knowledge, it is held that though the opinion was based on mere rumor or newspaper report and the juror states he can try the case fairly, those facts cannot be considered in determining his competency. That would be important, under the statute, if this were a criminal trial. But the provisions of the Criminal Practice Act (Rev. Code, §9264) in this regard have never been carried into the Civil Practice Act (Rev. Code, §6741). This leads to the conclusion that the legislature intended the more stringent rule of the common law should prevail in civil cases. *Shane v. Butte Electric Ry. Co.*, 37 Mont. 599, 97 Pac. 958.

19. Ga. Pen. Code, §859, "in a civil cause." See also *Pike County v. Griffin & W. P. Plank Road Co.*, 15 Ga. 39.

20. Ia. Code, §3688, subd. 9; §5360.

21. Kan. Gen. St., §6781; *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; Mo. Rev. St., 1909, §§5220, 7283.

[a] The purpose of the provision of the statute (Crim. Code, §205, Gen. St., 6781) read in connection with Bill of Rights, §10, guaranteeing a speedy trial by an impartial jury, is to secure defendant a jury free from bias, preju-

dice or interest. *State v. Stewart*, 85 Kan. 404, 116 Pac. 489.

22. Mo. Rev. St., 1909, §5220; *State v. Foley*, 144 Mo. 600, 46 S. W. 733; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Culler*, 82 Mo. 623; *State v. Walton*, 74 Mo. 270. See *infra*, VII, F, 23, j, (VII).

[a] The mere reading of newspaper accounts is not ground for challenge. Nev. Rev. Laws, §5206, subd. 6; Wyo. Comp. Laws, §4496, subd. 6.

23. *McCarthy v. Cass Ave. F. G. Ry. Co.*, 92 Mo. 536, 4 S. W. 516; *McComas v. Covenant Mut. Life Ins. Co.*, 56 Mo. 573; *Dew v. McDivitt*, 31 Ohio St. 139.

[a] If the opinion formed or expressed be as to the whole issue the juror is incompetent if "the prejudice thus alleged is not clearly rebutted." *Dew v. McDivitt*, 31 Ohio St. 139.

24. Colo.—Mills' Ann. St., §4256, in criminal prosecution, statute expressly so provides. Fla.—Gen. St., §1492. Haw.—Acts, 1905, ch. 5. Me.—Rev. St., ch. 84, §94. N. H.—Pub. St., ch. 209, §25. R. I.—Gen. Laws, ch. 279, §37. S. C.—Civ. Code, §2944. Utah. Comp. Laws, §3144, subd. 6. Va. Code, 1904, §3154. Wis.—St., 1898, §2849.

25. Ore.—Lord's Laws, §123. Wash. Rem. & Bal. Code, §331. Wis.—St., 1898, §2850.

See *infra*, VII, F, 23, j, (VII).

26. *Power v. People*, 17 Colo. 178, 28 Pac. 1121; *Babeck v. People*, 13 Colo. 515, 22 Pac. 817.

27. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, it merely means that the

practical effect of statutes which do not specifically provide for such examination by the court.²⁸

By still other statutes it is not ground for challenge for actual bias or for disqualifying the juror, that he has formed or expressed an opinion, providing he states on oath that he is impartial, and the court is satisfied that he is,²⁹ at least where the opinion is founded upon certain specified sources,³⁰ and this is held to be the rule under many statutes, disqualifying for the formation or expression of opinion, although they do not expressly so provide.³¹

juror may or may not be indifferent if he has formed or expressed an opinion, leaving it to the trial court to decide as a question of fact.

28. *Denver, S. P. & P. R. R. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811. See also *Union Gold Min. Co. v. Rocky Mt. Natl. Bank*, 2 Colo. 565; *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *State v. Foster*, 91 Iowa 164, 59 N. W. 8; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211; *State v. Arnold*, 12 Iowa 479.

[a] The earlier Indiana statutes were so construed notwithstanding a clause, "Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant." *Guertig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Bradford v. State*, 15 Ind. 347.

29. Miss.—Code, 1906, §2685. *N. Y. Code Crim. Proc.*, §376. See *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *People v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277; *People v. Otto*, 101 N. Y. 690, 5 N. E. 788; *Balbo v. People*, 80 N. Y. 484. Ohio.—Gen. Code, §13653, subd. 2.

[a] Statute as declaration of rule previously existing, see *Gammons v. State*, 85 Miss. 103, 37 So. 609; *Klyce v. State*, 79 Miss. 652, 31 So. 339; *Sam v. State*, 13 Smed. & M. (Miss.) 189, declaring rule previous to statute.

30. See statutes cited *infra*, this note, and *infra* VII, F, 23, j.

[a] Founded Upon Public Rumor, Statements in Public Journals or Common Notoriety.—Cal.—Pen. Code, §1076. Mont.—Rev. Code, §9264. Nev. Rev. Laws, §7150. N. D.—Rev. Code, §9975. Okla.—Rev. Laws, §5861. S. D. Code Crim. Proc., §341. Tenn.—Laws, 1899, ch. 383. Utah.—Comp. Laws, §4836. Wyo.—Comp. Laws, §6207, subd. 2.

[b] From Rumor or Newspaper Reports About the Truth of Which He

Has Expressed no Opinion.—Ariz. Civ. Code, §3558, subd. 6; Pen. Code, §1024. Ky.—Act of 1888 (see Code Crim. Proc., §207). Neb.—Rev. St., §8158.

[c] Special Provisions Aimed at Information Gained From Witnesses. Burns' Ann. St. (Ind.) §2101, subd. 2. Neb. Rev. St., §9109, subd. 2.

[d] Not Based on Personal Knowledge.—How. St. (Mich.) §15119.

[e] Statutory Questions in Texas. Code Crim. Proc., Art. 673, subd. 13.

[f] The statute must be construed in connection with the cases preceding its enactment in order to determine what is meant by newspaper reports. *Palmer v. State*, 121 Tenn. 465, 118 S. W. 1022.

31. Ark.—McGough v. State, 113 Ark. 301, 167 S. W. 857 (opinion founded on rumor); *Dolan v. State*, 40 Ark. 454. Colo.—Solander v. People, 2 Colo. 48. D. C.—United States v. Schneider, 10 Mack. 381. Ga.—Thomas v. State, 144 Ga. 298, 87 S. E. 8. Ia. State v. Hassan, 149 Iowa 518, 128 N. W. 960 (opinion based on what he has heard and read); *State v. Rohn*, 140 Iowa 640, 119 N. W. 88; *State v. Ralston*, 139 Iowa 44, 116 N. W. 1058; *State v. Young*, 104 Iowa 730, 74 N. W. 693; *State v. Yetzer*, 97 Iowa 423, 66 N. W. 737; *State v. Foster*, 91 Iowa 164, 59 N. W. 8. Kan.—State v. Hamilton, 74 Kan. 461, 87 Pac. 363, rumor. La.—State v. Mayfield, 104 La. 173, 28 So. 997; *State v. Vogel*, 49 La. Ann. 1057, 22 So. 308; *State v. Le Duff*, 46 La. Ann. 546, 15 So. 397; *State v. Covington*, 45 La. Ann. 979, 13 So. 266; *State v. Garig*, 43 La. Ann. 365, 8 So. 934; *State v. Boyd*, 38 La. Ann. 374; *State v. Ford*, 37 La. Ann. 443; *State v. Birdwell*, 36 La. Ann. 859; *State v. McGee*, 36 La. Ann. 206; *State v. Dugay*, 35 La. Ann. 327; *State v. Revells*, 35 La. Ann. 302; *State v. Vines*, 34 La. Ann. 1073; *State v. De Rance*, 34 La.

These various statutes are uniformly held to be constitutional,³² provided they do not receive such a liberal construction as to nullify the

Ann. 186, 44 Am. Rep. 426; State v. Johnson, 33 La. Ann. 889; State v. Lartigue, 29 La. Ann. 642; State v. Guidry, 28 La. Ann. 630; State v. Bunker, 14 La. Ann. 461. **Md.**—Zimmerman v. State, 56 Md. 536. **Mo.**—State v. Wooley, 215 Mo. 620, 115 S. W. 417; State v. Bobbitt, 215 Mo. 10, 114 S. W. 511 (rumor and newspaper reports); State v. Sykes, 191 Mo. 62, 89 S. W. 851; State v. Gartrell, 171 Mo. 489, 71 S. W. 1045; State v. Craft, 164 Mo. 631, 65 S. W. 280; State v. Brennan, 164 Mo. 487, 65 S. W. 325; State v. Shackelford, 148 Mo. 493, 50 S. W. 105; State v. Hunt, 141 Mo. 626, 43 S. W. 389; State v. Reed, 137 Mo. 125, 38 S. W. 574; State v. Robinson, 117 Mo. 649, 23 S. W. 1066; State v. Cunningham, 100 Mo. 382, 12 S. W. 376; State v. Brooks, 92 Mo. 542, 5 S. W. 257, 220; State v. Reed, 89 Mo. 168, 1 S. W. 225. **N. C.**—State v. De Graff, 113 N. C. 688, 18 S. E. 507; State v. Collins, 70 N. C. 241, 16 Am. Rep. 771; State v. Cockman, 60 N. C. 484; State v. Bone, 52 N. C. 121. **Tenn.**—Conatser v. State, 12 Lea 436, opinion based on information.

[a] **Not Disqualified as Matter of Law.**—It cannot be said as a matter of law that jurors are disqualified, who were strangers to the defendant, and to everyone "connected with the tragedy;" who were candid in their answers and plainly free from prejudice, the newspaper accounts which they had read and the rumors which they had heard had not closed their minds to a fair consideration of the evidence or to the giving of an intelligent, honest verdict. State v. Stewart, 85 Kan. 404, 116 Pac. 489.

[b] **Opinion Requiring Evidence To Remove.**—Juror is not rendered incompetent because he states that from rumor and from reading newspapers he has formed an opinion as to defendant's guilt, which it will take evidence to remove, where he also states that for the purposes of the trial he can disregard his opinion and can give the defendant a fair and impartial trial, and it appears he is indifferent in the case. Dewein v. State, 114 Ark. 472, 170 S. W. 582, following Hardin v. State, 66 Ark. 53, 48 S. W. 904 (where the court says it did not appear that

the juror "entertained any prejudice against defendant"), and *distinguishing* Sullins v. State, 79 Ark. 127, 95 S. W. 159 (where a juror was held incompetent but it appeared that his brother-in-law in whom he had great confidence, and who was also a witness for the state, had published the newspaper reports). See also United States v. Schneider, 10 Mack. (D. C.) 381.

[c] **Under a statute providing for examination by the court as to the juror's indifference, the proper test is** "can and will the juror render a verdict according to the evidence heard upon the trial, impartially and fairly, under his oath so to do, regardless of his preconceived opinions; and if the juror declares upon his voir dire oath that he can and will so decide, there is no cause for sustaining a challenge on the ground of such previously formed opinion." Jones v. People, 6 Colo. 452.

[d] **The opinion is shown not to be fixed, and hence not disqualifying** where the juror states on his voir dire that he can nevertheless, try the case fairly on the law and evidence as given on the trial, and that he is free from prejudice and bias. State v. Hebert, 104 La. 227, 28 So. 898.

[e] **In Pennsylvania** if the opinions or impressions of the juror are founded on rumors or reports or even newspaper statements which the juror feels conscious he can dismiss, and he has no fixed prejudices or belief and he is able to say he can try the prisoner fairly on the evidence, freed from the influence of such impressions it is within the discretion of the court to permit him to serve. For a fuller discussion see, Com. v. Nye, 240 Pa. 359, 87 Atl. 585; Com. v. Eagan, 190 Pa. 10, 42 Atl. 374; Com. v. Van Horn, 188 Pa. 143, 41 Atl. 469; Curley v. Com., 84 Pa. 151; Ortwein v. Com., 76 Pa. 414, 18 Am. Rep. 420; O'Mara v. Com., 75 Pa. 424; Staup v. Com., 74 Pa. 458; Com. v. Morrow, 9 Phila. (Pa.) 583.

32. **Cal.**—People v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933. **Ill.**—Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; s. c., 123 U. S. 131,

fundamental law that the jury be impartial,³³ provided further that they do not go to the extent of making the juror's statement alone sufficient to remove the disqualification.³⁴

c. *Knowledge or Information Without Opinion.*³⁵—Mere knowledge does not disqualify,³⁶ but persons who were witnesses of material

8 Sup. Ct. 21, 31 L. ed. 80. *Miss.*—Klyce v. State, 79 Miss. 652, 31 So. 339. See also Green v. State, 72 Miss. 522, 17 So. 381, which criticizes Logan v. State, 50 Miss. 269, and Alfred v. State, 37 Miss. 296, in so far as they intimate that it would be unconstitutional for the legislature to make a juror competent who had an opinion which would require evidence to remove. *Mont.*—State v. Mott, 29 Mont. 292, 74 Pac. 728; Territory v. Bryson, 9 Mont. 32, 22 Pac. 147. *Neb.* Lucas v. State, 75 Neb. 11, 105 N. W. 976. *N. Y.*—Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492, holding further that the act regulates procedure merely and so the *ex post facto* rule could not be invoked in the particular case. *N. D.* State v. Ekanger, 8 N. D. 559, 80 N. W. 432. *Ohio.*—Palmer v. State, 42 Ohio St. 596. See also Hartnett v. State, 42 Ohio St. 568; McHugh v. State, 42 Ohio St. 154. *Ore.*—State v. Megorden, 49 Ore. 259, 88 Pac. 306; Kumli v. Southern Pac. Co., 21 Ore. 505, 28 Pac. 637. *S. D.*—State v. Church, 6 S. D. 89, 60 N. W. 143, the court construing the statute upheld it but said it "runs pretty close to the line of infringing the constitutional right." *Utah.*—People v. Thiede, 11 Utah 241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237.

[a] The statute is "really in aid, and consequently not subversive, of the constitutional guaranties that a jury in a criminal cause shall be impartial." Stout v. State, 90 Ind. 1.

[b] "The constitution does not prescribe rules of evidence; it only requires the fact of the impartiality of the jury to exist; and a statute cannot be said to contravene its guaranty, which leaves the judicial mind free to find the fact, from the evidence submitted, according to the truth." Cooper v. State, 16 Ohio St. 328.

33. State v. Miller, 46 Ore. 485, 81 Pac. 363, the legislative declaration is in effect that the opinion shall not be of itself sufficient to sustain the challenge, but the court must be satisfied,

from all the circumstances that the juror cannot disregard the opinion. See also State v. McClear, 11 Nev. 39; Kumli v. Southern Pac. Co., 21 Ore. 505, 28 Pac. 637.

34. Eason v. State, 6 Baxt. (Tenn.) 466, jurors who have formed or expressed opinions which are disqualifying because of their foundation or strength are not "impartial" within the meaning of the constitution, and no statement of theirs can make them so. Hence a statute attempting to qualify them upon their statement is unconstitutional.

[a] Since that practically makes the juror the judge of his own fitness. Coughlin v. People, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, distinguishing the constitutional Illinois statute from one in Tennessee found unconstitutional in Eason v. State, 6 Baxt. (Tenn.) 466. See also Stokes v. People, 53 N. Y. 164, 13 Am. Rep. 492, making the same distinction of the Tennessee statute and case. So in Jones v. People, 2 Colo. 351, the court calls attention to the fact that "the court is required to ascertain that jurors will determine the case impartially."

35. Personal knowledge as source of opinion see *infra*, VII, F, 23, j, (II).

36. *Ia.*—State v. Foster, 91 Iowa 164, 59 N. W. 8. *La.*—State v. Perieux, 107 La. 601, 31 So. 1016. *N. H.*—State v. Sawtelle, 66 N. H. 488, 32 Atl. 831, which says, however, that the practice in New Hampshire and in most of the states is to excuse jurors who have heard about the case, "except on the rare occasions of difficulty in obtaining a jury." To same effect see State v. Howard, 17 N. H. 171.

[a] The very reason for drawing the jury "from the town, parish or hamlet nearest the place where the questions to be tried originated" was that they had a better and more certain knowledge of the facts. Waters v. State, 51 Md. 430.

[b] At common law the personal knowledge which a juryman had of the crime, he was supposed to use in determining his verdict. Therefore his

facts should not be permitted to serve.³⁷ One who has formed no opinion is competent though he may have been told about the case.³⁸

Jurors who have merely read accounts in newspapers and say they have not formed or expressed any opinion are clearly not disqualified,³⁹ and the mere fact that juror has read newspaper accounts is not ground for challenge for cause.⁴⁰ So a juror is clearly competent who has

knowledge was not ground for challenge. See *People v. Mol*, 137 Mich. 692, 100 N. W. 913, 68 L. R. A. 871. For an elaborate review of the common law rule that knowledge was a prerequisite rather than a disqualification, see *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831.

[c] Mere knowledge of a former verdict against defendant would not disqualify jurors. *Arnwine v. State*, 54 Tex. Crim. 213, 114 S. W. 796, 802; *Moore v. State*, 52 Tex. Crim. 336, 107 S. W. 540.

[d] Mere knowledge of facts of a former prosecution for a different crime would not disqualify, see *Woodroe v. State*, 50 Tex. Crim. 212, 96 S. W. 30.

37. See *infra*, this note.

[a] One who was at the scene of the killing, if not at the very time thereof, so soon thereafter as to become a witness to material facts, having located the wound in the body of deceased and being cognizant of the main salient features of the case, should not have been accepted as a juror. *Nelson v. State* (Tex. Crim.), 58 S. W. 107.

Effect of basing opinion upon what witnesses have told juror see *infra* VII, F, 23, j, (IV), to (VI), (VIII).

Disqualification of persons who are to be witnesses in case see *supra*, VII, F, 14, c.

38. *State v. Craft*, 164 Mo. 631, 65 S. W. 280, juror remembered nothing that was said.

[a] One is properly held competent who has only heard fragmentary portions of testimony adduced at three former trials, one of which was confined to the sole issue of insanity, and has not formed or expressed any opinion as to the guilt of accused. *State v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266.

[b] A proposed juror who says he has heard the case talked about but did not think he had formed or expressed an opinion as to the guilt or innocence of accused is competent.

Skinner v. State, 53 Miss. 399.

[c] The mere fact that juror has heard evidence on the trial of co-defendants, does not disqualify him where he states he has formed no opinion as to defendant's guilt. *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468; *Dreyer v. State*, 11 Tex. App. 631.

[d] Where he heard the testimony on a preliminary examination before a magistrate he is not necessarily disqualified and should not be excluded where he says he formed no opinion that would influence him in the case. *Wade v. State*, 12 Tex. App. 358.

39. *Palmer v. State*, 121 Tenn. 465, 118 S. W. 1022.

[a] Not Proper To Require Juror To Read Article.—A juryman having said that he had not formed or expressed an opinion but that he was a subscriber to a certain paper and usually read it carefully, but did not recall having read about the matter being tried, it was proper to refuse to permit counsel to show him certain news items and editorials in said paper and ask him if he had read them. He clearly having no opinion it would have been idle to have him read an article to see whether he would form an opinion. *Palmer v. State*, 121 Tenn. 465, 118 S. W. 1022, *distinguishing* *Ward v. State*, 102 Tenn. 724, 52 S. W. 996, where the prisoner was held entitled to have exhibited to the venireman, and to examine him thereon, the very newspaper report which the venireman said he had read.

Newspapers as source of opinion, see *supra*, VII, F, 23, b; *infra*, VII, F, 23, j, (VII).

40. *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211; *People v. Foglesong*, 116 Mich. 556, 74 N. W. 730. See also *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78; *Holt v. People*, 13 Mich. 224.

[a] Reasons for Rule.—(1) "If the rule were otherwise, in this day of intelligence, when nearly everybody

read an account but does not even remember the name of the person killed, though he may have formed an opinion.⁴¹

d. *Opinion Without Any Knowledge.*—According to some cases there can be no disqualifying opinion, unless it is based upon knowledge or reliable information of facts,⁴² and that though a juror admits having expressed an opinion he is clearly competent where he has no bias or prejudice and knows nothing about the facts.⁴³ But generally a juror may be rendered incompetent or subject to challenge because of opinion, although it is not founded upon knowledge or reliable information, if it be such as to prevent him from acting impartially.⁴⁴

e. *Necessity That Opinion Be Expressed.*—At common law an opinion, formed but not expressed, did not disqualify,⁴⁵ and that is the rule laid down in some of the early cases.⁴⁶ But provided the opin-

reads the newspapers, and if the reading of reports in the newspapers should disqualify one from acting as a juror, the courts would be able to get very few qualified jurors; and those qualified to serve would be generally the most ignorant in the community. *West v. State*, 79 Ga. 773, 4 S. E. 325. (2) As said by Field, C. J., in *Com. v. Trefethen*, 157 Mass. 180, 31 N. E. 961, "It is plainly impossible to exclude every juror who has read in the newspapers some statement of the case, because this might exclude every intelligent man in the county." See also *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. (3) "In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it." *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

[b] "It will be extremely difficult to find an intelligent person, who has not heard some sort of report, or read some sort of a local item, in regard to almost all matters, that are likely to be litigated before a jury." *State v. Meaker*, 54 Vt. 112.

[c] Should a juror be excused because of having read newspaper accounts "the public would be deprived of the advantage of having its most intelligent citizens in such service." *Ia.*—*State v. Rohn*, 140 Iowa 640, 119 N. W. 88; *State v. Young*, 104 Iowa 730, 74 N. W. 693. *Md.*—See *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601. *Miss.*—*Gammons v. State*,

85 Miss. 103, 37 So. 609. *Neb.*—*Taylor v. State*, 86 Neb. 795, 126 N. W. 752; *Basye v. State*, 45 Neb. 261, 63 N. W. 811. *W. Va.*—*State v. Baker*, 33 W. Va. 319, 10 S. E. 639. *Wyo.*—*Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

41. *Maxey v. State*, 66 Tex. Crim. 234, 145 S. W. 952, though he does recall reading about it and that he formed an opinion, which he states will not influence him.

42. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244 (there must be some evidence on which the opinion is founded); *Spence v. State*, 15 Lea (Tenn.) 539; *Conatser v. State*, 12 Lea (Tenn.) 436, the law does not regard what a juror may call an opinion, as being an opinion at all unless it is based upon knowledge or reliable information of facts.

43. *State v. Summers*, 36 S. C. 479, 15 S. E. 369, he believed he could render a verdict according to the evidence applied by the law as announced by the court may be found competent.

44. See *supra*, VII, F, 23, b; *infra*, VII, F, 23, j.

[a] May amount to bias or prejudice though not founded on knowledge or information as to the facts. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862.

45. See *infra*, VII, F, 23, h.

46. *Ga.*—*Griffin v. State*, 15 Ga. 476. *N. J.*—*State v. Spencer*, 21 N. J. L. 196. *Vt.*—*Boardman v. Wood*, 3 Vt. 570.

See also *State v. Morea*, 2 Ala. 275; *Clifford v. State*, 61 N. J. L. 217, 39 Atl. 721; *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50.

[a] Where Juror Could Not Recall Its Purport.—The mere formation of

ion is of a disqualifying character,⁴⁷ or has been received from a disqualifying source,⁴⁸ other and later authorities hold the opinion itself is disqualifying though it has not been expressed,⁴⁹ some saying that it disqualifies per se,⁵⁰ others that it prima facie disqualifies the juror.⁵¹

f. *Time of Opinion.*⁵²—The inquiry must be directed to the present state of the juror's mind,⁵³ but where a jurymen has expressed his opinion so strongly as to show prejudice he should be excluded though he states he no longer has any resentment against defendant.⁵⁴

g. *Subject Matter of the Opinion or Knowledge.*—(I.) *In General.* Though an unqualified opinion usually involves both a belief in the facts and a conclusion drawn from them,⁵⁵ one is not necessarily disqualified merely because he may have an opinion, knowledge, or belief as to some of the matters involved in the case,⁵⁶ nor because he has an

an unexpressed opinion, even the purport of which the juror could not recall at the time of trial is not disqualifying. *People v. Murphy*, 45 Cal. 137.

47. See *infra*, VII, F, 23, i.

48. See *infra*, VII, F, 23, j.

49. III.—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Davison v. People*, 90 Ill. 221. *Mass.*—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491. *Va.*—*Armistead v. Com.*, 11 Leigh (38 Va.) 657, 37 Am. Dec. 633; *Osiander v. Com.*, 3 Leigh (30 Va.) 780, 24 Am. Dec. 693. *Wash.*—*State v. Kinney*, 45 Wash. 165, 87 Pac. 1123.

As to statutory rules see the statutes generally, and *supra*, VII, F, 23, b.

50. *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50. See *State v. Potter*, 18 Conn. 166; *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

[a] *Early New York cases* so held. See *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1, *citing*, *People v. Mather*, 4 Wend. 229, 21 Am. Dec. 122; *Cancemi v. People*, 16 N. Y. 501.

51. *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *People v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277; *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273; *People v. Casey*, 96 N. Y. 115, 2 N. Y. Cr. 194.

[a] *Not Disqualified as Matter of Law.*—*State v. Tatso*, 50 Vt. 483. See also *State v. Phair*, 48 Vt. 366; *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361.

52. *Present opinion as disqualifying though subject to change by evidence* see *infra*, VII, F, 23, i, (II).

53. *Grissom v. State*, 8 Tex. App.

386; *Rothschild v. State*, 7 Tex. App. 519, if he had formed an opinion, discarded it, and at the time had no opinion he is competent. See also *Wright v. State*, 35 Ark. 639.

[a] It is not necessary to examine jurors as to what opinions they may have had prior to that time, when they disclose no present fixed opinion. *Hawes v. State*, 88 Ala. 37, 7 So. 302.

[b] *Juror who has forgotten his opinion* is competent. He said he had heard some talk about the case at the time the alleged offense was committed, and that he might have had some opinion about it at that time but did not recollect, and had no present opinion and was impartial. *Lyles v. Com.*, 88 Va. 396, 13 S. E. 802.

54. *Collins v. State*, 102 Ark. 180, 185, 143 S. W. 1075, jurymen was in the city on the night of the killing and then asserted the defendant ought to be lynched and that he would be willing to assist in lynching him.

55. *People v. Reynolds*, 16 Cal. 128.

56. *State v. Stewart*, 85 Kan. 404, 116 Pac. 489.

[a] *Juror knew defendant was a public official*, and believed public moneys were missing. But had formed no fixed opinion as to whether defendant was guilty or innocent of the crime of embezzling public moneys as charged. *State v. Spaulding*, 24 Kan. 1.

[b] *Mere knowledge that there is a local option law in force* or that the juror knows there was an election the result of which was to suspend the general laws of the state as to selling liquor, does not disqualify. *People v. Keefer*, 97 Mich. 15, 56 N. W. 105.

[c] *One who had heard only some of the circumstances; that the body of*

opinion upon or knowledge of a conceded fact,⁵⁷ as that the homicide was committed by accused,⁵⁸ or in a particular way,⁵⁹ or was the result of a certain controversy.⁶⁰ The opinion must be upon the merits of the case,⁶¹ or as to a material fact, or the issue to be tried,⁶² or

the man that was killed was found in a river and that the prisoner was in some way connected with that circumstance, is not incompetent. *Carroll v. State*, 3 Humph. (Tenn.) 315.

[d] **Opinion as to Evidentiary Fact Consistent With Innocence.**—A mere opinion that the defendant, who was charged with embezzling funds entrusted to him in his official capacity, had loaned money, the juror stating that he had no idea whether it was defendant's own money, or moneys of the city which he was so loaning, is not disqualifying. *State v. Krug*, 12 Wash. 288, 41 Pac. 126.

[e] **Knowledge of facts tending to show guilt, though acquired in another trial involving some of the same circumstances, does not necessarily disqualify where the court is satisfied that the juror will be impartial.** *Howell v. State*, 4 Ind. App. 148, 30 N. E. 714.

As to right of one who has tried similar matters to sit on jury, see *supra*, VII, F, 17.

57. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *State v. Morrison*, 67 Kan. 144, 72 Pac. 554; *State v. Start*, 60 Kan. 256, 56 Pac. 15; *State v. Wells*, 28 Kan. 321; *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556.

[a] **Matter Admitted.**—Where plaintiff alleged that a crossing was "exceptionally dangerous," and recited the facts that made it so, and defendant admitted the existence of those facts, it was proper to overrule defendant's challenge for cause to jurors who said they were familiar with the crossing and considered it exceptionally dangerous. *L. S. & M. S. Ry. Co. v. Reynolds*, 21 Ohio Cir. Ct. 402.

58. *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988.

[a] **Killing Admitted But Insanity Pleaded.**—*State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556. See also *Bales v. State*, 63 Ala. 30; *Dewain v. State*, 120 Ark. 302, 179 S. W. 346.

[b] **Killing Admitted But Justification Pleaded.**—*State v. Ware*, 58 Wash. 526, 109 Pac. 359.

59. *Conatser v. State*, 12 Lea (Tenn.) 436, with particular instrument.

[a] **Death by Violence Undisputed.** *Keffer v. State*, 12 Wyo. 49, 73 Pac. 556.

60. *Spence v. State*, 15 Lea (Tenn.) 539.

61. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862.

[a] **Though a juror was on a grand jury that returned another indictment against accused he is not necessarily rendered incompetent though he has expressed an opinion that if the evidence in the case at bar is as strong as that before said grand jury he would convict him. The juror had not, however, formed any opinion as to defendant's guilt or innocence.** *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690. Generally as to disqualification of grand jurors to sit see, *supra*, VII, F, 16, b.

62. *State v. Morrison*, 67 Kan. 144, 72 Pac. 554; *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805; *State v. Start*, 60 Kan. 256, 56 Pac. 15; *State v. Bane*, 1 Kan. App. 537, 42 Pac. 376. See *supra*, VII, F, 23, b.

As to guilt or innocence of accused, see *infra*, this section.

[a] **Where a jury is being impaneled to try the special plea of former jeopardy, it is proper to refuse to interrogate the jurors as to their having formed or expressed opinions of the guilt or innocence of the prisoner; and to confine the inquiry to such expressions or opinions as to the issue then to be tried, and as to any personal bias, animosity, or ill or good will to the prisoner.** *Josephine v. State*, 39 Miss. 613.

[b] **The words "material fact" do not relate solely to those matters which are material in the sense that they must be proved as part of the crime. The idea is rather that it be a controverted fact or a fact over which the trial court can see there is likely to be controversy. No very exact rule can be laid down. But in the case at bar the mere fact that a juror had simply a knowledge of the identity of cattle alleged to have been stolen, and had an opinion that they had at one**

under some statutes must be as to the "main question involved" in the case.⁶³ In a criminal case the foundation of the disqualification is that the juror has formed an opinion as to the guilt or innocence of the accused,⁶⁴ and the investigation should be directed to that general question.⁶⁵ The disqualification does not depend upon whether the

time belonged to the person alleged to have been the owner at the time of taking, does not make him incompetent. In determining the question the reviewing court considers not only the nature of the fact but whether the record shows it was controverted. *State v. Martin*, 28 Mo. 530.

[c] Jurors who have formed an opinion adverse to the validity of the title under which defendants in ejectment claim are incompetent to sit and should be excluded on defendant's challenge for cause. *White v. Moses*, 11 Cal. 68.

63. See *supra*, VII, F, 23, b.

[a] Determination as to What Is "Main Question."—Where it was impossible from the pleadings, or facts then before it, for the trial court to determine what are the main questions in the case, the challenger must, unless the other party will agree, prove by some competent evidence that the matter upon which the juror admits having a fixed opinion is in fact one of the main questions. In the case at bar from the whole of the juror's examination it appeared that his fixed opinion was not as to the matters in controversy. *Weill v. Lucerne Min. Co.*, 11 Nev. 200.

64. *People v. King*, 27 Cal. 507, 87 Am. Dec. 95; *People v. Reynolds*, 16 Cal. 128; *State v. Williams*, 49 La. 1148, 22 So. 759.

[a] Challenger Must Always Show Bias Against Himself.—In neither civil or criminal cases can the challenge be allowed without some showing by the challenger that the bias is against him. So the juror having stated he had formed and expressed an opinion as to the guilt or innocence of the prisoner he should have been asked the direct question whether he had formed and expressed an opinion that the prisoner was guilty, or there is no error in overruling the prisoner's challenge. *State v. Efler*, 85 N. C. 585. See also *State v. Benton*, 19 N. C. 196.

[b] Form of Question.—The prisoner having asked the juror whether he had formed or expressed the opinion

that the prisoners at the bar, or either of them was guilty of murder or manslaughter, there was no prejudicial error in the court's requiring the question to be put in its usual form whether either was guilty, explaining that the inquiry covered both murder and manslaughter. *State v. Matthews*, 80 N. C. 417.

[c] Error Cured by Similar Question Asked.—*State v. Armstrong*, 43 Ore. 207, 73 Pac. 1022.

[d] Distinction Between Belief as to Guilt and Belief That There Is Some Evidence of Guilt.—The juror having testified unequivocally that he never had heard of the case, and that he had no impression or opinion as to the guilt or innocence of the defendants, the court properly ruled that he was competent notwithstanding he said that the fact of an information having been filed led him to presume that there was some evidence of guilt. This is only presuming that the officers of the law have done their duty and have not filed an information without having some evidence supporting it. *State v. Kinney*, 45 Wash. 165, 87 Pac. 1123.

65. *State v. Arnold*, 12 Iowa 479 (it is not proper to question him upon a defense which may or may not be made and ask whether he has formed or expressed an opinion upon the subject of that defense); *Leach v. State*, 99 Tenn. 584, 42 S. W. 195.

[a] Impression That Defendant Connected With Crime Contrasted With Opinion of Guilt or Innocence.—That jurors have an impression that defendant was connected with the crime, and a feeling that unless it appeared from the evidence he was not so connected they would not be inclined to let him off, does not render them incompetent, where there is no showing of a formation or expression of such an opinion as to guilt or innocence as would prevent the rendition of a true verdict on the evidence. *State v. Brown*, 130 Iowa 57, 106 N. W. 379.

[b] In a prosecution for a seditious libel the juror could not be asked whether he had formed an opinion that

opinion is favorable or unfavorable to the accused,⁶⁶ but it is reversible error to refuse to permit a juror to be asked whether his opinion is for or against defendant's innocence after he has admitted the formation of the opinion.⁶⁷

A declared opinion as to a matter of law does not render the juror incompetent.⁶⁸ Nor is it disqualifying that the juror has an opinion or impression that persons who commit crimes should be punished.⁶⁹

A mere general opinion upon an abstract proposition which is in accord with reason and experience is not disqualifying.⁷⁰ One is not rend-

a certain book was libelous, but the question must be limited to whether the juror had formed an opinion as to the charge. *United States v. Calender*, 25 Fed. Cas. No. 14,709.

[c] **Question May Be Stripped to Material Fact.**—In a prosecution for keeping a house of assignation defendant's counsel having admitted the ownership of the house, it was proper to strip the question of everything immaterial and to ask the juror whether he had heard any statement concerning the character of the house by reason of which he had formed an opinion as to the character of such house as being a house of assignation. It was reversible error for the court to hold that the questions must be confined to opinions, from what the juror had heard, as to the guilt or innocence of the defendant. *State v. Bresland*, 59 Minn. 281, 61 N. W. 450.

[d] **Questions Held Proper.**—"What is your opinion now from what you have read as to the guilt or innocence of the defendant?" *People v. Brown*, 72 Cal. 390, 14 Pac. 90. "From the opinion you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" *People v. Hamilton*, 62 Cal. 377.

[e] **Question by Court.**—*King v. State* (Tex. Crim.), 64 S. W. 245.

66. **U. S.**—*United States v. Burr*, 25 Fed. Cas. No. 14,693; *United States v. Burr*, 25 Fed. Cas. No. 14,692g. **Cal.** *People v. Williams*, 6 Cal. 206, under former statute making it ground for challenge for implied bias. **Ia.**—*State v. Shelledy*, 8 Iowa 477. **Wash.**—*White v. Territory*, 1 Wash. 279, 24 Pac. 447.

67. *People v. Kunz*, 73 Cal. 313, 14 Pac. 836; *People v. Brown*, 72 Cal. 390, 14 Pac. 90; *Randle v. State*, 34 Tex. Crim. 43, 28 S. W. 953; *Stagner v. State*, 9 Tex. App. 440. See also *Peo-*

ple v. Hamilton, 62 Cal. 377, which distinguishes so much of *People v. Williams*, 6 Cal. 206, as seems to hold the contrary.

As to necessity for showing opinion hostile to challenger, see *supra*, this section.

68. *Pemberton v. State*, 11 Ind. App. 297, 38 N. E. 1096 (the trial court "might rightly rely upon its ability to correct any erroneous notion of the law indicated by the juror's answers"); *Com. v. Abbott*, 13 Mete. (Mass.) 120, it will be presumed he will follow the law as laid down by the court. It was sought to ask him whether he would consider the counsel's argument.

How far questions of law may be propounded to jurors on voir dire, see *supra*, VII, E, 4, i, (III), (E).

Knowledge of law as qualification, see *supra*, VII, F, 5, c, (III).

69. **Mo.**—*State v. Hayes*, 78 Mo. 307. **Tenn.**—*Leach v. State*, 99 Tenn. 584, 42 S. W. 195. **Va.**—*Mendum v. Com.*, 6 Rand. (27 Va.) 704.

[a] **Where the juror's statements point rather to the crime committed than to the prisoner he is not disqualified.** As where he said: "Any man who commits such a crime should be hung," and "a man committing so shocking a murder as this is reported to be, did not deserve a trial by jury." *State v. Coleman*, 20 S. C. 441.

70. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

Opinion as to conceded fact, see *supra*, this section.

[a] **Less Evidence of Malice Required Where Woman Killed by Man.** A juror, otherwise unbiased, is competent though he admits he will require less evidence of malice if the evidence shows defendant killed a woman than if he had killed a man. The court says in effect that this is

ered incompetent by his opinion as to the guilt or innocence of another person who has been tried for a crime growing out of the same transaction.⁷¹ The juror's belief that the prisoner is a bad man is not necessarily disqualifying.⁷²

(II.) As to Whether Crime Has Been Committed.⁷³ — That the juror believes a crime has been committed does not disqualify him.⁷⁴ On the other hand it is not necessarily disqualifying that the juror believes

but the opinion of most men, growing out of the well known fact that a woman is weaker than a man and her weakness in comparison with his strength is an item of evidence having a material bearing upon the question of guilt, especially as it affects the defenses of justification, excuse, or mitigation. *People v. Ochoa*, 142 Cal. 268, 75 Pac. 847.

71. *Lambright v. State*, 34 Fla. 564, 16 So. 582 (trial for killing same person); *State v. Caseday*, 58 Ore. 429, 115 Pac. 287, guilt of codefendant previously tried.

[a] **Proper Question on Trial of Accessory.**—"Have you formed an opinion as to the guilt or innocence of the principal, R. T.," is a proper question. *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724.

72. *Leach v. State*, 177 Ind. 234, 97 N. E. 792, knowledge that general reputation of defendant for morality was bad.

[a] **Notorious Criminals.**—If this were ground for principal challenges "notorious criminals could not be tried at all." *People v. Allen*, 43 N. Y. 28, quoting with approval *People v. Lohman*, 2 Barb. (N. Y.) 216, 1 Com. 379.

[b] **Juror Had Read of Prisoner's Deportation.**—Juror was not subject to challenge for implied bias though he had an impression that defendant was a bad man, gained from reading newspaper accounts of his having been deported by the vigilance committee, and believed that he would be more likely to commit a crime than a man about whom he had not heard such things, where he said he had no bias against the prisoner and he would endeavor to be governed by the evidence. *People v. Mahoney*, 18 Cal. 180.

[c] **An expression of an opinion that defendant is a "tough citizen"** is not evidence of the possession by the juror of an opinion that the defendant is guilty of the particular crime charged, where on voir dire he

says he knows nothing of the facts and has no opinion as to the guilt or innocence of defendant. *State v. Anderson*, 14 Mont. 541, 37 Pac. 1.

73. **Prejudice against crime generally**, see *supra*, VII, F, 13, d.

74. **U. S.**—*United States v. Burr*, 25 Fed. Cas. No. 14,693; *United States v. Burr*, 25 Fed. Cas. No. 14,692g. *Md. Gillespie v. State*, 92 Md. 171, 48 Atl. 32, no opinion as to participation by accused. *Mich.*—*Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78.

[a] **May Presume Crime Has Been Committed.**—Where the law presumes innocence the jury must indulge the same presumptions, but where the law presumes that a crime has been committed, a juror is not incompetent for indulging a like presumption. *State v. Ware*, 58 Wash. 526, 109 Pac. 359.

[b] **Though a juror has heard that poison had been found in the victim's stomach and believed that to be the fact, it would not necessarily disqualify him from serving on a jury to try defendant for administering the poison.** He is competent where he has no impression as to the guilt or innocence of defendant though he may believe a crime has been committed. *People v. Fogelson*, 116 Mich. 556, 74 N. W. 730, characterizing as dictum so much of *People v. Thacker*, 108 Mich. 652, 66 N. W. 562, as seems to lay down a different rule.

[c] **Belief That a Conspiracy Existed.**—Where the prosecution was for murder of a prison guard during an attempt at prison break the court said "any man of sufficient intelligence to be a juror would, after reading in the newspapers of the break and escape, be of the opinion that there was some agreement or concert of action among the convicts engaged in the escape." Therefore a jurymen was competent though he said evidence would be required to remove his opinion of the existence of such a conspiracy, and that the killing was done while carry-

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the prisoner committed the act charged, where no opinion has been formed as to the criminality of the act under the circumstances.⁷⁵ A mere expression of just indignation on hearing of the crime does not disqualify.⁷⁶

h. *Character of Expression.*⁷⁷ — At the common law an opinion did not disqualify in a criminal case unless it indicated malice or prejudice against the accused.⁷⁸ And there is still authority for the proposition that a formed and declared opinion is not ground for challenge unless the expression was out of malice or ill-will towards the party.⁷⁹ Gen-

ing out the conspiracy, where his information came solely from newspapers and common rumors; he had no opinion as to the guilt or innocence of defendant nor as to whether defendant was engaged in the conspiracy; and he could and would, notwithstanding his opinion, act impartially and fairly in the case. *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.

[d] A mere opinion that deceased had been unlawfully killed by some one, that a crime had been committed, which opinion would take evidence to remove does not disqualify jurors who have formed no opinion as to who had killed deceased. *State v. Haworth*, 24 Utah 398, 68 Pac. 155.

[e] An opinion that in killing deceased the defendant had committed a crime is not disqualifying, when founded solely on public rumor and statements in public journals, and, being subject to removal by evidence, it appears to the trial court that the juror will act impartially and fairly upon the evidence. *People v. Sowell*, 145 Cal. 292, 78 Pac. 717. See *infra*, VII, F, 23, j. (VII).

75. *Hall v. Com.*, 89 Va. 171, 15 S. E. 517.

Where also conceded, see *supra*, this section.

76. *State v. Perioux*, 107 La. 601, 31 So. 1016, juror expressed no opinion as to the guilt or innocence of the accused.

77. Expressions indicative of feeling against the act rather than opinions of defendant's guilt, see *supra*, VII, F, 23, g.

78. *United States v. Schneider*, 10 Mack. (D. C.) 381; *State v. Flower*, Walk. (Miss.) 318. See *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. But see *Boon v. State*, 1 Ga. 618, malice is inferred from the declaration where the opinion remains fixed.

[a] **Distinction Between Civil and Criminal Cases.**—At common law not only must the opinion have been expressed, but it must appear that it was expressed from ill-will. This is the reason for the common-law rule that juror cannot be questioned as to his opinion in criminal cases, though he could be in civil cases. It tended to his dishonor in a criminal case. *Boardman v. Wood*, 3 Vt. 570.

[b] It was the malice or ill-will, rather than the opinion which was the ground of the challenge. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831; *State v. Howard*, 17 N. H. 171.

79. *The King v. Edmonds*, 4 B. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009. See also *State v. Spencer*, 21 N. J. L. 196, which says that was the common-law rule, from which the court is not disposed to depart. This case was approved in *State v. Fox*, 25 N. J. L. 566, and both are quoted from and approved in *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50. And see *Clifford v. State*, 61 N. J. L. 217, 39 Atl. 721; *Mann v. Glover*, 14 N. J. L. 195.

[a] "There should be found some other circumstances of relationship, partiality, prejudice, hostility or ill-will, acting at the same time upon the mind and giving it a bias, or the juror should be accepted." *State v. Wilson*, 38 Conn. 126. The court quotes with approval *State v. Potter*, 18 Conn. 166, wherein it was said that, under the principles laid down by Hawkins and other common-law writers, the expression of opinion formed even from a personal knowledge of the case, and not out of ill-will to the party, is no cause of challenge, and the opinion expressed must be such as to indicate hostility, or a want of indifference in the jury. See also *State v. Allen*, 46 Conn. 531.

erally, however, under modern statutes malice or ill-will is not material or essential, but the character or source of the opinion and its effect upon the ability of the juror to act impartially, are the only matters considered.⁸⁰ Where the rule is that an expressed opinion will not disqualify unless it was indicative of malice or ill-will, the expression itself does not establish malice or ill-will, under a principal challenge, nor bias or partiality, under a challenge to the favor.⁸¹

Where the challenge can only be for actual bias it has been held that there must be prejudice either with reference to the facts or the parties to the action.⁸² If the juror's opinion was formed out of corrupt motives, or through ill-will toward the defendant, it would of course render him incompetent no matter what ground it might rest upon,⁸³ but if the cause of ill-will has been removed since the expression of opinion the court may find the juror competent.⁸⁴

A mere statement of an opinion made for the purpose of keeping off the jury, does not disqualify.⁸⁵ And a mere casual declaration is not disqualifying where the juror's answers show that he had no fixed opinion.⁸⁶

i. *Character of Opinion.* — (I.) *Fixed or Hypothetical.* — The fixedness or strength of the existing opinion is the essential test of a juror's competency, and the court should look specially to such state of mind in passing upon the question of qualification.⁸⁷ The question is always

80. See *supra*, VII, F, 23, b; *infra*, VII, F, 23, i and j; and the discussion generally under VII, F, 23.

81. *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50; *State v. Fox*, 25 N. J. L. 566.

82. *People v. Wong Ark*, 96 Cal. 125, 30 Pac. 1115.

[a] "Having formed an unqualified opinion" is no longer a cause for challenge for implied bias and does not of itself constitute cause for actual bias. *People v. Cochran*, 61 Cal. 548. See also *People v. Brown*, 59 Cal. 345.

83. *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Morgan v. Stevenson*, 6 Ind. 169. See also *State v. Morgan*, 23 Utah 212, 64 Pac. 356.

[a] An opinion founded on malice or ill-will may not be within the terms of the act for malice and ill-will may be distinct grounds of challenge. *Solander v. People*, 2 Colo. 48.

[b] Where a juror has malice against the prisoner, growing out of his fixed opinion that prisoner stole from him, he is not an impartial juror even though he might be able to qualify as a juror by showing that his remark that prisoner was guilty of the crime charged and ought to be hung, was based merely on rumor. *Riddle v. State*, 3 Heisk. (Tenn.) 401.

[c] Whether the opinion be decided or hypothetical the juror must be entirely free from prejudice against accused. *Wright v. Com.*, 32 Gratt. (74 Va.) 941; *Jackson v. Com.*, 23 Gratt. (64 Va.) 919.

84. *Com. v. Hailstock*, 2 Gratt. (43 Va.) 564.

85. *Hill v. State*, 64 Ga. 453.

86. *Blackman v. State*, 80 Ga. 785, 7 S. E. 626, casual remark that he believed defendant guilty because two juries had found him guilty.

87. *Olive v. State*, 34 Fla. 203, 15 So. 925.

[a] The court should not unduly limit counsel, but should aid him in his effort to discover the weight of the juror's opinion. *Limerick v. State*, 14 Ohio Cir. Ct. 207, 7 Ohio Cir. Dec. 664.

[b] The test of qualification is not merely the existence of a previously formed opinion but whether or not the mind of the juror is at the time of his examination free from bias and prejudice, and its capacity to act and render a verdict uninfluenced by such opinion. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *State v. Schnelle*, 24 W. Va. 767.

[c] The rule is that an opinion fully made up and expressed is good ground

one of degree.⁸⁸ At common law a juror who had a fixed opinion as to the merits of the cause was disqualified,⁸⁹ and under the statutes a juror who has such a fixed opinion that it will be controlling on him is disqualified.⁹⁰ The term used most frequently in the statutes is "unqualified,"⁹¹ which has been defined as being a "fixed, settled and abiding conviction" as to the guilt or innocence of defendant.⁹² Various terms are used in statutes and cases to define this same idea.⁹³ But in effect

for principal challenge and as a matter of law the juror is excluded; but if the opinion is imperfectly formed, or hypothetical, the challenge is to the favor and the exclusion depends upon how the trier shall find the fact of indifference. *State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771; *State v. Benton*, 19 N. C. 196.

88. *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

89. *Underwood v. State*, 179 Ala. 9, 60 So. 842; *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Long v. State*, 86 Ala. 36, 5 So. 443; *Bales v. State*, 63 Ala. 30.

[a] A juror who had an opinion as to the guilt or innocence of the accused was ipso facto disqualified at common law. *People v. Landis*, 139 Cal. 426, 73 Pac. 153; *People v. Miller*, 125 Cal. 44, 57 Pac. 770; *People v. Wells*, 100 Cal. 227, 34 Pac. 718. See also *Rothschild v. State*, 7 Tex. App. 519.

90. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459; *Long v. State*, 86 Ala. 36, 5 So. 443; *Jackson v. State*, 77 Ala. 18; *Slack v. State*, 67 Tex. Crim. 460, 149 S. W. 107.

[a] It is only when the juror has "such a fixed attitude of mind that it would control his actions in some appreciable degree when he assumes the new relation of a trier of the fact involved in litigation that such a mental state will disqualify him." *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824. See also *State v. Caseday*, 58 Ore. 429, 115 Pac. 287; *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520; *State v. Tom*, 8 Ore. 177. So in *State v. Morse*, 35 Ore. 462, 57 Pac. 631, a juror was competent where the examination "indicates that his opinion was not of a fixed and determined character, but was so unsubstantial that contradiction from any reliable source would be as readily accepted as true as the statements upon which such opinion was formed, and would remove any impression he then had."

[b] To state that defendant "was not justifiable" in killing deceased, and to couple that statement with a comparison of a certain other murder trial showed a "matured opinion," a conclusion to which the juror had come by deliberation, and the juror was incompetent. *Jeffries v. State*, 74 Miss. 675, 21 So. 526.

[c] "I have formed my opinion"—"I believe he ought to be hung," were said, in *Brakefield v. State*, 1 Sneed (Tenn.) 215, to be "in the strongest terms of opinion, conviction and prejudice," and show a disqualifying opinion.

91. See the statutes *supra*, VII, F, 23, b.

[a] If the juror has formed or expressed an unqualified opinion that the prisoner ought to be hanged he is incompetent. *State v. Morgan*, 23 Utah 212, 64 Pac. 356.

92. *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698.

93. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

[a] "Expressed in the varying terms of judicial utterances, the opinion or impression concerning the merits of the cause on trial which disqualifies a person called as a juror, must be a 'fixed,' 'absolute,' 'positive,' 'definite,' 'decided,' 'substantial,' 'deliberate,' 'unconditional' opinion. The rule is almost universally laid down by these words, or words of similar import." *Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637.

[b] Must be of a "positive or fixed" character to disqualify. *State v. Morrison*, 67 Kan. 144, 72 Pac. 554; *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805; *State v. Start*, 60 Kan. 256, 56 Pac. 15; *State v. Bane*, 1 Kan. App. 537, 42 Pac. 376.

[c] Various other expressions have been used, such as (1) "fixed, absolute, positive, definite, settled, decided, unconditional" (*State v. Hebert*, 104 La. 227, 28 So. 898; *State v. Giron*,

they all mean the same thing, and differentiate between these opinions, beliefs, or knowledge which amount to a conviction or prejudgment of the case,⁹⁴ and those impressions or opinions which will not prevent the juror from coming to the case with a free and open mind. The opinion must be more than an impression,⁹⁵ and all the cases concede

52 La. Ann. 491, 26 So. 985; *State v. Williams*, 49 La. Ann. 1148, 22 So. 759; *State v. Farrer*, 35 La. Ann. 315; (2) "deliberate, fixed, and continuing" (*Wright v. State*, 18 Ga. 383); (3) "fixed and deliberate one partaking of the nature of prejudgment" (*Gillespie v. State*, 92 Md. 171, 48 Atl. 32; *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 14 L. R. A. 601; *Waters v. State*, 51 Md. 430); (4) a fixed settled opinion upon the issue to be tried (*Shoeffler v. State*, 3 Wis. 823); (5) "fixed and decided" (*United States v. Schneider*, 10 Mack. [D. C.] 381); (6) "deliberate and decided" (*State v. Baker*, 33 W. Va. 319, 10 S. E. 639. See also *State v. Greer*, 22 W. Va. 800; *Thompson v. Updegraff*, 3 W. Va. 629); (7) an "abiding bias or conviction," as distinguished from a "merely passing or transitory inclination." *State v. Meyer*, 58 Vt. 457, 3 Atl. 195; *State v. Meaker*, 54 Vt. 112.

[d] The trier must determine whether the opinion is fixed or permanent in character so as to prevent the juror from coming to the trial in a fair, candid and impartial frame of mind. *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

94. Colo.—*Denver*, S. P. & P. R. Co. v. Moynahan, 8 Colo. 56, 5 Pac. 811. Ill.—*Coughlin v. People*, 144 Ill. 140, 23 N. E. 1, 19 L. R. A. 57; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Davison v. People*, 90 Ill. 221. Mass.—*Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Com. v. Knapp*, 9 Pick. 496, 20 Am. Dec. 491. Mich.—*People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. Ore.—*Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637. Pa.—*Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724.

[a] "Where the opinion is of such a character as partiality or prejudice may be inferred from it, then of course the person is not a qualified juror." *Waters v. State*, 51 Md. 430.

[b] The terms "unqualified opinion or belief" are used to define the nature of the opinion or belief and to

distinguish between a hypothetical opinion or casual impression, and a decided fixed opinion. *People v. Reynolds*, 16 Cal. 128.

[c] The wording of the code provision "having an unqualified opinion or belief," means such a settled conviction founded upon a knowledge of the facts as would raise a strong presumption of partiality, but a hypothetical opinion, founded on hearsay or information, and unaccompanied with malice or ill-will, will not support a challenge for implied bias. Also, the additional words of the statute, "founded upon knowledge of its material facts, or of some of them," shows that there must be a distinction drawn between a fixed opinion formed after hearing what purported to be the facts and a mere impression formed upon rumor or hearsay evidence. That the juror has read or heard a statement of the facts does not of itself disqualify him. There must have been more than a suspicion or inclination of mind toward a conclusion; there must have been a conclusion reached. There must be both a belief in the facts and a conclusion from them. *Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. 769.

95. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

[a] "Opinion" and "Impression" Defined and Distinguished.—(1) An opinion is "a conclusion or judgment held with confidence, but falling short of positive knowledge." An impression is "a notion, remembrance, or belief, especially one that is somewhat indistinct or vague." *Lindsay v. State*, 69 Ohio St. 215, 69 N. E. 126. (2) In *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, the court, distinguishing between impressions and opinions, says in effect that the average juror frequently means the former, when he says he has the latter.

[b] No challenge lies for actual bias where the evidence shows an "impression" entirely founded on public rumor and statements in public journals, and that juror can and will act

that if the opinion is only hypothetical, the partiality is not so manifest as to necessarily result in the exclusion of the juror.⁹⁶ Where an opinion is based upon the hypothesis that certain facts exist but the truth thereof is still an open matter in the juror's mind his opinion is only hypothetical and he is competent.⁹⁷ Despite the statutes, if the

impartially and fairly. *People v. Nunley*, 142 Cal. 441, 76 Pac. 45. See also *People v. Collins*, 105 Cal. 504, 39 Pac. 16; *People v. Brown*, 59 Cal. 345.

[c] If the whole examination shows that the juror has only an impression and not a fixed opinion he is not subject to challenge for implied bias. *People v. Symonds*, 22 Cal. 348; *People v. McCauley*, 1 Cal. 379.

[d] A mere impression gained from reading a newspaper account would not disqualify even before the statute. *O'Brien v. People*, 36 N. Y. 276, 3 Abb. Pr. (N. S.) 368; *Sanchez v. People*, 22 N. Y. 147. See *infra*, VII, F, 23, j, (VII).

[e] It must be such an opinion as would be likely to bias or prevent a candid judgment upon a full hearing of the evidence. *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533.

[f] Jurors having only vague, indefinite or "floating impressions" may properly be found competent. *State v. Carey*, 15 Wash. 549, 46 Pac. 1050; *State v. Krug*, 12 Wash. 288, 41 Pac. 126; *State v. Murphy*, 9 Wash. 204, 37 Pac. 420; *Rose v. State*, 2 Wash. 310, 26 Pac. 264.

[g] Not every impression made upon the mind by reading or hearing about the case, renders the juror incompetent as matter of law. *Shoeffler v. State*, 3 Wis. 823.

96. **U. S.**—*United States v. Burr*, 25 Fed. Cas. No. 14,693; *United States v. Burr*, 25 Fed. Cas. No. 14,692g; *United States v. McHenry*, 6 Blatchf. 503, 26 Fed. Cas. No. 15,681. **Colo.**—*Union Gold M. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo. 565. **Conn.**—*State v. Smith*, 49 Conn. 376; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State v. Wilson*, 38 Conn. 126; *State v. Potter*, 18 Conn. 166. **D. C.**—*United States v. Schneider*, 10 Mack. 381. **Ind.**—*Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Goodwin v. Blachley*, 4 Ind. 438. **N. Y.**—*Balbo v. People*, 80 N. Y. 484.

[a] "The settled rule is that if, upon the whole examination, it appears that the opinion is decided or substan-

tial, the juror is incompetent. On the other hand, if the opinion is merely hypothetical, or so slight that it will, in all probability, yield to the evidence, especially if he says he believes he can give the prisoner a fair trial, he is competent; and the court must determine upon the particular circumstances of each case, whether the opinion be decided or substantial, or hypothetical merely." *Hall v. Com.*, 89 Va. 171, 15 S. E. 517. See also *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *Little v. Com.*, 25 Gratt. (66 Va.) 921; *Jackson v. Com.*, 23 Gratt. (64 Va.) 919; *Smith v. Com.*, 6 Gratt. (47 Va.) 696.

[b] Where the opinions of the jurors are "wholly hypothetical" they may be permitted to serve. *Dinsmore v. State*, 61 Neb. 418, 85 N. W. 445. See also *Curry v. State*, 4 Neb. 545, which says in effect that this is the rule even where there is no statute.

[c] **Terms Used To Express.**—A "conditional," "hypothetical," "contingent," "indeterminate," "floating," "indefinite," "uncertain" opinion will not render juror incompetent. *Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637.

97. **Ia.**—*State v. Ralston*, 139 Iowa 44, 116 N. W. 1058; *State v. Crofford*, 121 Iowa 395, 96 N. W. 889. See also *State v. Rohn*, 140 Iowa 640, 119 N. W. 88 (opinion conditioned on truth of newspaper reports); *State v. Ostrander*, 18 Iowa 435. **Mo.**—*State v. Farrow*, 74 Mo. 531. **N. C.**—*State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771; *State v. Benton*, 19 N. C. 196. **Ohio.**—*Loeffner v. State*, 10 Ohio St. 598.

[a] **Opinion Conditioned on Truth of What Had Heard.**—A juror was properly held competent who was not acquainted with defendants nor deceased, nor with any person in the neighborhood where the homicide occurred. He had heard some reports of the inquest and some statements about confessions attributed to defendants. He had a decision, conditioned on the truth of what he had heard, but no

juror retain a fixed opinion he is disqualified, because he is not then indifferent,⁹⁸ and he is not necessarily competent to act because his opinion is merely hypothetical if in connection with other circumstances it appears that he will not be impartial.⁹⁹

(II.) **Evidence Required To Remove—In General.** — Some cases hold that a juror is not fair and impartial who has formed an opinion

fixed opinions and could give a fair and impartial consideration to the evidence, including that bearing on whether the confessions were freely and voluntarily made. He also stated that he would take the law from the court and render a verdict after fairly weighing the evidence and without prejudice. *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824.

[b] **Opinion Dependent on Correctness of Report.**—Though jurors have read newspaper reports of a preliminary examination of defendant, which purport to give the evidence thereat, they are not incompetent where such opinions as they have, or may have expressed are dependent upon the correctness of the report, and their minds are not so biased that they cannot return a verdict based solely on the evidence adduced at the trial. *State v. Meyer*, 58 Vt. 457, 3 Atl. 195.

[c] **One who qualifies his statement** (1) as to his opinion by saying in effect that his opinion is fixed, only if what he has heard is true, has not, in fact, a fixed opinion (*Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948); (2) as where the opinion was preceded by the remark "if that were so." *Mercer v. State*, 17 Ga. 146. (3) A statement that defendant "ought to be hung if he did that," shows that his opinion was based on a hypothetical case, and hence is not disqualifying. *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500. (4) So where a juror said "from what he had heard" or "from what he had found out," defendant ought to be hung or imprisoned for life, there is nothing in these expressions to indicate that his opinion was founded on any statement made by any witness or anyone who had talked with a witness. *Johnson v. State*, 11 Lea (Tenn.) 47. See also *Mann v. State*, 3 Head (Tenn.) 373.

[d] **Whatever the source of the information**, if there is no conviction of mind, an opinion unmixd with prejudice, which is wholly contingent upon the truth or falsity of the information,

and would yield readily to testimony, is no disqualification. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48.

[e] **If he has no opinion or conviction as to the information he has**, he is impartial within the meaning of the constitution. *Palmer v. State*, 42 Ohio St. 596.

[f] **One who says he has heard a story and believed "there was something in it;" "believed it like other reports,"** obviously had an opinion or belief which was likely to be changed by the statements of the next person he might meet and was not an "unqualified opinion or belief." *People v. O'Loughlin*, 3 Utah 133, 1 Pac. 653.

As to opinion which will require evidence to remove, see *infra*, VII, F, 23, i, (II).

98. *Solander v. People*, 2 Colo. 48; *Brown v. State*, 70 Ind. 576; *Gueting v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Scranton v. Stewart*, 52 Ind. 68. See *Palmer v. People*, 4 Neb. 68, where it is suggested that the statute by its terms "evidently applies to cases where the opinion is merely hypothetical, and excludes all cases where there is bias or a decided opinion."

Juror's statement of impartiality does not qualify him if his opinion is in fact fixed, see *infra*, VII, F, 23, k, (I).

Sources of information are not important if opinion is in fact fixed, see *infra*, VII, F, 23, j, (I).

99. See cases *infra*, this note.

[a] **Though the statute (1) makes the expression of an unqualified opinion bias in law**, a much less decided opinion, if expressed, may be sufficient in connection with other circumstances to render him incompetent for actual bias. *People v. Reynolds*, 16 Cal. 128. (2) **An opinion less than one which is "unqualified" may be sufficient of itself**, or in connection with other proof, to exclude a juror if it appear that the opinion will prevent him from acting with entire impartiality. *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698.

which requires evidence to remove,¹ that fact alone being considered sufficient to show that his opinion is fixed,² as where he says he cannot lay aside his fixed opinion until he has heard evidence enough to remove it.³ If at the time of his examination his opinion is fixed, he is clearly incompetent though he says he might change it on evidence,⁴

1. *Shane v. Butte Elect. Ry. Co.*, 37 Mont. 599, 97 Pac. 958.

[a] **Jurors who testify on their voir dire** (1) that they have formed such an opinion as to the guilt of the defendant as would require evidence to remove should be excused on challenge. *Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985. (2) Such a juror is properly excused. *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825.

[b] **Prior to the enactment of the statute**, a juror was not impartial who either from hearing the evidence, conversing with witnesses, or from rumor only had formed an opinion which it would require evidence to remove. *Green v. State*, 72 Miss. 522, 17 So. 381; *Logan v. State*, 50 Miss. 269; *Alfred v. State*, 37 Miss. 296; *Sam v. State*, 13 Smed. & M. (Miss.) 189.

2. *Guetig v. State*, 66 Ind. 94, 32 Am. Rep. 99; *State v. Beatty*, 45 Kan. 492, 25 Pac. 899; *State v. Miller*, 29 Kan. 43; *State v. Wells*, 28 Kan. 321.

[a] **Where the juror discloses that his so-called "impression" is of such a nature that it will require evidence to change or remove it**, his opinion is fixed and he is not an impartial juror. *People v. Shufelt*, 61 Mich. 237, 28 N. W. 79; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501; *Stephens v. People*, 38 Mich. 739.

[b] **One is incompetent who says he has "no doubt" as to the correctness of his opinion and would continue to entertain the same until it should be removed by evidence.** *State v. Miller*, 29 Kan. 43.

[c] **So one was incompetent who said he had no opinion**, but also said that in order to be acquitted the defendant must prove himself innocent, and that he had such an abhorrence of the offense charged, it would accord with his feelings to convict unless the evidence satisfied his mind that the accused was innocent. *State v. Vogan*, 56 Kan. 61, 42 Pac. 352.

[d] **If a juror has an opinion as to the guilt or innocence of a defendant, so far fixed that evidence would be**

required to remove it, he is disqualified, notwithstanding that he can, or believes he can, disregard such opinion and try the case according to the law and evidence as given on the trial. *State v. Riley*, 36 Wash. 441, 78 Pac. 1001, *distinguishing* the following cases: *State v. Croney*, 31 Wash. 122, 71 Pac. 783; *State v. Farris*, 26 Wash. 205, 66 Pac. 412; *State v. Boyce*, 24 Wash. 514, 64 Pac. 719; *State v. Royse*, 24 Wash. 440, 64 Pac. 742. See also *State v. Stentz*, 30 Wash. 134, 70 Pac. 241, 63 L. R. A. 807; *State v. Latton*, 19 Wash. 57, 52 Pac. 314; *State v. Moody*, 18 Wash. 165, 51 Pac. 356; *State v. Rutten*, 13 Wash. 203, 43 Pac. 30.

[e] **The state's challenge to a juror was properly allowed** where he stated he had formed an opinion regarding the merits of the case, and that it would require evidence to remove that opinion, and that he had advised with the defendant, and had told the prosecuting attorney that it was against the interests of the prosecutrix to have the case prosecuted. *State v. Neel*, 23 Utah 541, 65 Pac. 494.

[f] **Taken in Connection With His Knowledge, etc.**—Challenge should have been sustained where a juror stated he had formed an opinion as to the guilt or innocence of defendant, which would require evidence to remove, "when taken in connection with his acquaintance with the deceased, his presence at the home of the deceased, his visit to the spot where the tragedy occurred, his remaining at the hotel where (defendant) was boarding, his intimate knowledge of so many of the facts and of the condition of the minds of those" who thought defendant guilty. *Wilson v. State*, 87 Neb. 638, 128 N. W. 38.

3. *Com. v. Sushinskie*, 242 Pa. 406, 89 Atl. 564. Compare *Com. v. Nye*, 240 Pa. 359, 87 Atl. 585; *Curley v. Com.*, 84 Pa. 151.

4. *People v. Johnston*, 46 Cal. 78; *State v. Crofford*, 121 Iowa 395, 96 N. W. 889, where a juror was held incompetent who said he believed what he had heard and read, that his mind

or though the opinion is based upon a source which is ordinarily not such as to make the opinion disqualifying." So a juror has been held incompetent where it would take "pretty strong evidence," or "strong and clear evidence" to remove his opinion,⁶ or where it would yield only to evidence "materially different,"⁷ or where he said it would take "conclusive evidence."⁸ On the other hand, it is frequently held that the mere fact that the juror will carry his opinion into the jury box, and that it will take some evidence to remove it, is not necessarily disqualifying,⁹ on the theory that a man's mind does not change without

was made up, and that it would take evidence to change it.

[a] **Long Standing Opinion Frequently Expressed.**—Juror who had formed an opinion that the prisoner was guilty when he first heard of the case, which opinion had remained with him for two years, and which he had frequently expressed in discussing the case with others, was incompetent where he admitted evidence differing from what he had heard would have to be introduced to remove his opinion, although he said he could lay the opinion aside. *Rothschild v. State*, 7 Tex. App. 519.

As to present existence of opinion, see *supra*, VII, F, 23, f.

Statement of impartiality as affecting competency generally, see *infra*, VII, F, 23, k.

5. *Eason v. State*, 6 Baxt. (Tenn.) 466.

[a] **Even where the opinion is based on rumor** and the juror says he can try the case impartially he is incompetent where he says he has an opinion which will take evidence to remove. *People v. Gehr*, 8 Cal. 359, under former statute. See also *People v. Suesser*, 132 Cal. 631, 64 Pac. 1095.

[b] **Juror had talked with one who while not himself a witness** was telling the facts which he had learned from witnesses, and from this conversation juror formed an opinion which he still entertained. He said it would take proof to remove the opinion, but the opinion would not have any weight with him in making his verdict, if the proof were sufficient. He was incompetent. *Mahon v. State*, 127 Tenn. 535, 156 S. W. 458.

As to what sources of information are disqualifying, see *infra*, VII, F, 23, j.

6. *State v. John*, 124 Iowa 230, 100 N. W. 193 (reversible error not to excuse after peremptories exhausted);

Palmer v. State, 42 Ohio St. 596. See also *Thurman v. State*, 27 Neb. 628, 43 N. W. 404.

[a] **A juror who had heard the testimony on a former trial and who said** "the evidence would have to be very strong to change his opinion," and again, "it would be a pretty hard matter to set aside the evidence he had based his opinion on," and also that the only thing he had not made up his mind on was as to the classification of the killing," shows such a fixed opinion that he is incompetent. *King v. State*, 89 Ala. 146, 7 So. 750.

7. *Brown v. State*, 70 Ind. 576.

8. *Olive v. State*, 34 Fla. 203, 15 So. 925; *Andrews v. State*, 21 Fla. 598.

9. **Ariz.**—*Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948; *Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698. **Miss.**—*Whitehead v. State*, 97 Miss. 537, 52 So. 259; *Gammons v. State*, 85 Miss. 103, 37 So. 609; *Green v. State*, 72 Miss. 522, 17 So. 381. **Mont.**—*Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147. **N. C.**—*State v. Banner*, 149 N. C. 519, 63 S. E. 84. **Ore.**—*State v. Humphrey*, 63 Ore. 540, 128 Pac. 824; *State v. Miller*, 46 Ore. 485, 81 Pac. 363; *State v. Armstrong*, 43 Ore. 207, 73 Pac. 1022; *State v. McDaniel*, 39 Ore. 161, 65 Pac. 520. **Tex.**—*Morrison v. State*, 40 Tex. Crim. 473, 51 S. W. 358.

[a] **It Does Not Disqualify as a Matter of Law.**—*Territory v. Johnson*, 16 Hawaii 743.

[b] **He is not required to "lay it aside as a garment"** on entering the box. The statute merely proceeds upon the reasonable view that the existence of an opinion "is not inconsistent with the attitude of an impartial seeker after truth." *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616.

[c] **Where juror also said it was not a fixed opinion and that he would be guided entirely by the evidence allowed by the court to go to the jury.**

some cause, such as evidence.¹⁰ This is particularly true where the opinion is one based upon hearsay rumors and reports or newspapers, and the juror indicates that he will be governed by the evidence,¹¹ or

English v. State, 31 Fla. 340, 356, 12 So. 689.

[d] **Juror Not Conscious of Bias or Prejudice.**—Where the juror says he has formed or expressed an opinion as to the guilt or innocence of the accused which it would take evidence to remove, but also declares that he is not conscious of any bias or prejudice and would decide the case according to the evidence, uninfluenced by such opinion, the court does not commit any error of law in holding him competent. *State v. Hayes*, 69 S. C. 295, 48 S. E. 251; *State v. Williamson*, 65 S. C. 242, 43 S. E. 671.

[e] **It has always been held under the statute that the juror may be competent, though it would require evidence to remove his opinion, where he states he can try the case fairly.** *State v. Church*, 199 Mo. 605, 98 S. W. 16; *State v. Sykes*, 191 Mo. 62, 89 S. W. 851; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Walton*, 74 Mo. 270; *State v. Barton*, 71 Mo. 288; *State v. Core*, 70 Mo. 491.

[f] **Vague Impression.**—A juror is competent though he says he has heard something of the matter, and that it would require some testimony to remove his impression, which was, however, "vague," and that he had no bias or prejudice, nor had he talked with the parties nor with anyone who pretended to know the facts. *Estes v. Richardson*, 6 Nev. 128.

10. *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[a] "In belief, as in the material world, changes do not occur without reason. Opinions are not formed or abandoned without cause. If all the residents of the county (being otherwise competent) whose opinion of this case could only be changed by evidence were excluded from the jury, the defendant could not be tried." The question was not whether they "could change their minds without cause, but whether they could and would disregard the information they had received and the opinions they had formed concerning the case, and render a verdict on nothing but the evi-

dence given them during the trial." *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. "If one has an opinion, speaking in the abstract, undoubtedly it would require evidence to remove it." *Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

11. **Cal.**—*People v. Brown*, 148 Cal. 743, 84 Pac. 204; *People v. Ochoa*, 142 Cal. 268, 75 Pac. 847. **Fla.**—*O'Connor v. State*, 9 Fla. 215. **Nev.**—*State v. Williams*, 28 Nev. 395, 82 Pac. 353. See also *State v. Simas*, 25 Nev. 432, 62 Pac. 242. **N. C.**—*State v. Potts*, 100 N. C. 457, 6 S. E. 657. **N. D.**—*State v. Fujita*, 20 N. D. 555, 129 N. W. 360, Ann. Cas. 1913A, 159, following *State v. Werner*, 16 N. D. 83, 112 N. W. 60; *State v. Eking*, 8 N. D. 559, 80 N. W. 482. **S. D.**—*State v. Church*, 6 S. D. 89, 60 N. W. 143, but it is better to allow the challenge. **Tex.** *Campos v. State*, 50 Tex. Crim. 289, 97 S. W. 100.

See *infra*, VII, F, 23, j, (VII); VII, F, 23, k.

[a] **For some evidence would be necessary even though the opinion was based on rumor only.** *Sullins v. State*, 79 Ark. 127, 95 S. W. 159. See also *Hardin v. State*, 66 Ark. 53, 48 S. W. 904 (which follows as laying down the correct rule); *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; *Casey v. State*, 37 Ark. 67, and *Benton v. State*, 30 Ark. 228; and *distinguishes so much of Vance v. State*, 56 Ark. 402, 19 S. W. 1066, and *Polk v. State*, 45 Ark. 165, as seem to the contrary.

[b] **One who merely reads a newspaper must receive some impression therefrom and that impression is not sufficient of itself to disqualify the juror even though he says that some evidence would be required to remove it.** *State v. Croney*, 31 Wash. 122, 71 Pac. 783; *State v. Gile*, 8 Wash. 12, 35 Pac. 417.

[c] **Juror who had an impression made by reading newspapers but said it would yield to evidence; that he could give prisoner a fair trial and that the partial opinion he had formed would not influence him; that he had no prejudice against prisoner and would not be willing to act on what he had**

where the opinion "will yield readily" to the evidence.¹² So it has been held that an opinion does not necessarily disqualify the juror even though he says he will retain it if the evidence corresponds to the facts as he has heard them,¹³ and though he would require "strong," or "very strong" or "strong enough" evidence to remove the opinion,¹⁴ or where he refused to differentiate between "considerable" and "some" evidence.¹⁵ But still other cases, while holding to the rule

read, was competent. *Hall v. Com.*, 89 Va. 171, 15 S. E. 517.

[d] In *Tennessee*.—There is some conflict in the early cases. In *Palmer v. State*, 121 Tenn. 465, 118 S. W. 1022, the court says the modern doctrine begins with the cases of *Conatser v. State*, 12 Lea 436, and *Spence v. State*, 15 Lea 539. Without attempting to reconcile this early conflict the court reviews at length the *Spence* case; *Woods v. State*, 99 Tenn. 182, 41 S. W. 811; *Leach v. State*, 99 Tenn. 584, 42 S. W. 195; *State v. Robinson*, 106 Tenn. 204, 61 S. W. 65; *Turner v. State*, 111 Tenn. 593, 69 S. W. 774; and *Wilson v. State*, 109 Tenn. 167, 70 S. W. 57, and concludes that jurors whose opinions are based on mere rumors, though it would require evidence to remove are competent where they say they can give a fair and impartial verdict on the law and evidence.

12. *Fla.*—*Denham v. State*, 22 Fla. 664. *La.*—*State v. Ford*, 42 La. Ann. 255. *Ore.*—*Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637, "it is now generally considered that if the juror's opinion will readily yield to the evidence presented in the case, he is not incompetent to sit upon the trial of the issue."

[a] Juror who states his opinion is not fixed; that it would yield readily to testimony; that he would decide solely on the sworn testimony; and that he did not think the opinion he had formed would have any effect upon him, but that he would give defendant a fair and impartial trial was competent. *Brown v. State*, 40 Fla. 459, 25 So. 63.

[b] Juror is competent who has not conversed with witnesses, but has formed and expressed an opinion from rumor and who states that his opinion would yield readily to evidence, though he would rather not go in the box having heard what he had. *Andrews v. State*, 21 Fla. 598.

13. *Carson v. State*, 50 Ala. 134; *State v. Williams*, 3 Stew. (Ala.) 454. See also *Olive v. State*, 34 Fla. 203, 15 So. 925, where the juror's statements clearly showed a willingness to follow the evidence.

14. *State v. Frier*, 45 La. Ann. 1434, 14 So. 296, following *State v. Garig*, 43 La. Ann. 365, 8 So. 934, where he said his opinion "would yield readily to evidence, provided he believed the testimony offered to counteract such opinion." And in *State v. Hugel*, 27 La. Ann. 375, a juror was found competent though he said it would require "strong evidence" to remove his impression and that he "does not consider weak evidence as evidence, but strong evidence he considers evidence."

[a] Newspaper Reports Requiring Evidence Stronger Than He Had Read. Though one has read in the newspapers accounts of the evidence at a former trial, from which he has formed what he called a decided opinion, to remove which it would require evidence stronger than that which he had read, he was competent where he said he felt it was his duty as a juror to discard his former opinion and that he could and would do so. *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

15. *State v. Coleman*, 27 La. Ann. 691.

[a] Juror Willing To Submit Own Case to Juror of Like Mind.—Juror was properly held competent who said he did not know any of the parties concerned; he had read of the case and discussed it with people as to the extent of whose knowledge of the facts he had no knowledge; had formed an opinion, but did not know that he had ever expressed it. He said it would take considerable evidence to remove his opinion but that if he were on the same trial, he would be willing to have one sit on the jury who was in the same frame of mind that he then was. He would give the defendant the presumption of innocence and try him

that some evidence may be required, consider the juror incompetent if it will take strong evidence to remove his opinion.¹⁶

j. *Source of Opinion*.¹⁷ — (I.) In General. — If the opinion be in fact fixed, the source from which it was derived is of no importance; the juror is disqualified,¹⁸ on the other hand an opinion which is not fixed may leave the juror qualified despite its source.¹⁹ In other words it is the nature of the opinion and not merely the sources of the information which determines the qualification,²⁰ though some cases and

impartially on the evidence adduced, disregarding the reports he had heard if different from the evidence, and laying aside his opinion. *State v. Me-gorden*, 49 Ore. 259, 88 Pac. 306, *distinguishing* *State v. Miller*, 46 Ore. 485, 81 Pac. 363.

16. *Fugate v. State*, 82 Miss. 189, 33 So. 942.

[a] "Light Impressions" and "Strong Impressions" Distinguished. Light impressions which may fairly be supposed to yield to the testimony that may be offered and which leave the mind open to a fair consideration of that testimony do not disqualify; but those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, and which will resist or combat that testimony constitute a sufficient objection to the juror. *White-head v. State*, 97 Miss. 537, 52 So. 259; *Gammons v. State*, 85 Miss. 103, 37 So. 609; *Fugate v. State*, 82 Miss. 189, 33 So. 942.

17. Opinion not based on any knowledge, information or evidence, see *supra*, VII, F, 23, d.

18. *Carson v. State*, 50 Ala. 134; *Union Gold M. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo. 565. See *supra*, VII, F, 23, i, (I).

[a] Source Immaterial if Opinion Fixed. — In *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, after an exhaustive review of all the Illinois cases, the court says, "taking them all together, it is plain that the rule in this state, except so far as it is modified by the statute, is perfectly well settled that, if a juror has made up a decided opinion upon the merits of the case, either from personal knowledge of the facts, or from the statements of witnesses, or from the relations of the parties, or from either of them, or from rumor, and that opinion is positive and not hypothetical, and is such as will probably prevent

him from giving an impartial verdict, he is disqualified."

[b] Under the statute the source of the information is unimportant if the opinion be fixed or "unqualified." The juror is incompetent. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

[c] Whether It Be Rumor or Fact. *Conway v. Clinton*, 1 Utah 215. See also *Ga.* — *Boon v. State*, 1 Ga. 618; *Reynolds v. State*, 1 Ga. 222. *Kan.* — *State v. Miller*, 29 Kan. 43. *Mo.* — *State v. Punshon*, 133 Mo. 44, 34 S. W. 25. *Tex.* — *Rothschild v. State*, 7 Tex. App. 519. *Vt.* — *State v. Shaw*, 73 Vt. 149, 50 Atl. 863. *Va.* — *Wright v. Com.*, 32 Gratt. (73 Va.) 941; *Jackson v. Com.*, 23 Gratt. (64 Va.) 919; *Wormeley v. Com.*, 10 Gratt. (51 Va.) 658; *Clore v. Com.*, 8 Gratt. (49 Va.) 606; *Armistead v. Com.*, 11 Leigh (38 Va.) 657, 37 Am. Dec. 633.

[d] "One might be so impressed with a rumor as to form an opinion which he would be unable to disregard, and which would enter into his deliberations and conclusion upon the case, and in such cases the juror is disqualified." *McGough v. State*, 113 Ark. 301, 167 S. W. 857. See also *Sullins v. State*, 79 Ark. 127, 95 S. W. 159.

[e] Juror Who Will Not Presume Defendant Innocent. — A juror is incompetent who says that he cannot after what he has read "presume" the defendants to be innocent but only the "possibility" of their being so, though the source of his information was only newspaper accounts. *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

19. See *supra*, VII, F, 23, i, (I).

[a] An opinion no matter how formed, or upon what it may be based, that is not fixed and may be changed by the evidence, and will not bias the verdict, is not disqualifying. *Beason v. State*, 72 Ala. 191.

20. *State v. Riley*, 36 Wash. 441, 78

statutes practically make opinions received from certain sources disqualifying.²¹ If the opinion be a "qualified" one it then becomes necessary for the court to determine not only the strength of the opinion but the sources thereof.²² The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent.²³ Under those statutes which name sources from which the opinion must originate, there can be no inquiry into his ability to lay aside his opinion and act impartially unless the opinion was founded upon some one or more of the sources stated,²⁴ and that it was so founded must affirmatively appear,²⁵ but where the juror's opinion is based on a non-disqualifying statutory source, he is not made incompetent by the fact that he supposes there is some other evidence.²⁶

(II.) **Juror's Own Knowledge.**²⁷ — Opinion based on juror's own knowledge is not necessarily disqualifying, according to some cases,²⁸ but

Pac. 1001; *State v. Murphy*, 9 Wash. 204, 37 Pac. 420.

21. See *infra*, this section, and see statutes, *supra*, VII, F, 23, b.

22. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

23. *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

24. Cal.—*People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *People v. Helm*, 152 Cal. 532, 93 Pac. 99; *People v. Miller*, 125 Cal. 44, 57 Pac. 770; *People v. Wells*, 100 Cal. 227, 34 Pac. 718. Neb.—*Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106; *Curry v. State*, 4 Neb. 545. Nev.—*State v. Roberts*, 27 Nev. 449, 77 Pac. 598. But see *State v. Salgado*, 38 Nev. 64, 145 Pac. 919, 150 Pac. 764; *State v. Casey*, 34 Nev. 154, 117 Pac. 5; *State v. Simas*, 25 Nev. 432, 62 Pac. 242; *State v. McClear*, 11 Nev. 39. Okla.—*Moorehead v. State*, 151 Pac. 1183; *Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719.

[a] **Indiana.**—(1) In *Woods v. State*, 134 Ind. 35, 33 N. E. 901, the court reviews the decisions and statutes prior to the date of the criminal code of 1881 (Burns' Ann. Stat., §2101, sub. div. 2) and concludes that the former discretionary power to determine the competency of the juror despite the sources of his information has been taken away. See also *Dugle v. State*, 100 Ind. 259. (2) But where the source of the information is not one of those mentioned in the statute the court's discretion as to whether the juror is competent remains the same, and its decision will not be disturbed unless the discretion be abused. *Woods v.*

State, 134 Ind. 35, 33 N. E. 901; *Stout v. State*, 90 Ind. 1.

[b] Under the Texas statute where the juror is first asked as to the effect of his conclusions upon his verdict, if on the further examination it appears that the juror's opinion is not founded on the sources stated in the statute he must be discharged, without further examination since he is incompetent. *Shannon v. State*, 34 Tex. Crim. 5, 28 S. W. 540.

25. *People v. Miller*, 125 Cal. 44, 57 Pac. 770; *People v. Wells*, 100 Cal. 227, 34 Pac. 718; *Taylor v. State*, 44 Tex. Crim. 547, 72 S. W. 396.

[a] **Juror is properly excluded** on the challenge of prosecutor, where he says that he has formed and still has an opinion that the defendant is not guilty, which opinion is not based on public rumor, common notoriety nor statements of newspapers and would require considerable evidence to change, though he also says he will try to act impartially and thinks he can do so. *People v. Fultz*, 109 Cal. 258, 41 Pac. 1040.

26. *People v. Warner*, 147 Cal. 546, 82 Pac. 196.

27. **Personal knowledge without opinion**, see *supra*, VII, F, 23, c.

Necessity that juror have some knowledge or information on which to base opinion, see *supra*, VII, F, 23, d.

28. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948, question is for the court to consider with the juror's belief as to his impartiality.

Personal knowledge without opinion, see *supra*, VII, F, 23, c.

other courts hold that it is,²⁹ and some statutes so provide.³⁰ Also personal knowledge of matters which are vital issues in the case may render one incompetent whose opinion is based on that knowledge.³¹

(III.) Conversations With Parties or Persons Interested. — Though the juror's opinion be based on statements made to him by a party he may still be found competent,³² but one who has heard a statement of a case from a party and believes it to be true must necessarily have an "unqualified opinion" according to some cases,³³ and it has also been held that jurors should be excluded who talked with persons directly interested though not actual parties.³⁴

(IV.) Rumor or Hearsay and Source Having Knowledge Distinguished.³⁵ If the opinion and expression thereof arises from hearsay as distinguished from a source purporting to speak from a knowledge of the facts, it is not alone disqualifying,³⁶ and a distinction has sometimes

29. *State v. Foley*, 144 Mo. 600, 46 S. W. 733; *State v. Hultz*, 106 Mo. 41, 16 S. W. 940; *State v. Walton*, 74 Mo. 270; *Wilson v. State*, 109 Tenn. 167, 70 S. W. 57; *Woods v. State*, 99 Tenn. 182, 41 S. W. 811; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Conatser v. State*, 12 Lea (Tenn.) 436; *Eason v. State*, 4 Baxt. (Tenn.) 466; *Alfred v. State*, 2 Swan (Tenn.) 581.

30. See statutes *supra*, VII, F, 23, b.

31. *Johnson v. Park City*, 27 Utah 420, 76 Pac. 216.

32. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948; *State v. Carpenter*, 124 Iowa 5, 98 N. W. 775, the question was raised by defendant after trial, neither party having challenged.

33. *Ruff v. Rader*, 2 Mont. 211.

[a] A juror was properly rejected on the state's challenge, where he had talked with the defendant on the morning of the trial, about the case and who said he had to some extent formed an opinion but not from what the defendant had told him, and that their talk would not influence his verdict. Both jurymen and defendant were guilty of misconduct in holding the conversation. *State v. Smith*, 124 Iowa 334, 100 N. W. 40.

34. *People v. Wells*, 100 Cal. 227, 34 Pac. 718, it does not, however, support the inference that the opinion was upon common rumor or newspaper report.

[a] Talking With Members of Deceased's Family. — In *Walsingham v. State*, 61 Fla. 67, 56 So. 195, in a murder case reversal was had for the overruling of defendant's challenge for cause (after defendant's peremptories were exhausted) to a juror, based on

his expressed opinion. The juror had talked with members of the deceased's family and on his direct examination, asked if he had "a fixed opinion," answered affirmatively. But on cross-examination, and on examination by the court stated he would decide on the testimony given before him. On his direct examination he also stated he had no bias or prejudice and would give defendant a fair trial.

35. Rumor and newspaper reports, see *infra*, VII, F, 23, j, (VII).

36. *State v. Armstrong*, 43 Ore. 207, 73 Pac. 1022; *Payne v. State*, 3 Humph. (Tenn.) 375; *McGowan v. State*, 9 Yerg. (Tenn.) 184.

[a] Juror has not a fixed opinion when it is based on hearsay only and not upon statements of anyone claiming personal knowledge, and he thinks he can render a true verdict. *State v. Ormiston*, 66 Iowa 143, 23 N. W. 370.

[b] If the juror has formed an opinion from mere rumor not relied on as true, the juror is competent although he may still entertain that opinion. *Conatser v. State*, 12 Lea (Tenn.) 436; *Alfred v. State*, 2 Swan (Tenn.) 581.

[c] Talk With Person Related to Deceased and Reading Newspapers. *State v. Thorne*, 41 Utah 414, 126 Pac. 286, Ann. Cas. 1915D, 90.

[d] Such opinion is presumptively merely hypothetical, and it will be so considered in the absence of proof to the contrary. *Wright v. Com.*, 32 Gratt. (73 Va.) 941; *Jackson v. Com.*, 23 Gratt. (64 Va.) 919; *Wormeley v. Com.*, 10 Gratt. (51 Va.) 658; *Clore v. Com.*, 8 Gratt. (49 Va.) 606.

been drawn by the cases between a rumor, and a statement by a witness repeated to the juror.³⁷ One who has merely talked with persons who had heard witnesses testify at a preliminary hearing, is not thereby disqualified,³⁸ and a juror is not necessarily disqualified though one source of his information be a juror who sat on a previous trial,³⁹ or though the information came from arguments made in a similar case and which the proposed jurors had heard.⁴⁰ But where the juror will not say unequivocally that he could disregard what he had heard he should be rejected.⁴¹ Under some statutes and cases if the juror's opinion is founded upon conversations with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, the court must excuse him;⁴² and some cases hold that one is disqualified whose opinion is based either upon a statement of facts made by

37. *Ward v. State*, 102 Tenn. 724, 52 S. W. 996.

[a] A newspaper statement to disqualify must purport to be detailed by those who profess to know the facts. Any other statement is only a rumor whether printed or oral. *Palmer v. State*, 121 Tenn. 465, 118 S. W. 1023; *Woods v. State*, 99 Tenn. 182, 41 S. W. 811; *Spence v. State*, 15 Lea (Tenn.) 539.

[b] Where the juror cannot say that the accounts which he has heard and read were given by persons who knew or professed to know the facts, his opinion is based on rumor and he may qualify. *State v. Robinson*, 106 Tenn. 204, 61 S. W. 65.

38. *Tisdale v. State*, 120 Ark. 470, 179 S. W. 650.

[a] From Persons Who Attended Coroner's Inquest.—The mere fact that the juror's opinion was founded, in part at least, upon statements made to him by persons who had attended the coroner's inquest, and who repeated the evidence they had there heard, does not render him incompetent. *Jackson v. Com.*, 23 Gratt. (64 Va.) 919.

39. *State v. Williams*, 49 La. 1148, 22 So. 759; *Johnson v. State*, 49 Tex. Crim. 314, 94 S. W. 224, does not disqualify one who says he can try the case fairly on the evidence adduced.

[a] Juror who stated he had formed an opinion from what other jurors had told him of the evidence of a prosecuting witness, and who said they believed that evidence and had an opinion were held incompetent. *Drye v. State*, 40 Tex. Crim. 125, 49 S. W. 83.

40. *Armstrong v. State* (Tex. Crim.), 47 S. W. 1006, where they state they

can try impartially regardless of what they heard on said argument.

41. *Morehead v. State* (Okla.), 151 Pac. 1183. Compare *infra*, VII, F, 23, k, (III).

42. Ind.—*Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458; *Noe v. State*, 92 Ind. 92. Mo.—*State v. Foley*, 144 Mo. 600, 46 S. W. 733; *State v. Hultz*, 106 Mo. 41, 16 S. W. 940; *State v. Walton*, 74 Mo. 270. Mont. See *State v. Mott*, 29 Mont. 292, 74 Pac. 728; *State v. Sheerin*, 12 Mont. 539, 31 Pac. 543, 33 Am. St. Rep. 600; *Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147.

[a] Although He May Swear He Feels Able To Render an Impartial Verdict.—*Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106; *Smith v. State*, 5 Neb. 181; *Carroll v. State*, 5 Neb. 31. See also *Cowan v. State*, 22 Neb. 519, 35 N. W. 405.

[b] An opinion of a proposed juror "based on reading an affidavit, or what purports to be an affidavit of a witness to the transaction and acts constituting the crime charged, if not within the letter of the statute, is within the reason thereof." *Woods v. State*, 134 Ind. 35, 33 N. E. 901.

[c] Must Be Witnesses to Gravamen of Offense.—This "peremptory disqualification" applies only to conversations with witnesses to the transaction constituting the gravamen of the offense, and not to opinions based upon conversations with witnesses to some merely incidental or collateral matter connected with the trial. *Walker v. State*, 102 Ind. 502, 1 N. E. 856.

[d] A juror who was himself a

witnesses themselves, or by others who have heard the witnesses relate the facts.⁴³ But under some statutes the mere fact that one has talked with a witness does not necessarily disqualify him,⁴⁴ even though they were eye witnesses of the act charged as a crime, if the juror's opinion did not become fixed thereby.⁴⁵ If the juror believes the statements as to the case made to him by persons who know or claim to know the facts, he is thereby disqualified,⁴⁶ and one whose opinion remained fixed after talking with a witness is incompetent though he did not know the person he talked with was a witness.⁴⁷

(V.) Former Trial of Same Case.⁴⁸ — The mere fact that the juror has heard of former trials and that the juries disagreed, does not disqualify him,⁴⁹ nor does the fact that he has heard some of the testimony on a former trial.⁵⁰ But under some statutes a juror whose opinion was

deputy sheriff and formed his opinion from talking with the sheriff and other deputies and witnesses in the case was said to have "formed his opinion from original sources" and was hence incompetent. *Keaton v. State*, 40 Tex. Crim. 139, 49 S. W. 90.

Generally as to evidence printed in newspaper, see *infra*, VII, F, 23, j, (VII).

43. *Wilson v. State*, 109 Tenn. 167, 70 S. W. 57; *Woods v. State*, 99 Tenn. 182, 41 S. W. 811; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Conatser v. State*, 12 Lea (Tenn.) 436; *Eason v. State*, 4 Baxt. (Tenn.) 466; *Alfred v. State*, 2 Swan (Tenn.) 581; *Rice v. State*, 1 Yerg. (Tenn.) 432. See also *Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

[a] Though He Swore He Could Give Defendant a Fair Trial.—*Mahon v. State*, 127 Tenn. 535, 156 S. W. 458; *Turner v. State*, 111 Tenn. 593, 69 S. W. 774.

44. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948 (the question becomes one for the court to consider together with the juror's belief as to his impartiality); *Shepprie v. State*, 79 Miss. 740, 31 So. 416; *Penn v. State*, 62 Miss. 450.

[a] Witnesses Whom He Would "Likely Believe."—Though a juror had expressed an opinion after talking with persons about the case, and says he "would likely believe" what he had previously heard "if repeated by witnesses that I believe," he is competent where he says he will try the case fairly and without prejudice or bias and notwithstanding his previous opinion. *State v. Hebert*, 104 La. 227, 28 So. 898.

45. *State v. Guidry*, 28 La. Ann. 630.

46. *Ruff v. Rader*, 2 Mont. 211, he has an "unqualified" opinion. See also *People v. Cebulla*, 137 Cal. 314, 70 Pac. 181; *Shepprie v. State*, 79 Miss. 740, 31 So. 416; *Klyce v. State*, 79 Miss. 652, 31 So. 339.

[a] Effect on Juror's Mind as Controlling.—The mere circumstance that the persons with whom the juror talked were, or were not, witnesses would be immaterial, if the juror's opinion be not founded wholly or in part, on what such persons said. If he understood them to have only such information as he himself has obtained from his reading, their conversation amounts to public rumor so far as he is concerned. On the other hand a narration, even of pure fiction, by one whom the juror believed and who told the juror that he saw the crime committed and knew whereof he spoke, might make such a deep impression upon the juror's mind as to conduce to the formation of a strong opinion. *People v. Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193.

47. *Caldwell v. State*, 69 Ark. 322, 63 S. W. 59.

[a] It Must Affirmatively Appear That the Person Was Not a Witness. The mere statement of the juror that the persons with whom he conversed "did not claim to be witnesses of the transaction," is not sufficient. *Curry v. State*, 4 Neb. 545.

48. Hearing testimony without forming opinion, see *supra*, VII, F, 23, c.

49. *Texas M. R. Co. v. Crowder*, 25 Tex. Civ. App. 536, 64 S. W. 90.

50. Ia.—*State v. Foster*, 91 Iowa 164, 59 N. W. 8. La.—*State v. Ford*,

founded on sworn evidence taken at a former trial is properly excluded.⁵¹

(VI.) **Trial of Another Case.**—A juror is not necessarily disqualified though he has read or heard all the evidence given on the trial of another for the same offense,⁵² or though he has expressed an opinion on evidence heard in another case and says he would convict defendant if the evidence is as strong as in the other case.⁵³ But if he has an unqualified opinion as to the main fact in issue, based on such evidence, he may be incompetent,⁵⁴ and a juror was held properly excluded whose

37 La. Ann. 443, it is the fixed opinion rather than the source that governs. **N. C.**—See *Dunn v. Wilmington & W. R. Co.*, 131 N. C. 446, 42 S. W. 862. **Ohio.**—*Carano v. State*, 3 Ohio Cir. Ct. (N. S.) 629, judgment affirmed, 69 Ohio St. 561, 70 N. E. 1116. **S. C.**—*State v. Malloy*, 95 S. C. 441, 78 S. E. 995, Ann. Cas. 1915C, 1053.

[a] **A juror whose answers show no enmity or bias**, but who positively states that he will be governed by the evidence introduced on the trial before him, is competent notwithstanding that he was present at a former trial of the cause, heard a portion of the testimony and formed and expressed an opinion upon the merits. *Denver S. P. & P. R. R. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811.

51. **Cal.**—*People v. Hickman*, 113 Cal. 80, 45 Pac. 175. **Neb.**—*Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825. **Pa.**—See *Staup v. Com.*, 74 Pa. 458, where it was suggested that jurors who had heard or read testimony on a former trial should be excluded. Compare *Ortwein v. Com.*, 76 Pa. 414, 18 Am. Rep. 420, where jurymen were held properly permitted to serve though their opinions were based in part on reports of the finding by the coroner's jury. See also *Com. v. Grauman*, 52 Pa. Super. 215.

52. *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211; *State v. Caseday*, 58 Ore. 429, 115 Pac. 287, *distinguishing* *State v. Miller*, 46 Ore. 485, 81 Pac. 363.

[a] **One who was present as a spectator** (1) and heard the evidence in one case is not for that reason alone disqualified as a juror in the next case on substantially the same issue. *State v. Sawtelle*, 66 N. H. 488, 32 Atl. 831, *distinguishing* *State v. Webster*, 13 N. H. 491, as (2) having overlooked the distinction between principal challenges and challenges to the

favor in that case. Jurors who sat in court room and heard evidence on the trial of defendant on another indictment, wherein he was found guilty and who stated they had formed an opinion, should have been excluded.

[b] **Where juror says he has no fixed opinion**, this being, by statute, sufficient to qualify him. *Jones v. State*, 120 Ala. 303, 25 So. 204.

[c] **While Sitting as Juror in Other Case.**—A juror may be found indifferent though his opinion was formed from what he learned while sitting in a case against a different defendant and he says his opinion "would probably unconsciously influence" him, but that he could and would decide the case according to the law and the evidence. *Territory v. Johnson*, 16 Hawaii 743.

53. *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690, juror as grand juror had returned indictment in the other case. He had not formed any opinion as to guilt or innocence of defendant in case at bar.

54. *State v. John*, 124 Iowa 230, 100 N. W. 193; *Goble v. State*, 42 Tex. Crim. 501, 60 S. W. 968. See also *Drye v. State*, 40 Tex. Crim. 125, 49 S. W. 83.

[a] In *Com. v. Vitale*, 250 Pa. 552, 95 Atl. 724, the juror had just sat on a jury which had found defendant's brother guilty of the same crime. Both brothers were charged with being accessories before the fact, of the same principal. The court says it is "inconceivable that he could have been regarded as competent."

[b] **One who had served as a juror in another case** growing out of the same condemnation proceedings, was not competent although he declared he had no opinion as to the amount of damages sustained by this particular plaintiff, and that his opinion as to whether plaintiff was damaged at all was "only as a juror in the other

opinion was based in part on the fact that he discredited certain witnesses who had testified at the trial of a co-defendant and said he would discredit them if introduced at the trial.⁵⁵

(VII.) **Rumor and Newspaper Reports.**—Opinions formed on rumor or newspaper reports do not necessarily disqualify,⁵⁶ nor those founded

case," and was only an opinion "in a general way." *Hunt v. Columbia*, 122 Mo. App. 31, 97 S. W. 955.

[c] It was error to refuse to permit defendant to ask jurors whether they had heard the testimony on another trial wherein the facts were similar. *Barnes v. State* (Tex. Crim.), 88 S. W. 805.

[d] **Testimony on trial of accomplice** having been source of juror's opinion he was incompetent. *Shannon v. State*, 34 Tex. Crim. 5, 28 S. W. 540.

55. *State v. James*, 34 S. C. 49, 579, 12 S. E. 657, 13 S. E. 325.

56. **Ariz.**—Territory *v. Davis*, 2 Ariz. 59, 10 Pac. 359. **Conn.**—*State v. Smith*, 49 Conn. 376; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *State v. Wilson*, 38 Conn. 126; *State v. Potter*, 18 Conn. 166. **Ga.**—*West v. State*, 79 Ga. 773, 4 S. E. 325. **Ind.**—*Gueting v. State*, 66 Ind. 94, 32 Am. Rep. 99; *Gilbooley v. State*, 58 Ind. 182; *Hart v. State*, 57 Ind. 102. **Ia.**—*State v. Crofford*, 121 Iowa 395, 96 N. W. 889. **La.**—*State v. Giron*, 52 La. Ann. 491, 26 So. 985; *State v. Lartigue*, 29 La. Ann. 642; *State v. Caulfield*, 23 La. Ann. 148; *State v. Ward*, 14 La. Ann. 673; *State v. Bunger*, 14 La. Ann. 461. **Md.**—*Gillespie v. State*, 92 Md. 171, 48 Atl. 32; *Garlitz v. State*, 71 Md. 293, 18 Atl. 39; *Waters v. State*, 51 Md. 430. **Mich.** *People v. Foglesong*, 116 Mich. 556, 74 N. W. 730; *People v. Thacker*, 108 Mich. 652, 66 N. W. 562; *People v. Evans*, 72 Mich. 367, 40 N. W. 473; *People v. Gage*, 62 Mich. 271, 28 N. W. 835, 4 Am. St. Rep. 854; *Stephens v. People*, 38 Mich. 739; *Stewart v. People*, 23 Mich. 63, 9 Am. Rep. 78. **Neb.** *Palmer v. People*, 4 Neb. 68. **N. D.** *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482. **Okla.**—*Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719; *Hyde v. Territory*, 8 Okla. 69, 56 Pac. 851; *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314; *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988. **Wash.**—*Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

See *supra*, VII, F, 23, b; VII, F, 23, j. (IV).

[a] It is only essential that a juror be able to discard the rumors which he may have heard, or the hearsay testimony, and be governed by the testimony adduced at the trial. *Cook v. State*, 90 Miss. 137, 43 So. 618; *Gammons v. State*, 85 Miss. 103, 37 So. 609.

[b] **A light and transient opinion** obtained from vague rumors or the reading of brief and partial newspaper reports, which in the nature of things would not close the mind of an unprejudiced man against testimony, would not disqualify. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805; *State v. Start*, 60 Kan. 256, 56 Pac. 15; *State v. Thomas*, 58 Kan. 505, 51 Pac. 228; *State v. Treadwell*, 54 Kan. 507, 38 Pac. 799; *State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750.

[c] **Distinguished From Conversations With Witnesses.**—An opinion based on rumor or newspaper reports and not from conversation with any of the witnesses is not disqualifying. *State v. Dent*, 41 La. Ann. 1082, 7 So. 694; *State v. Dorsey*, 40 La. Ann. 739, 5 So. 26; *State v. Ford*, 37 La. Ann. 443; *State v. Vines*, 34 La. Ann. 1073; *State v. Coleman*, 27 La. Ann. 691; *State v. Hugel*, 27 La. Ann. 375; *State v. Bunger*, 14 La. Ann. 461.

[d] **As a matter of law a juror is not incompetent** whose opinions are founded on newspaper reports or what he has heard, but whose mind would not be influenced thereby, and who is not sensible of any bias or prejudice but will be governed by the evidence. *State v. Coleman*, 20 S. C. 441; *State v. Dodson*, 16 S. C. 453.

[e] **This rule is not dependent upon the statute**, but has been in force long prior to its enactment. *Stephens v. People*, 38 Mich. 739, citing *Holt v. People*, 13 Mich. 224.

[f] **Matter Read in Newspaper Distinguished From Conversation With Member of Coroner's Jury.**—*People v. Quimby*, 134 Mich. 625, 94 N. W. 1061, distinguishing *People v. Thacher*, 108 Mich. 652, 66 N. W. 562, where the

upon public rumor, statements in public journals, or common notoriety.⁵⁷ It is difficult to lay down any fixed rule as to persons who formed their opinions from newspaper reports, or common report and rumor.⁵⁸ The juror may be found competent despite his preconceived opinion if it appears that he will act fairly and impartially,⁵⁹ and unless there is some bias or prejudice,⁶⁰ or unless the opinion is of a nature to influence his verdict.⁶¹ They are considered mere impressions and al-

juror had talked with a member of the coroner's jury, who told him the facts as he understood them.

[g] In New York prior to the statute a fixed and settled opinion disqualified, and was ground of principal challenge without regard to how or upon what evidence the opinion was formed. Nor did the statement by the juror that he could lay it aside and decide the case impartially remove the disqualification. But in many cases a hypothetical opinion or an impression derived from mere rumor or reading newspaper accounts, made the juror subject only to challenge to the favor, leaving the question of indifference one of fact for the triers. *Balbo v. People*, 80 N. Y. 484. See also *Freeman v. People*, 4 Denio (N. Y.) 9, 47 Am. Dec. 216; *People v. Honeyman*, 3 Denio (N. Y.) 121; *People v. Bodine*, 1 Denio (N. Y.) 281.

57. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948; *Haugen v. Chicago, M. & St. P. Ry. Co.*, 3 S. D. 394, 53 N. W. 769. See *supra*, VII, F, 23, j, (IV).

58. *Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719.

59. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948; *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059; *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314.

Source of opinion immaterial, see *supra*, VII, F, 23, j, (I).

Effect of juror's statement as to his ability to try case impartially, see *infra*, VII, F, 23, k.

[a] Under the statute if he has merely read newspaper reports, or heard rumors and his impression formed thereon will not interfere with his rendering a fair and impartial verdict upon the evidence and law of the case he is competent. *Bridges v. State*, 80 Neb. 91, 113 N. W. 1048; *Barker v. State*, 73 Neb. 469, 103 N. W. 71; *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; *Rottman v. State*, 63 Neb. 648, 88 N. W. 857; *State v. Kelly*, 28 Ore. 225, 42 Pac. 217, 52 Am.

St. Rep. 777; *Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637; *State v. Saunders*, 14 Ore. 300, 12 Pac. 441. See *supra*, VII, F, 23, b.

60. *State v. Caulfield*, 23 La. Ann. 148; *Gillespie v. State*, 92 Md. 171, 48 Atl. 32; *Garlitz v. State*, 70 Md. 293, 18 Atl. 39; *Waters v. State*, 51 Md. 430.

[a] Where a juror's conceptions are not fixed and settled, or warped by prejudice, but are only such as would naturally spring from rumor or newspaper report, and his mind is open to the impressions it may receive at the trial, so as to be convinced by the law and testimony, he is competent. *O'Connor v. State*, 9 Fla. 215, approved in *Montague v. State*, 17 Fla. 662, and *Olive v. State*, 34 Fla. 203, 15 So. 925.

[b] If the juror discloses that he is biased or prejudiced, or has a fixed and settled opinion as to the guilt or innocence of accused, the source of his information is of no importance and he is incompetent though he makes the statutory declaration of impartiality on his oath. *Lucas v. State*, 75 Neb. 11, 105 N. W. 976; *Basye v. State*, 45 Neb. 261, 63 N. W. 811. See *supra*, VII, F, 23, j, (I).

[c] Bias or Prejudice Taking Evidence To Remove.—Challenge should be sustained where the juror discloses a bias or prejudice either for or against the defendant and which it would take evidence to remove, though he says he can try impartially. *Owens v. State*, 32 Neb. 167, 49 N. W. 226; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *Olive v. State*, 11 Neb. 1, 7 N. W. 444. See *supra*, VII, F, 23, i, (II).

[d] Opinion Not Fixed and No Malice or Ill-Will.—One who has heard common reports and has expressed opinions, which are not fixed and which do not show malice, ill-will or interest is not incompetent. *State v. Howard*, 17 N. H. 171.

61. *McGough v. State*, 113 Ark. 301, 167 S. W. 857; *Decker v. State*, 85 Ark.

ways of a hypothetical nature resting upon the supposition of the truth of what has been heard or read.⁶² Opinions so founded are nearly always held not disqualifying where the juror says he can lay them aside.⁶³ And opinions so founded have been held not fixed but mere

64, 107 S. W. 182; *Sneed v. State*, 47 Ark. 180, 1 S. W. 68; *Meyer v. State*, 19 Ark. 156.

62. **U. S.**—*Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. Ark. *Dolan v. State*, 40 Ark. 454. Ind. *Morgan v. State*, 31 Ind. 193. Kan. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *State v. Beatty*, 45 Kan. 492, 25 Pac. 899. Md.—*Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. E. A. 601.

See *supra*, VII, F, 23, i.

[a] In *State v. Cunningham*, 100 Mo. 382, 12 S. W. 376, the court says of a juror, "His notions of the case were nothing more than such as any one would form from reading a newspaper report, and it is but common information that such reports have little or no influence upon a fair-minded man when he is called upon to determine the fact in the light of evidence given under oath. If such a juror is to be rejected it must be because he is an intelligent, honest, fair-minded man, and not because he has any opinion which would in the least sway his mind from an impartial consideration of the evidence." And in *State v. Wilson*, 85 Mo. 134, it was said to be rather "indicative of outspoken ingenuousness," than of prejudice or bias, that the juror stated in effect that the reading of the newspaper account made him "naturally suppose the defendant guilty."

[b] "The man who does not read and think and form opinions regarding such crimes as murders committed in his locality is better fitted to have lived in the Dark Ages than to serve on juries in the twentieth century." *State v. Williams*, 28 Nev. 395, 82 Pac. 353.

[c] **Jurors Without Impression Desirable But Impossible.**—"A broad-minded intelligent citizen who has never acquired any impression either directly or indirectly about the issue to be tried would be an ideal juror; but in these days, when the means of communication through the press and otherwise is so extensive among the people, it would be impracticable to attain to this high standard for jurors." *State*

v. Humphrey, 63 Ore. 540, 128 Pac. 824.

[d] **Everyone receives impressions "which do not reach the dignity of opinions"** and "If such impressions should be held to conclusively disqualify a juror the obstacles to securing jurors would, in this age of newspapers, be well nigh insuperable." *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126.

[e] "Intelligent men take newspaper accounts as current news liable to qualification, explanation, or contradiction, and, when qualified, explained, or contradicted, they change their opinions or belief accordingly as a matter of course." *Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719.

[f] **The reason underlying the statute** is that it would be impossible to administer justice if an opinion formed merely from reading newspaper accounts or hearing "the average neighborhood discussion" of the matter, of itself disqualified a juror. *State v. Caseday*, 58 Ore. 429, 115 Pac. 287.

[g] **Juror Who Claims No Impression Is Dangerous.**—*State v. Miller*, 46 Cre. 485, 81 Pac. 363.

63. Mont.—*State v. Howard*, 30 Mont. 518, 77 Pac. 50. W. Va.—*State v. Schnelle*, 24 W. Va. 767. Wis. *Hughes v. State*, 109 Wis. 397, 85 N. W. 333, following *Baker v. State*, 88 Wis. 140, 59 N. W. 570.

See *infra*, VII, F, 23, k.

[a] **Bias of Mind Controls.**—The opinion which disqualifies must be an opinion upon the case, and not upon rumors and newspaper reports in regard to the truth of which the juror has no established belief either way. The information from newspapers or other sources may be so detailed, full and complete that the juror should be held disqualified where he has formed or expressed an opinion thereon. But is the bias of mind based upon substantial facts which the juror believes, and not the mere transitory opinion, that disqualifies. *State v. Meaker*, 54 Vt. 112, reviewing and distinguishing so far as they may seem to the contrary, *State v. Hayden*, 51 Vt. 296; *State v.*

impressions even where the juror says he does not know whether he could give the parties justice but supposes he could.⁶⁴

(VIII.) **Evidence Reported in Papers.**—Evidence, or what purports to be evidence, printed in a public newspaper is a "statement in a public journal" within the meaning of the statute, and one may be competent whose information is derived therefrom,⁶⁵ and the rule has been held to apply to a published report of the alleged confession of an accused,⁶⁶ or his accomplice.⁶⁷ But under some statutes a distinction is made between reading newspaper accounts, and newspaper reports of the transactions constituting the crime,⁶⁸ or between reading newspaper accounts and newspaper reports of the testimony taken at a former trial,⁶⁹ and some cases hold that there is no difference between hearing testimony delivered orally in a case, and reading the same testimony taken down and accurately published in some newspaper,⁷⁰

Phair, 48 Vt. 366; *State v. Clark*, 42 Vt. 629; *Boardman v. Wood*, 3 Vt. 570; *State v. Godfrey, Brayt.* (Vt.) 170. The same rule applies in both civil and criminal cases. *State v. Meaker*, 54 Vt. 112.

[b] **Caution as to Extent of Rule.** "While we remember this, we should not be unmindful of other important considerations, two of which are, that amid all this rapidity of thought and its transmission the constitution remains the same, and so does the mind of man. We can lay aside our opinions, our prejudices and our convictions with no more ease and certainty than our forefathers could one hundred years ago;" and the constitution still guarantees trial by an impartial jury. *Rothschild v. State*, 7 Tex. App. 519.

64. *Hall v. State*, 51 Ala. 9.

65. *People v. Hopt*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708, affirming 4 Utah 47, 9 Pac. 407.

[a] **Information obtained from newspaper accounts of the evidence on the trial of a co-conspirator.** *People v. Irwin*, 77 Cal. 494, 20 Pac. 56.

[b] **Testimony of Witnesses Before the Grand Jury.**—*People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54.

[c] **The statute makes no discrimination between opinions formed from the reading of the testimony upon a former trial and those based upon information gathered from other sources.** *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616, *distinguishing* *Greenfield v. People*, 74 N. Y. 277, 6 Abb. N. C. 1, as merely holding that the juror in the case at bar was not deemed competent where he had read the testimony given on a former trial, though

he made the statement.

[d] **Newspaper Account of the Coroner's Inquest.**—*State v. Olberman*, 33 Ore. 556, 55 Pac. 866.

66. *State v. Wooley*, 215 Mo. 620, 115 S. W. 417; *State v. Bobbitt*, 215 Mo. 10, 114 S. W. 511; *State v. Church*, 199 Mo. 605, 98 S. W. 16.

67. *State v. Myers*, 198 Mo. 225, 94 S. W. 242.

68. *Siberry v. State*, 149 Ind. 684, 39 N. E. 936, 47 N. E. 458; *Noe v. State*, 92 Ind. 92, the latter is disqualifying, the former is not.

See *supra*, VII, F, 23, j, (IV).

[a] **If the juror has read newspaper accounts of what purports to be the statements of eye witnesses, believes the statement to be true, and has an opinion that the defendant is guilty, his examination shows a fixed belief or settled conviction, and he should be excluded notwithstanding his statement that he can try the case fairly, laying aside his opinion.** *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988.

69. *Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106, it appearing that the jurors have read in newspapers the reports of the testimony of witnesses taken at a former trial, they are wholly incompetent and the court had no discretion but its duty was to sustain the challenge. See *McHugh v. State*, 42 Ohio St. 154 (*distinguishing* *McHugh v. State*, 38 Ohio St. 153); *Frazier v. State*, 23 Ohio St. 551; *Cooper v. State*, 16 Ohio St. 328; and *supra*, VII, F, 23, j, (V).

70. *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066.

[a] **Reports of Evidence Before Coroner's Jury.**—One who has read the

a distinction being then drawn between reading or hearing extracts or partial reports of the testimony, and reading or hearing substantially all of it,⁷¹ and even conceding that the report as published was verbatim, the juror is not incompetent unless it appears he has read all of it.⁷² If what the juror hears or reads does not connect the defendant with the crime charged he is competent.⁷³ One has been held competent who remembered the opinion he had formed on reading the evidence of a former trial, but did not remember the evidence.⁷⁴

k. Oath or Statements of Juror as Affecting Competency.
(I.) In General. — If an opinion be such as necessarily disqualifies, no further inquiry is permissible as to whether the juror can lay aside that opinion and be guided by the evidence alone.⁷⁵ The statutes frequently provide that the juror's statement be considered.⁷⁶ They do not deny the principle that the jury must be free from bias which may influence their judgment.⁷⁷ They do not change the juror's essential qualifications, but only furnish a test by which those qualifications may be determined.⁷⁸ The statement must go directly to the question of opinion, and does not cure actual bias growing out of some collateral matter.⁷⁹ The statutes do not make the juror's statement conclusive of his impartiality,⁸⁰ and where jurors have fixed and unqualified

report of the evidence taken before the coroner whether as written down by that official, or as published in the newspapers is incompetent. *State v. Culler*, 82 Mo. 623.

71. *State v. Myers*, 198 Mo. 225, 94 S. W. 242 (*distinguishing State v. Culler*, 82 Mo. 623, and *State v. Foley*, 144 Mo. 600, 46 S. W. 733, as being cases where the juror had read all the testimony in preliminary proceedings or had been present at a former trial and heard the witnesses detail their evidence under oath); *State v. Riddle*, 179 Mo. 287, 78 S. W. 606. And see *State v. Hunt*, 141 Mo. 626, 43 S. W. 389, which similarly *distinguishes State v. Culler*, 82 Mo. 623, and *State v. Taylor*, 134 Mo. 109, 35 S. W. 92. See also *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066; *State v. Hultz*, 106 Mo. 41, 16 S. W. 940; *State v. Wilson*, 85 Mo. 134.

[a] **Reading Garbled Report of Coroner's Inquest.**—*State v. Shackelford*, 148 Mo. 493, 50 S. W. 105.

72. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

73. *State v. Gartrell*, 171 Mo. 489, 71 S. W. 1045.

74. *Grissom v. State*, 4 Tex. App. 374.

75. *Spence v. State*, 15 Lea (Tenn.) 539; *Couaster v. State*, 12 Lea (Tenn.)

436; *State v. Clark*, 42 Vt. 629. See *supra*, VII, F, 23, j, (I).

76. See the statutes, and *supra*, VII, F, 23, b.

77. *People v. Suesser*, 132 Cal. 631, 64 Pac. 1095. See *Balbo v. People*, 80 N. Y. 484.

Constitutionality of the statutes, see *supra*, VII, F, 23, b.

78. *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988; *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314.

[a] **The Texas statute divides into two distinct parts**; one involving the opinion of the juror himself—the other the means by which the court satisfies itself as to the strength of the juror's conclusion. *Stagner v. State*, 9 Tex. App. 440.

79. *People v. Riggins*, 159 Cal. 113, 112 Pac. 862.

80. *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616.

[a] As pointed out in *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57, to hold otherwise would compel a party to rest on the juror's oath to fairly try instead of giving him the impartial jury to which he is entitled.

[b] **It is harmless error that the court deemed it his imperative duty to declare the juror competent on his statement that he could try fairly**; if examination shows he was competent,

opinions the mere fact that they have been led to say they will deal fairly and justly does not make them competent,⁸¹ nor can a juror be qualified by being led to say his opinion is based on rumor when in fact it is not,⁸² and while the declaration of the juror is to be considered it is not controlling,⁸³ for it is the duty of the court and not of the juror to determine his impartiality.⁸⁴ At the same time the court is justified in basing its holding that the juror is competent on the juror's statements alone, there being nothing else to show either the nature or character of the opinion.⁸⁵

The weight to be given the juror's declaration, and how far it shall have the effect of relieving him from the disqualification arising from his opinion is for the court to determine from all the facts and circumstances,⁸⁶ and the court may consider the juror's conduct, demeanor

under the statute. *Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147.

81. *State v. John*, 124 Iowa 230, 100 N. W. 193 ("they insisted upon their opinions as persistently as due courtesy to the court would permit, and finally yielded a reluctant concession that they could deal with defendant justly"); *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *Palmer v. State*, 42 Ohio St. 596.

[a] Challenge ought to be allowed where jurors disclose they have a "fixed opinion" that a particular party should recover, though they say the opinion will not influence them. *Choctaw, O. & T. R. Co. v. True*, 35 Tex. Civ. App. 309, 80 S. W. 120.

[b] It is not enough to merely frame questions so as to lead the juror to say that he is disinterested and that he can and will render a fair and impartial verdict, under the law as stated in the instructions. *Lucas v. State*, 75 Neb. 11, 105 N. W. 976.

82. *People v. Helm*, 152 Cal. 532, 93 Pac. 99, "when from his own lips the evidence discloses that it is not so founded."

83. *Colo.*—*Union Gold M. Co. v. Rocky Mt. Nat. Bk.*, 2 Colo. 565. *Ia.* *State v. Smith*, 124 Iowa 334, 100 N. W. 40; *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211. *Kan.*—*State v. Stewart*, 85 Kan. 404, 116 Pac. 489; *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *State v. Otto*, 61 Kan. 58, 58 Pac. 995; *State v. Beuerman*, 59 Kan. 586, 53 Pac. 874; *State v. Snodgrass*, 52 Kan. 174, 34 Pac. 750; *State v. Beatty*, 45 Kan. 492, 25 Pac. 899; *State v. Miller*, 29 Kan. 43; *Morton v. State*, 1 Kan. 468. *La.*—*State v. Jackson*, 37

La. Ann. 768; *State v. Barnes*, 34 La. Ann. 395. *N. Y.*—*Balbo v. People*, 80 N. Y. 484. *Okla.*—*Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059. *Wash.* *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138.

84. *Ia.*—*State v. Munchrath*, 78 Iowa 268, 43 N. W. 211. *Miss.*—*Gammous v. State*, 85 Miss. 103, 37 So. 609; *Fugate v. State*, 82 Miss. 189, 33 So. 942; *Sheppric v. State*, 79 Miss. 740, 31 So. 416; *Klyce v. State*, 79 Miss. 652, 31 So. 339; *Jeffries v. State*, 74 Miss. 675, 21 So. 526. *Mo.*—*State v. Foley*, 144 Mo. 600, 46 S. W. 733; *State v. Walton*, 74 Mo. 270.

[a] "It is for the trial court to determine whether the juror entertained such opinion or impression as would influence his verdict." *People v. Otto*, 101 N. Y. 690, 5 N. E. 788. See also *Territory v. Bryson*, 9 Mont. 32, 22 Pac. 147.

85. *Groszhmigmeg v. State*, 57 Tex. Crim. 241, 121 S. W. 1113; *State v. Haworth*, 24 Utah 398, 68 Pac. 155; *People v. Thiede*, 11 Utah 241, 39 Pac. 837 (*affirmed* in 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237); *People v. Hopt*, 4 Utah 247, 9 Pac. 407 (*affirmed* in 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708); *United States v. Reynolds*, 1 Utah 319 (*affirmed*, 98 U. S. 145, 25 L. ed. 244, it indicates that the juror has only an impression and not a fixed opinion). See also *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905.

86. *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988. See also *State v. Morse*, 35 Ore. 462, 57 Pac. 631.

See *infra*, VII, F, 23, I, (I) and (III).

[a] Circumstances Considered.—The court in reaching its conclusion may

and bearing in court in determining whether he is qualified to serve, in view of his answers to the questions propounded,⁸⁷ and not merely upon the particular wording of the juror's statement,⁸⁸ nor upon his answer to one question,⁸⁹ especially where he explained subsequently

take into consideration not only the juror's answers but all the other circumstances and the juror's demeanor. So it was proper to consider the fact that the juror had at first denied having made any statement, and it was not until the time, place, and person had been named that he recalled the conversation. Though that conversation was not of itself perhaps sufficient to disqualify, the juror's apparent unwillingness to mention it was a suspicious circumstance which the court might consider. *Mason v. State*, 15 Tex. App. 534.

[b] A juror whose whole examination shows that he has only an impression or qualified opinion, which he could disregard and which he did not believe would influence him, and which he had received from reading newspapers and talking with his neighbors, is competent. *State v. Farris*, 26 Wash. 205, 66 Pac. 412.

87. Ind.—*Stout v. State*, 90 Ind. 1. Ia.—*State v. Brown*, 130 Iowa 57, 106 N. W. 379; *State v. Smith*, 124 Iowa 334, 100 N. W. 40; *State v. Crofford*, 121 Iowa 395, 96 N. W. 889; *State v. Foster*, 91 Iowa 164, 59 N. W. 8; *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211. Mo.—*State v. Sykes*, 191 Mo. 62, 89 S. W. 851; *State v. Cunningham*, 100 Mo. 382, 12 S. W. 376; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *State v. Walton*, 74 Mo. 270. Neb.—*Taylor v. State*, 86 Neb. 795, 126 N. W. 752; *Lucas v. State*, 75 Neb. 11, 105 N. W. 976; *Baye v. State*, 45 Neb. 261, 63 N. W. 811.

[a] The conduct and appearance of the juror, his manner and apparent candor or impartiality are all to be considered by the court. *Kumli v. Southern Pac. Co.*, 21 Ore. 505, 28 Pac. 637; *Bradford v. Territory*, 2 Okla. 228, 37 Pac. 1061.

[b] No Fixed Rule Can Be Laid Down.—The trial judge is clothed with a large discretion and much must depend on the character of the juror as disclosed by his bearing, his relation to the parties, and many other things impossible to specify. *Haugen v. Chicago,*

M. & St. P. Ry. Co., 3 S. D. 394, 53 N. W. 769.

[c] The Intangible Elements of Personality.—“The court should take into consideration the demeanor of the proposed juror; his answers as indicating candor or a desire to evade the question or conceal the truth; the impression or opinion which has been formed or expressed; the extent of knowledge of the facts of the case; the sources from which the information came; and from these, and from the many intangible yet potent elements which constitute personality, decide upon the existence of bias or animus either for or against the accused.” *Gammans v. State*, 85 Miss. 103, 37 So. 609, reviewing at length cases from Mississippi and other jurisdictions. See also *Fugate v. State*, 82 Miss. 189, 33 So. 942.

[d] Where the substance of the whole examination is that the juror had an opinion, but that he would and could lay it aside and give the prisoner a fair trial he may be permitted to serve. *Bice v. State*, 55 Tex. Crim. 529, 117 S. W. 163.

[e] “The manner of the juror while testifying is oftentimes more indicative of the real character of his opinion, than his words.” *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244, affirming 1 Utah 319.

[f] “In evenly balanced cases the appearance of the juror, the manner in which he is examined by counsel, and its effect upon him, sometimes justly have great weight with the court.” *People v. O’Laughlin*, 3 Utah 133, 1 Pac. 653.

88. *Com. v. Nye*, 240 Pa. 359, 87 Atl. 585. See also *State v. Mott*, 29 Mont. 292, 74 Pac. 728; *State v. Anderson*, 14 Mont. 541, 37 Pac. 1.

89. *Press Pub. Co. v. McDonald*, 73 Fed. 440, 19 C. C. A. 516; *Clark v. Com.*, 123 Pa. 555, 16 Atl. 795.

[a] Applying the rule that the whole examination should be considered, the mere fact that a juror by one answer to a question said his impression would be “a right hard thing to

that he did not clearly comprehend the questions.⁹⁰ So no matter how positive the juror's declaration that he can try fairly, the court is to determine from the whole examination considering the source of information and determining its strength from all the circumstances,⁹¹ and it is not prejudicial error to refuse to take a juror after he has made the statement that he can be impartial.⁹² On the other hand the fact that selected portions of the juror's answers show that he has formed and expressed an opinion as to material facts, does not necessarily disqualify him if the whole examination shows him to be impartial,⁹³ nor does the fact that he says his opinion is fixed, control the

get over," was not sufficient to make the juror incompetent. *Hall v. Com.*, 89 Va. 171, 15 S. E. 517.

90. *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824, questions were hypothetical.

91. *United States v. Schneider*, 10 Mack. (D. C.) 381.

[a] The juror's asseverations of ability to render an impartial verdict do not make him a competent juror where his information is from a disqualifying source. *State v. Foley*, 144 Mo. 600, 46 S. W. 733.

[b] If he really has a fixed opinion, even (1) though based on rumor he is not competent to consider the evidence pro and con, or to make an unbiased application of the law, even though he thinks he can do so. *Jackson v. State*, 77 Ala. 18. See *supra*, VII, F, 23, i; VII, F, 23, j, (I). (2) A strong impression or opinion of a fixed or abiding character, based on information derived from witnesses or from those acquainted with the facts and deemed reliable, will disqualify although the juror himself may think and state that he can fairly try the case. *State v. Morrison*, 64 Kan. 669, 68 Pac. 48; *State v. Otto*, 61 Kan. 58, 58 Pac. 995. See *supra*, VII, F, 23, j, (I).

[c] Statement of juror that he can readily render a verdict according to the evidence will not alone render him competent, if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence. *Olive v. State*, 34 Fla. 203, 15 So. 925; *Andrews v. State*, 21 Fla. 598. See also *Washington v. Com.*, 86 Va. 405, 10 S. E. 419; *Dejarnette v. Com.*, 75 Va. 867; *Armistead v. Com.*, 11 Leigh (38 Va.) 657, 37 Am. Dec. 633; *Jackson v. Com.*, 23 Gratt. (64 Va.) 919.

[d] If from any cause the juror has

such an opinion as will preclude a fair trial he is disqualified without regard to the causes enumerated in the statute. *Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985; *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059; *Huntley v. Territory*, 7 Okla. 60, 54 Pac. 314.

92. *United States v. Alexander*, 2 Idaho 386, 17 Pac. 746; *Tipton Light, etc. Co. v. Newcomer*, 33 Ind. App. 42, 67 N. E. 548.

[a] In Mississippi the statute specifically so provides. See Code 1906, §2685, and *Lewis v. State*, 85 Miss. 35, 37 So. 497; *Klyce v. State*, 79 Miss. 652, 31 So. 339; *McGuire v. State*, 76 Miss. 504, 25 So. 495.

93. *State v. Roberts*, 95 Kan. 280, 147 Pac. 828 (although they had read about the trial and conviction of the principal defendant and expressed an opinion as to his guilt); *State v. Daugherty*, 63 Kan. 473, 65 Pac. 695; *State v. Bussey*, 58 Kan. 679, 50 Pac. 891; *State v. Lowe*, 56 Kan. 594, 44 Pac. 20; *State v. Bane*, 1 Kan. App. 537, 42 Pac. 376.

[a] **Though Juror Admits Prejudice.** Even where one admits that what he has read and reports he has heard have prejudiced him against defendant, he may be held competent where from his whole examination it appears that he has heard no witness speak about the case and that he has no acquaintance with defendant, nor relationship with any witness and would try the case fairly on the evidence adduced. *State v. Vickers*, 209 Mo. 12, 106 S. W. 999.

[b] **Burden on Defendant To Change Opinion.**—A juror was properly held competent who said in effect that the "burden would be on defendant to change his opinion," where it appeared that all he knew was gained from newspaper reports, that he had not

court where his whole examination shows that his opinion is not fixed within the rule,⁹⁴ particularly where his answer is given in response to a question suggesting the language used,⁹⁵ or where the answers to

talked with any witness, and that he was entirely free to be governed by the evidence. *State v. Brennan*, 164 Mo. 487, 65 S. W. 325.

94. *Ala.*—*Crickland v. State*, 151 Ala. 31, 44 So. 90; *Jarvis v. State*, 138 Ala. 17, 34 So. 1025; *Ragsdale v. State*, 134 Ala. 24, 32 So. 674; *Long v. State*, 86 Ala. 36, 5 So. 443; *Bales v. State*, 63 Ala. 30, rule applied where juror said, "I can't help believing what I have heard." *La.*—*State v. McGee*, 36 La. Ann. 206, stating that in so far as *State v. Ricks*, 32 La. Ann. 1098, may seem to lay down a different rule it has been overruled by later cases. *Ore.*—*State v. Ingram*, 23 Ore. 434, 31 Pac. 1049. *Pa.*—*Com. v. Eagan*, 190 Pa. 10, 42 Atl. 374, the mere fact that a jurymen said he had a "fixed" opinion, and said, "I think I can," when asked if he could overcome it, does not render him incompetent. See also *Curley v. Com.*, 84 Pa. 151.

[a] Though a juror in answer to a final direct question said he had "a fixed, unqualified, opinion," there was no error in permitting him to serve where from his entire testimony it clearly appeared his opinion was not of that character. *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948.

[b] Juror who said he had an opinion "to a certain extent," and expressed an apprehension that he would go on the jury with a biased opinion, was competent where he said he could lay his opinion aside and decide solely on the evidence. His opinion was formed from newspaper reports. *Long v. State*, 86 Ala. 36, 5 So. 443.

[c] The mere fact that the juror may call his opinion a "decided opinion" does not necessarily disqualify him where it is clear that from the sources of his information his opinion is but hypothetical. *Maile v. Com.*, 9 Leigh (36 Va.) 661.

95. *Smith v. Com.*, 100 Ky. 133, 37 S. W. 586 (the answer was "sufficiently modified and restricted by the response given to the inquiry made by the court"); *State v. Sykes*, 191 Mo. 62, 89 S. W. 851.

[a] Illustrations. — (1) The mere fact that the jurors have used such

expressions as that it would require "a good deal of evidence," or "pretty solid testimony" to overcome his opinion "must be read in the light of the examination then being prosecuted by the defendant's attorney, which was calculated to lead them to such an assertion." *State v. Armstrong*, 43 Ore. 207, 73 Pac. 1022. (2) So though in one part of his testimony the juror said, "No; I do not think I would," in answer to an inquiry as to whether he felt he would be a fair juror, he was not necessarily incompetent, and the court properly considered the source of his information, as well as his subsequent answers. *State v. Savage*, 36 Ore. 191, 60 Pac. 610, 61 Pac. 1128. (3) And though a juror answered affirmatively the question whether his opinion "was not a decided and pretty substantial one," the court found him competent, taking particular notice of the fact that his whole information was based on rumor. *Wormeley v. Com.*, 10 Gratt. (51 Va.) 658.

[b] It is not to be determined from a mere "catch question" (1) which makes him say he has prejudice and bias which would take evidence to remove, when his whole examination shows he was referring to newspaper reports and that he had no bias at all. *State v. Cunningham*, 100 Mo. 382, 12 S. W. 376. (2) See also *State v. Taylor*, 134 Mo. 109, 35 S. W. 92, where the court says the trial court properly took into consideration, in determining the juror's competency, that the answers "were replies to adroitly put and complicated questions, which could scarcely be correctly answered by a simple negative or a simple affirmation."

[c] Reason for Rule.—"The shrewd lawyer . . . invariably puts the question as to the forming of an opinion, and the juror, having perhaps in reality but a casual impression respecting the case, is quite certain to dignify his state of mind by the adoption of the term used by the lawyer and call it an opinion." *Lindsey v. State*, 69 Ohio St. 215, 69 N. E. 126.

[d] "Voluntary Information" Contrasted With "Adroit" Questions.—"It

the inquiries of the court disclose no fixed opinion though answers to counsel did.⁹⁶

(II.) **Positive Statements of Partiality.**⁹⁷ — If a juror is conscious of his inability to render a verdict without being influenced by his previous impressions or opinions he should be excluded.⁹⁸ The fact that the juror says he has an opinion is not conclusive,⁹⁹ nor that he says he has "a belief" as to the merits of the case.¹ The mere fact that the juror states he would be influenced by his opinion does not necessarily require his rejection.²

(III.) **Equivocal Statement of Impartiality.** — Though it is said that the statement of impartiality must be made substantially in the form pre-

is the voluntary information given by a juror which tests his suitability, rather than answers that are elicited by adroit and confusing questions." State v. Royse, 24 Wash. 440, 64 Pac. 742. See also State v. Straub, 16 Wash. 111, 47 Pac. 227.

96. State v. Le Duff, 46 La. Ann. 546, 15 So. 397; State v. Johnson, 33 La. Ann. 889.

[a] Certainly the court will not reverse for "a merely hypothetical impression as to the persuasiveness of certain proposed evidence raised by ingenious interrogatories propounded by counsel." State v. Heff, 155 Iowa 21, 134 N. W. 950.

97. That decision is based on whole examination and not on isolated answers, see *supra*, VII, F, 23, k, (I).

98. Lohman v. People, 1 N. Y. 379, 49 Am. Dec. 340, "although a man may think himself impartial when he is not, he cannot be a competent juror if conscious of an inability to render a verdict without being influenced by previous impressions."

But see *supra*, VII, F, 23, k, (I).

[a] Juror in Sympathy With Accused.—State v. Punshon, 133 Mo. 44, 34 S. W. 25.

[b] A juror who states frankly that he cannot give the defendant the same fair trial that he could have given if he had not heard of the case is incompetent and should have been excused on defendant's challenge. Scribner v. State, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985.

[c] Juror's statement of partiality entitled to great weight if not conclusive. State v. Coella, 3 Wash. 99, 28 Pac. 28.

99. State v. Stewart, 85 Kan. 404, 116 Pac. 489; State v. Morrison, 67

Kan. 144, 72 Pac. 554; State v. Bussey, 58 Kan. 679, 50 Pac. 891.

[a] When the judge becomes satisfied that what the juror calls an opinion, was not such in legal meaning and that it had left no unfavorable bias on his mind, the challenge should be overruled." State v. Collins, 70 N. C. 241, 16 Am. Rep. 771. See also State v. Benton, 19 N. C. 196.

[b] The juror had formed what he called an opinion against the defendant which it would require some testimony to remove, but which was not against him unless he was one of the gang which committed the crime, and was based in part upon the fact that he was indicted with the others. Juror had heard and read about the trials of such others, but had not talked with any witness, or person claiming to be acquainted with the facts, nor had he read what purported to be the testimony of any witness. He stated that he could lay aside the fact that defendant was indicted, if instructed so to do, and that notwithstanding any bias, opinion or prejudice he could render an impartial verdict according to the law and evidence. The supreme court refused to say the trial court's ruling that the juror was competent was an abuse of its discretion. Lindsey v. State, 69 Ohio St. 215, 69 N. E. 126.

1. State v. Medlicott, 9 Kan. 257.

2. Minich v. People, 8 Colo. 440, 9 Pac. 4.

[a] That juror said he did not think he would make a fair juror may be attributed to his desire to evade jury duty by exaggeration. State v. Savage, 36 Ore. 191, 60 Pac. 610, 61 Pac. 1128. See also O'Mara v. Com., 75 Pa. 424, "the tendency is to exaggerate their opinions, to escape serving in capital cases."

scribed by the statute,³ and that the whole statement taken together must show an unequivocal declaration that the juror has an absolute belief that his opinion will not influence his verdict,⁴ some courts hold that the mere fact that the juror may be in doubt as to whether his opinion will affect his verdict does not disqualify him, if the trial court is satisfied of his impartiality from his whole examination,⁵ and

3. *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73; *People v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277.

[a] While the code declarations need not be made literally, they must be in substance and then if there is nothing in their further examination impeaching such declarations the court may receive them as jurors if satisfied their opinions and impressions will not influence their verdict. *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. 194.

4. La.—*State v. Ramsey*, 50 La. Ann. 1339, 24 So. 302, differentiating the various Louisiana cases. *Neb. Flege v. State*, 93 Neb. 610, 142 N. W. 276, 47 L. R. A. (N. S.) 1106; *Thurman v. State*, 27 Neb. 628, 43 N. W. 404. N. Y.—*People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, "it is not enough to be able to point to detached language, which alone considered would seem to meet the statute requirement." *Okla.—Morehead v. State*, 151 Pac. 1183; *Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719. Va. *Washington v. Com.*, 86 Va. 405, 10 S. E. 419. See *Wright v. Com.*, 32 Gratt. (73 Va.) 941. W. Va.—*State v. Johnson*, 49 W. Va. 684, 39 S. E. 665; *State v. Schnelle*, 24 W. Va. 767.

[a] Where there is hesitancy and doubt on the part of the juror and he will not say positively that he could try the case as though he had no opinion, he is not competent. *Fugate v. State*, 82 Miss. 189, 33 So. 942; *McGuire v. State*, 76 Miss. 504, 25 So. 495; *Mabry v. State*, 71 Miss. 716, 14 So. 267.

[b] Juror does not show doubt who says he has been thinking since he was called whether he can try impartially or not, and has concluded that he can, his further answers showing that he would try on the law and evidence uninfluenced by impressions. *State v. Kellogg*, 104 La. 580, 29 So. 285.

[c] Expressions Held Equivocal. (1) "I couldn't go into that jury box with that evidence on the stand and

change my opinion from what I heard there." If that evidence was produced on the stand it would take pretty strong evidence to overcome it. The juror had heard detailed what purported to be all the facts by two persons from the town where the crime was committed. *Morehead v. State (Okla.)*, 151 Pac. 1183. (2) A mere answer on direct examination, "Notwithstanding that opinion I could render a fair and impartial verdict upon the evidence as it shall be offered in this case" is not sufficient. Nor was it sufficient that the following questions and answers were put by the judge and answered by the juror, "Q. Could you, in this case, divest yourself of any opinion you entertain and render a fair and impartial verdict upon the evidence brought out on the trial here? A. I think I could. Q. Could you do it? A. Yes, sir." *People v. Flaherty*, 162 N. Y. 532, 57 N. E. 73. (3) Juror is properly excluded on state's challenge who says it is "very doubtful" whether he can give accused a fair and impartial trial. *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330. (4) "I think I can." *Miller v. State*, 29 Neb. 437, 45 N. W. 451. See also *Neb.—Curry v. State*, 4 Neb. 545. S. C.—*State v. Haines*, 36 S. C. 504, 15 S. E. 555. W. Va.—*State v. Johnson*, 49 W. Va. 684, 39 S. E. 665. (5) "Well I don't think it would." *Sims v. Jones*, 43 S. C. 91, 20 S. E. 905. (6) "Possibly that opinion might change, if they have evidence." *State v. Johnson*, 49 W. Va. 684, 39 S. E. 665. See also *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626.

[d] The fact that the juror is in doubt as to whether the opinion he has formed would yield to the testimony to be adduced on the trial, is sufficient to disqualify him, though he says he can give the prisoner a fair trial. *Dejarnette v. Com.*, 75 Va. 867.

5. *Territory v. Robello*, 20 Hawaii 7.

[a] If the court from all his an-

the mere fact that the juror gives contradictory answers concerning his opinion does not necessarily disqualify him.⁶ Some cases say that the reviewing court will not interfere with the trial court's determination merely because some of the juror's answers seem inconsistent or incoherent,⁷ for in such case, in some jurisdictions, the complaining party should have the matter made more clear by a further examination,⁸ or there exists, by virtue of the conflicting statements of the juror, a conflict in the evidence which forbids review.⁹

1. *Determination.*—(I.) *In General.*—The result of the statutes is to make the question of the juror's competency as affected by his opinion, one of fact,¹⁰ or, as sometimes stated, it is a mixed one of law and fact.¹¹ The question is to be determined from all the facts and

swers and all the evidence and circumstances is entirely satisfied that he would discharge his duties impartially. *State v. Munchrath*, 78 Iowa 268, 43 N. W. 211.

[b] That a juror cannot accurately define the word "qualified" as applied to his opinion, does not prove that he was not a proper juror. *People v. Brown*, 48 Cal. 253.

[c] In the absence of a statutory rule mere lack of positiveness does not disqualify. The court may rightly have concluded that this was "a mistrust of himself, proceeding from a sensitive conscience which would be his best equipment for the service required of him. *United States v. Schneider*, 10 Mack. (D. C.) 381.

6. *State v. Pearce*, 87 Kan. 457, 124 Pac. 814, Ann. Cas. 1913E, 358. See *State v. Labore*, 80 Kan. 664, 103 Pac. 106.

[a] It is the province of the trial court to settle the contradictions and to determine upon the testimony whether the juror had disqualifying opinions and whether he was free from bias, prejudice, or interest. *State v. Pearce*, 87 Kan. 457, 124 Pac. 814, Ann. Cas. 1913E, 358.

7. *Walker v. State*, 102 Ind. 502, 1 N. E. 856. See also *United States v. Schneider*, 10 Mack. (D. C.) 381.

[a] After several direct questions and inconclusive answers the court said "That is not the question. The question is whether that is a fixed opinion that would bias your verdict." Answer. "I can't swear that it would . . . I can't say that it would bias my verdict." The court then asked, "Do you answer yes, or no?" and juror replied, "Well, I will answer no." He was held competent. *Ham-*

mil v. State, 90 Ala. 577, 8 So. 380. See also *State v. Wyse*, 32 S. C. 45, 10 S. E. 612.

8. *Shields v. State*, 149 Ind. 395, 49 N. E. 351. See *infra*, VII, F, 23, 1, (II).

9. *People v. Edwards*, 163 Cal. 752, 127 Pac. 58; *People v. Loper*, 159 Cal. 6, 112 Pac. 720, Ann. Cas. 1912B, 1193; *People v. Ryan*, 152 Cal. 364, 92 Pac. 853.

10. III.—*Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57. *Ind.* *Shields v. State*, 149 Ind. 395, 49 N. E. 351. *Kan.*—*State v. Stewart*, 85 Kan. 404, 116 Pac. 489. *Ore.*—*State v. Miller*, 46 Ore. 485, 81 Pac. 363; *State v. Saunders*, 14 Ore. 300, 12 Pac. 441; *State v. Tom*, 8 Ore. 177. *Pa.*—*Clark v. Com.*, 123 Pa. 555, 16 Atl. 795. *Utah.* *People v. Thiede*, 11 Utah 241, 39 Pac. 837, judgment affirmed, 159 U. S. 510, 16 Sup. Ct. 62, 40 L. ed. 237.

Determination of effect of statement of by juror as to effect of his opinion, see *supra*, VII, F, 23, k.

11. *Ala.*—*Jarvis v. State*, 138 Ala. 17, 34 So. 1025; *Long v. State*, 86 Ala. 36, 5 So. 443. *Kan.*—*State v. Stewart*, 85 Kan. 404, 116 Pac. 489. *Utah.* *State v. Thorne*, 41 Utah 414, 126 Pac. 286; *United States v. Reynolds*, 1 Utah 319, affirmed, 98 U. S. 145, 25 L. ed. 244.

[a] *Mixed Question of Law and Fact.*—Whether the nature and strength of the opinion formed is such as in law necessarily raises the presumption of partiality is a mixed question of law and fact. *Pearson v. Rocky Mountain Fuel Co.*, 219 Fed. 496, 135 C. C. A. 208, quoting with approval *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. See also *Palmer v. State*, 121 Tenn. 465, 118 S. W.

circumstances appearing in evidence under the guidance of those rules of evidence which exist independently of the statute.¹² The proper practice is to examine the jurors upon their voir dire as to the opinions they have formed,¹³ though this would disclose some of the evidence,¹⁴

1022; *Spence v. State*, 15 Lea (Tenn.) 539; *Conaster v. State*, 12 Lea (Tenn.) 436.

[b] "The issue raised upon a challenge for cause to a juror in a criminal case, on the ground that he has formed an opinion founded upon rumor, statements in public journals, or common notoriety, and upon which he has expressed an opinion, is one of mixed law and fact." *Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719; *Huntley v. Territory*, 7 Okla. 30, 54 Pac. 314.

[c] More a Question of Fact Than of Law.—*Press Pub. Co. v. McDonald*, 73 Fed. 440, 19 C. C. A. 516.

12. *Coughlin v. People*, 144 Ill. 140, 33 N. E. 1, 19 L. R. A. 57.

[a] Determinable from the manner, appearance and expressions of the proposed juror, the sources of his information, the form of the questions to which his answers are given "and from these and other things the trial court is to determine whether his opinion is fixed and positive or whether he is an unprejudiced man whose impression or opinion is wholly contingent upon the truth or falsity of the information he has received and who is free to hear and impartially consider the evidence and to render a verdict without regard to any former impression or opinion which he may have had." *State v. Stewart*, 85 Kan. 404, 116 Pac. 489. See *supra*, VII, F, 23, k, (I).

13. Ala.—*Bales v. State*, 63 Ala. 30; *Carson v. State*, 50 Ala. 134. Fla.—*Ellis v. State*, 25 Fla. 702, 6 So. 768. Pa.—*Comfort v. Mosser*, 121 Pa. 455, 15 Atl. 612; *O'Mara v. Com.*, 75 Pa. 424. Tenn.—*Williams v. Godfrey*, 1 Heisk. 299.

As to examination of jurors generally see *supra*, VII, E, 5, i.

[a] The right to interrogate the jurors in relation to any opinion they may have formed must be conceded, both to determine the challenge for actual bias and as laying a foundation for peremptory challenge. *State v. Steeves*, 29 Ore. 85, 43 Pac. 947.

[b] Distinction Between Challenge to Favor and for Principal Cause. Question as to formation of impression was proper under the old practice when challenge was to the favor but not if it was for principal cause. *People v. Honeyman*, 3 Denio (N. Y.) 121, explaining *People v. Bodine*, 1 Denio (N. Y.) 281.

[c] It was error to refuse to permit counsel to ask if he would not convict on less evidence than if he had not heard of the case. *Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985.

[d] The extent to which the court will go in the examination is a matter which rests in its discretion. Error cannot be predicated upon its rejection of a juror without examination into the sources on which the juror's opinion was based. *Zimmerman v. State*, 56 Md. 536.

[e] Under the Texas statute (1) reading "the juror shall first be asked whether, in his opinion, the conclusions so established will influence his verdict. If he answers in the affirmative he shall be discharged, if he answers in the negative he shall be further examined," etc., when the juror answers the first question affirmatively no further questioning is permitted and he must be discharged. *Shannon v. State*, 34 Tex. Crim. 5, 28 S. W. 540. See also *Spear v. State*, 16 Tex. App. 98; *Stagner v. State*, 9 Tex. App. 440. (2) Where jurors have admitted the forming or expressing of opinions it is sometimes necessary to examine into the details thereof; but when they emphatically deny that they have formed any conclusion the better practice is to cut off further inquiry. *Arnold v. State*, 38 Tex. Crim. 5, 40 S. W. 735. (3) But the court is not only not interdicted from asking questions, but the statute provides that he may ask questions to the end that the jurors may be fairly and intelligently interrogated as to their qualifications. *King v. State* (Tex. Crim.), 64 S. W. 245.

14. *People v. O'Neil*, 48 Hun 36, 5 N. Y. Crim. 302, 10 N. Y. St. 1.

and they may be asked whether they have either formed or expressed an opinion,¹⁵ except in so far as under the practice of the particular jurisdiction this might tend to disgrace the juror.¹⁶ The juror may be questioned as to his opinion, even to an extent which would not be material on a challenge for cause, for the purpose of determining as to peremptories.¹⁷ Failure to permit a question which would disclose the source of information on which the juror had formed his opinion is clearly harmless where the court excused the juror because he had

15. *Trout v. Williams*, 29 Ind. 18, the rule as to the effect to be given to an expressed opinion does not go so far as to exclude the question.

16. *State v. Madoil*, 12 Fla. 151, the court says the matter was formerly much in doubt. (Citing common law and early United States cases.)

Questions as to matters going to dishonor or discredit of juror, see *supra*, VII, E, 4, i, (III), (C).

[a] **Asking About Opinion as Tending To Disgrace.**—In *State v. Spencer*, 21 N. J. L. 196, the court followed the common-law rule that the juror could not be asked whether he had formed or expressed an opinion, since that was no ground of challenge unless expressed in a manner evincing malice or ill-will and it would compel him to convict himself of disreputable conduct to answer. See also *Clifford v. State*, 61 N. J. L. 217, 39 Atl. 721; *Moschell v. State*, 53 N. J. L. 498, 22 Atl. 50; *State v. Fox*, 25 N. J. L. 566; *State v. Zellers*, 7 N. J. L. 220.

[b] **Different Rule Where Malice and Ill-Will Rule Not Recognized.** The mere formation of an opinion and the expression thereof is not "dishonor or disgrace" in a jurisdiction which does not hold to the malice and ill-will rule. *People v. Christie*, 2 Abb. Pr. (N. Y.) 256, 2 Park. Crim. 579. See also *Pike County v. Griffin & W. P. Plank Road Co.*, 15 Ga. 39; *Copenhagen v. State*, 14 Ga. 22.

[c] The rule never applied to civil cases, and is changed by statute in this state, as to criminal cases. *Maize v. Sewell*, 4 Blackf. (Ind.) 447.

[d] For a discussion at length of the reasons for holding that the juror could not be asked as to his opinion, see *State v. Baldwin*, 3 Brev. (S. C.) 309, 1 Treadw. Const. 289, followed in *State v. Sims*, 2 Bailey (S. C.) 29; *State v. Crank*, 2 Bailey (S. C.) 66, 23 Am. Dec. 117.

[e] **The prisoner could not on voir dire** ask whether the juror had formed or expressed an opinion. This was the rule prior to the adoption of the statute requiring the judge, on motion of either party, to examine along that line. The theory of the old rule was that the prisoner's peremptory challenges were a sufficient protection. *State v. Coleman*, 20 S. C. 441, citing *State v. Baldwin*, 1 Treadw. Const. (S. C.) 289, 3 Brev. 309; *State v. Sims*, 2 Bailey (S. C.) 29.

17. *Basve v. State*, 45 Neb. 261, 63 N. W. 811; *Com. v. Grauman*, 52 Pa. Super. 215. See generally as to examination in aid of exercise of peremptory challenges, *supra*, VII, E, 5, m, (I).

[a] **Conceding the immateriality of answers to question as to the juror's opinion as to whether a burglary had been committed**, which opinion was gained from being present part of the time while a co-indictee was being tried and hearing some of the evidence, the defendant was entitled to propound the questions for the purpose of determining his peremptory challenges. *State v. King*, 174 Mo. 647, 74 S. W. 627.

[b] **Question Directed to Isolated Feature of Case.**—"Have you any belief now as to whether (deceased) was killed or not," being directed to an isolated feature of the case, would tend only remotely to lay a foundation for a challenge for cause; but was a proper question as being possibly of value in exercising peremptory. *Eyttinge v. Territory*, 12 Ariz. 131, 100 Pac. 443.

[c] The juror having said that he had formed no opinion and that what he had heard was rumor, it was reversible error to refuse to permit counsel to interrogate him as to whether he had not conversed much about the case. *Heath v. Com.*, 1 Rob. (40 Va.) 735.

formed and expressed an opinion,¹⁸ and it is harmless to refuse a question which could not have resulted in the juror's exclusion no matter how it was answered.¹⁹

(II.) **Presumptions and Burden of Proof.** — According to some cases as soon as it appears that the juror has formed or expressed an opinion as to the guilt or innocence of the prisoner, he is incompetent and the burden then shifts upon the party seeking to retain him to show that the opinion is not of a disqualifying nature,²⁰ but other cases hold that the challenging party must establish the disqualifying nature of the opinion.²¹ The question is to be determined by a preponderance of the testimony,²² but in all doubtful cases the better practice is for the court to resolve the doubt against the juror's ability to discard his opinion and to exclude him.²³

18. *Martin v. Mitchell*, 28 Ga. 382, this was on the assumption that the question was proper which the court doubts. It is suggested that the excused juror's opinion may have been adverse to appellant.

19. *Gillespie v. State*, 92 Md. 171, 48 Atl. 32.

20. *Meyer v. State*, 19 Ark. 156, after challenge by prisoner for cause, and the existence of the opinion is shown, the state must prove that the opinion is based on rumor, and that it is not such as to bias or prejudice the juror's mind.

[a] If the record simply shows that an opinion has been formed as to a material fact, and there is nothing to show that it was hypothetical, conditional, indefinite, or uncertain, it was reversible error not to allow the challenge. *State v. Brown*, 15 Kan. 400.

[b] That the juror says he supposes he has an opinion does not disqualify him where he does not say it was definite and fixed, or would require evidence to remove it; and no further questions are asked him that might have disclosed a state of mind rendering him incompetent. *Tisdale v. State*, 120 Ark. 470, 179 S. W. 650, citing *McElvain v. State*, 101 Ark. 443, 450, 142 S. W. 840; *Collins v. State*, 102 Ark. 180, 143 S. W. 1075; *Jackson v. State*, 103 Ark. 21, 145 S. W. 559; *Hamer v. State*, 104 Ark. 606, 150 S. W. 142.

21. *Holt v. People*, 13 Mich. 224 (and, until a disqualifying opinion is shown, the other party need offer no proof of the juror's fitness); *Palmer v. State*, 121 Tenn. 465, 118 S. W. 1022; *Spence v. State*, 15 Lea (Tenn.) 539; *Conaster v. State*, 12 Lea (Tenn.)

436. See also *Shields v. State*, 149 Ind. 395, 49 N. E. 351.

[a] **No Error Where Matter Should Have Been Further Investigated.**—The juror said that he did not think himself impartial; his sympathies were with the prisoner but his prejudices were against him; it cannot be determined whether he was a competent juror or not. So no error can be predicated upon failure to excuse him for cause. The matter "should have been more thoroughly probed," but the prisoner having peremptorily challenged cannot complain. *Johns v. State*, 55 Md. 350.

22. *State v. Miller*, 46 Ore. 485, 81 Pac. 363, it is not like the consideration of a motion for nonsuit which requires that the case should not be taken from the jury if there is any evidence, inference or presumption reasonably tending to support plaintiff's theory.

23. *People v. Ryan*, 152 Cal. 364, 92 Pac. 853; *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54; *State v. Church*, 6 S. D. 89, 60 N. W. 143. Compare *supra*, VII, F, 23, k, (III).

[a] **Source Doubtful.**—*Conatser v. State*, 12 Lea (Tenn.) 436.

[b] **The practical difficulty of determining the exact state of mind of the juror is so great, many jurors being unable to distinguish between their own qualified and unqualified opinion, and the court having before it the metaphysical inquiry as to whether the mind is merely impressed, and to what degree impressed, with the truth or falsity of a given proposition; the only safe rule is to reject the juror in every doubtful case.** *People v. Brotherton*, 43 Cal. 530.

(III.) **Conclusiveness of Ruling.**—The decision of the question on the facts is one for the discretion of the trial court.²⁴ It is however a sound legal discretion which can be reviewed and the finding is not conclusive,²⁵ except that the rule that a challenge to the favor will not be reviewed²⁶ has been strictly applied in some cases.²⁷ Great weight is accorded to the opinion of the court before whom the veniremen are examined and questioned.²⁸ The usual holding is that the finding of the trial court is conclusive and not subject to review, except in case of gross abuse of discretion,²⁹ or a positive violation of

[c] **State Should Not Be Given Benefit of Doubt.**—*Fugate v. State*, 82 Miss. 189, 33 So. 942.

[d] **"The Principle That Every Reasonable Doubt Must Be Resolved in Favor of the Defendant Applies.**—*Scribner v. State*, 3 Okla. Crim. 601, 108 Pac. 422, 35 L. R. A. (N. S.) 985. See also *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059.

24. *Cal.*—*Scragg v. Sallee*, 24 Cal. App. 133, 140 Pac. 706. *Haw.*—*Territory v. Johnson*, 16 Hawaii 743. *Neb.* *Taylor v. State*, 86 Neb. 795, 126 N. W. 752. *Utah.*—*State v. Thorne*, 41 Utah 414, 126 Pac. 286; *People v. Hopt*, 4 Utah 247, 9 Pac. 407 (*affirmed*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708); *United States v. Reynolds*, 1 Utah 319, *affirmed*, 98 U. S. 145, 25 L. ed. 244. *Vt.*—*State v. Meaker*, 54 Vt. 112.

See cases and discussion throughout *supra*, VII, F, 23.

As to weight of juror's statement as to effect of his opinion, see *supra*, VII, F, 23, k.

[a] **Whether the juror has formed such an opinion that he could not be impartial is a matter for the "conscience or discretion" of the court.** *Pearson v. Rocky Mountain Fuel Co.*, 219 Fed. 496, 135 C. C. A. 208, *quoting* with approval *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244.

[b] **When the opinion is based upon the statutory exceptions then the court has a wide margin allowed it in weighing, measuring and testing the juror's declarations for the purpose of ascertaining his fairness and impartiality.** *People v. Miller*, 125 Cal. 44, 57 Pac. 770. To same effect see *Walker v. State*, 102 Ind. 502, 1 N. E. 856.

25. *Palmer v. State*, 42 Ohio St. 596; *McHugh v. State*, 42 Ohio St. 154; *State v. Miller*, 46 Ore. 485, 81 Pac. 363. But see *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616, under New York statute.

[a] **Though it will not lightly interfere, it is the duty of the supreme court to reverse the finding of fact of the trial court whenever it is satisfied that the lower court has erred in holding the juror competent.** *Dennis v. State*, 91 Miss. 221, 44 So. 825.

[b] **The judge with the juror before him is better qualified than the members of the reviewing court with only the paper record at hand to determine the ultimate question of whether or not the juror will disregard his previous opinion.** *State v. Humphrey*, 63 Ore. 540, 128 Pac. 824; *State v. Caseday*, 58 Ore. 429, 115 Pac. 287; *State v. Savage*, 36 Ore. 191, 60 Pac. 610, 61 Pac. 1128.

26. See *supra*, VII, E, 4, m.

27. *State v. Green*, 95 N. C. 611. See also *Union Gold M. Co. v. Rocky Mt. Nat. Bank*, 2 Colo. 565.

28. *Robinson v. Com.*, 104 Va. 888, 52 S. E. 690; *McCue v. Com.*, 103 Va. 870, 49 S. E. 623; *State v. Baker*, 33 W. Va. 319, 10 S. E. 639.

[a] **Finding of trial judge is not conclusive, but will not be disturbed unless clearly wrong.** *State v. Ekanger*, 8 N. D. 559, 80 N. W. 482.

29. *Cal.*—*People v. Ruef*, 14 Cal. App. 576, 114 Pac. 48, 54. *Colo.*—*Imboden v. People*, 40 Colo. 142, 90 Pac. 608; *Thompson v. People*, 26 Colo. 496, 59 Pac. 51; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Minich v. People*, 8 Colo. 440, 9 Pac. 4; *Jones v. People*, 2 Colo. 351; *Solander v. People*, 2 Colo. 48. *Ia.*—*State v. Heft*, 155 Iowa 21, 134 N. W. 950, *following State v. Hassan*, 149 Iowa 518, 128 N. W. 960; *State v. Fielding*, 135 Iowa 255, 112 N. W. 539; *State v. Brown*, 130 Iowa 57, 106 N. W. 379; *Wilson v. Wapelo County*, 129 Iowa 77, 105 N. W. 363. *Kan.*—*Healer v. Inkman*, 94 Kan. 594, 146 Pac. 1172. *Ore.*—*State v. Caseday*, 58 Ore. 429, 115 Pac. 287; *State v. Armstrong*, 43 Ore. 207, 73 Pac. 1022;

law.³⁰ Where the juror explicitly declares that he is indifferent, and there is no evidence to controvert his statement, there is no evidence on which to find him incompetent,³¹ but if the juror fails to make the statutory declaration there is no evidence on which to base the trial court's finding that he is competent.³² In other words the finding is to be reviewed like any other finding of fact,³³ and will stand if

State v. Savage, 36 Ore. 191, 60 Pac. 610, 61 Pac. 1128; *State v. Morse*, 35 Ore. 462, 57 Pac. 631; *Kumli v. Southern Pacific Co.*, 21 Ore. 505, 28 Pac. 637; *State v. Saunders*, 14 Ore. 300, 12 Pac. 441. **Tex.**—*King v. State* (Tex. Crim.), 64 S. W. 245, following *Davis v. State*, 19 Tex. App. 201. **Utah.** *State v. Thorne*, 41 Utah 414, 126 Pac. 286; *People v. Hopt*, 4 Utah 247, 9 Pac. 407 (*affirmed*, 120 U. S. 430, 7 Sup. Ct. 614, 30 L. ed. 708); *United States v. Reynolds*, 1 Utah 319, *affirmed*, 98 U. S. 145, 25 L. ed. 244.

[a] In Indiana under the prior statutes, it was uniformly held that the decision was wholly within the trial court's discretion and would not be reviewed unless abused. *Woods v. State*, 134 Ind. 35, 33 N. E. 901.

[b] In Civil Suits.—(1) The decision to warrant a reversal must be "manifestly erroneous and prejudicial to the party complaining." *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369. (2) "Unless it clearly appears from the record that the requirements of the statute have been disregarded in the overruling of a challenge for cause, the ruling of the trial court should be sustained." *Denver S. P. & P. R. Co. v. Moynahan*, 8 Colo. 56, 5 Pac. 811.

[c] "Extreme Application" of Rule. Where it appeared that the juror had both read an account of the case in a newspaper, and had received from the father of deceased a narrative of the circumstances of the homicide, and had at one time formed an opinion as to the guilt of the principal as whose accessory defendant was being tried; the supreme court said, "to admit him as a juror was an extreme application of the discretion permitted by the statute; yet, standing by itself, it is not such an abuse of that discretion as to warrant a reversal of the judgment on that ground alone." *Goins v. State*, 46 Ohio St. 457, 21 N. E. 476.

30. **Ia.**—*State v. Smith*, 124 Iowa 234, 100 N. W. 40. **Kan.**—*State v. Pearce*, 87 Kan. 457, 124 Pac. 814, Ann. Cas. 1913E, 358; *State v. Stewart*, 85

Kan. 404, 116 Pac. 489. **Utah.**—*State v. Thorne*, 41 Utah 414, 126 Pac. 286; *United States v. Reynolds*, 1 Utah 319, *affirmed*, 98 U. S. 145, 25 L. ed. 244.

[a] Where the appellate court has jurisdiction in criminal cases only upon questions of law, it will not review an order denying a challenge upon the ground of actual bias, unless the evidence upon the examination is so opposed to the decision of the trial court that the question becomes one of law. *People v. Duncan*, 8 Cal. App. 186, 96 Pac. 414; *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407.

[b] It not appearing that the opinion was not based on the sources mentioned in the statute, nor that the juror could not lay aside his opinion and act without bias, the ruling must be upheld. *People v. Overacker*, 20 Cal. App. 67, 127 Pac. 1059.

[c] "This court, sitting as a court of error, can only say that the facts stated in the exceptions, do not, as a matter of law, disqualify the juror." *State v. Tatro*, 50 Vt. 483.

[d] Juror's Opinion Must Disqualify Him in Law.—"The finding of the trial court ought not to be set aside by a reviewing court, unless it appears that upon the evidence the trial court ought to have found that the juror had formed such an opinion that he could not in law be deemed impartial." *Gentry v. State*, 11 Okla. Crim. 355, 146 Pac. 719. See also *Turner v. State*, 4 Okla. Crim. 164, 111 Pac. 988; *Johnson v. State*, 1 Okla. Crim. 321, 97 Pac. 1059.

31. *Morgan v. Stevenson*, 6 Ind. 169.

32. *People v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277; *People v. McGonegal*, 136 N. Y. 62, 32 N. E. 616, explaining *People v. McQuade*, 110 N. Y. 284, 18 N. E. 156, 1 L. R. A. 273, and *Greenfield v. People*, 74 N. Y. 277, as holding same rule. See also *People v. Casey*, 96 N. Y. 115, 2 N. Y. Crim. 194; *Balbo v. People*, 80 N. Y. 484.

33. *State v. Stewart*, 85 Kan. 404, 116 Pac. 489.

[a] Having been determined as a

there be any evidence to support it,³⁴ and cannot be reversed unless there be manifest or palpable error.³⁵ Concealment of material facts has led to reversal of the judgment even after motion for new trial had been denied.³⁶

G. SPECIAL OR STRUCK JURY.—1. In General.—Historically, special juries date back to the earliest period of the common law.³⁷ Such a jury was one selected in a particular way by the parties.³⁸ At

question of fact, "we could hardly justify ourselves in reversing the decision." *State v. Church*, 6 S. D. 89, 60 N. W. 143.

[b] The writ of error *coram nobis* cannot be invoked for the purpose of revoking the judgment by showing that jurors had formed or expressed opinions unfavorable to defendant. *Fugate v. State*, 85 Miss. 94, 37 So. 554, 107 Am. St. Rep. 268.

34. Cal.—*People v. Riggins*, 159 Cal. 113, 112 Pac. 862; *People v. Scott*, 123 Cal. 434, 56 Pac. 102; *People v. Wells*, 100 Cal. 227, 34 Pac. 718. Ind.—*Smith v. State*, 142 Ind. 288, 41 N. E. 595; *Lewis v. State*, 137 Ind. 344, 36 N. E. 1110. Kan.—*State v. Roberts*, 95 Kan. 280, 147 Pac. 828; *State v. Pearce*, 87 Kan. 457, 124 Pac. 814, Ann. Cas. 1913E, 358; *State v. Stewart*, 85 Kan. 404, 116 Pac. 489. N. Y.—*People v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277.

[a] If conclusion might be made thereon either in the affirmative or the negative, the trial court's determination is final. *People v. Wells*, 100 Cal. 227, 34 Pac. 718; *People v. Overacker*, 20 Cal. App. 67, 127 Pac. 1059; *People v. Maughs*, 8 Cal. App. 107, 96 Pac. 407; *People v. Collins*, 6 Cal. App. 492, 92 Pac. 513.

[b] Applied as to Juror Near Border Line.—A juror having no personal knowledge of the facts nor acquaintance with the persons involved, who has formed an opinion from newspaper reports which it would take evidence to remove, and who is afraid he could not give the testimony the same weight as he could if he had not formed that opinion, but says he has no prejudice or bias and will lay aside his opinion and try the defendant solely on the evidence, is "very near if not upon the border line," but is not as a matter of law incompetent, and having been decided by the trial court to be competent, the supreme court will not reverse that finding of fact as being

contrary to the evidence. *Baker v. State*, 88 Wis. 140, 59 N. W. 570.

[c] If the juror denies having formed or expressed any opinion, and this be controverted, it is for the trial court to determine after weighing all the evidence just as any other controverted fact, and will not be disturbed except in a case plainly erroneous. The trial court may reconcile the conflict. *Holloway v. State*, 53 Ind. 554; *Clem v. State*, 33 Ind. 418; *Bradford v. State*, 15 Ind. 347.

35. U. S.—*Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021; *Press Pub. Co. v. McDonald*, 73 Fed. 440, 19 C. C. A. 516. Ala.—*Jarvis v. State*, 138 Ala. 17, 34 So. 1025; *Long v. State*, 86 Ala. 36, 5 So. 443. Ariz.—*Brady v. Territory*, 7 Ariz. 12, 60 Pac. 698, followed in *Leigh v. Territory*, 10 Ariz. 129, 85 Pac. 948. Wyo.—*Bryant v. State*, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596, following *Carter v. Territory*, 3 Wyo. 193, 18 Pac. 750, 19 Pac. 443.

[a] So long as the power entrusted to the trial judge is fairly exercised his findings will not be disturbed, and the supreme court will intervene only in cases of palpable error, where injustice has been done or there is evident abuse of discretion. *Gammons v. State*, 85 Miss. 103, 37 So. 609.

36. *Sheppie v. State*, 79 Miss. 740, 31 So. 416; *Jeffries v. State*, 74 Miss. 675, 21 So. 526.

[a] But where there was no concealment on the juror's part, and he fairly and fully answered stating that he had formed and expressed an opinion, but defendant did not challenge him for cause, the supreme court refused to disturb the court's finding especially after a denial of a motion for a new trial heard on conflicting affidavits and statements. *Schrader v. State*, 84 Miss. 593, 36 So. 385.

37. *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.

38. 3 Bouv. L. Dict. (3rd Rev.), 3099.

common law it was a jury of specially chosen freeholders,³⁹ in cases "of too great nicety for the discussion of ordinary freeholders,"⁴⁰ and was selected by the striking process.⁴¹

The terms "struck jury" and "special jury" are used interchangeably by the courts;⁴² and statutes now provide for what is usually called a "struck jury," but which is in some respects the same as a common law "special jury."⁴³ At common law special or struck juries are allowed only in the discretion of the court,⁴⁴ but by statute they are sometimes demandable as a matter of right.⁴⁵ Where the allowance of such a jury is discretionary, the discretion is not arbitrary but a sound judicial discretion which is reviewable;⁴⁶ but there will be no

Selection of special jury, see *infra*, VII, G, 3.

39. See *infra*, VII, G, 2.

40. **Mo.**—State *v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43 (*quoting* 3 Bl. Com. 357). **Va.**—Atlantic & D. R. Co. *v. Peake*, 87 Va. 130, 12 S. E. 348. **Eng.**—See *Rex v. Edmonds*, 4 Barn. & Ald. 471, 3 Cox C. C. 517, 6 E. C. L. 564, 106 Eng. Reprint 1009, wherein the court says: "It is the object of a special jury to obtain the return of persons of a somewhat higher station in society than those who are ordinarily summoned to attend as jurymen."

41. *McDermott v. Hoffman*, 70 Pa. 31.

Method of selection, see *infra*, VII, G, 3.

Striking jurors as equivalent to peremptory challenge, see *supra*, VII, E, 5, a, (VII).

42. **Del.**—Wallace *v. Wilmington*, etc. R. Co., 8 Houst. 529, 18 Atl. 818. **Ind.**—Evansville & S. I. Traction Co. *v. Johnson* (Ind. App.), 97 N. E. 176. **Mo.**—Barr *v. Kansas City*, 121 Mo. 22, 25 S. W. 562. **N. J.**—Cook *v. State*, 24 N. J. L. 843. **Pa.**—Atlee *v. Shaw*, 4 Yeates 236.

43. See generally the statutes and the following: **Ala.**—Code, 1907, §4635; Zinzinam *v. State*, 186 Ala. 9, 65 So. 56; Gibbs *v. State*, 7 Ala. App. 30, 60 So. 999. **Ariz.**—Pen. Code, §1032. **Ark.**—Kirby's Dig., 1904, §§4538-4540; St. Louis, etc. Ry. Co. *v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147. **Ca.**—Hilton & Dodge Lumb. Co. *v. Ingram*, 135 Ga. 696, 70 S. E. 234; Maddox *v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500; Atlantic Coast Line R. Co. *v. Bunn*, 2 Ga. App. 305, 58 S. E. 538. **Ind.**—Burns' Ann. St., 1914, §§547-553; Evansville & S. I. Traction Co. *v. Johnson* (Ind. App.), 97 N. E.

176. **Kan.**—Gen. St., 1909, §5877. **Ky.**—Carroll's St., 1915, §2267. **Md.**—Pub. Gen. Laws, 1904, art. 51, §§13, 14, 17; Hamlin *v. State*, 67 Md. 333, 10 Atl. 214, 301; Lee *v. Peter*, 6 Gill & J. 447. **Minn.**—Rev. Laws, 1905, §4169, as amended by Laws 1909, ch. 417, §1; Riley *v. Chicago, M. & St. P. Ry. Co.*, 67 Minn. 165, 69 N. W. 718. **Mo.**—State *v. Lehman*, 175 Mo. 619, 75 S. W. 139; State *v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43. **N. Y.**—Code Civ. Proc., §§1063-1069; Industrial & General Trust Co. *v. Tod*, 104 App. Div. 517, 93 N. Y. Supp. 725. **Tex.**—Vernon Sayles' Civ. St., arts. 5203-5205; Code Crim. Proc., arts. 683-685. **Va.**—Code, 1904, §3158; Atlantic & D. R. Co. *v. Peake*, 87 Va. 130, 12 S. E. 348. **W. Va.**—Code, 1913, §4660; State *v. Pearis*, 35 W. Va. 320, 13 S. E. 1006. **Wis.**—St., 1913, ch. 40a, §§925-70; 925-269; ch. 194, §4750, et seq.; Gallagher *v. State*, 26 Wis. 423.

[a] **Statutes are constitutional** which provide for special or struck juries, not being in derogation of the constitutional provisions that the right of trial by jury shall be preserved inviolate. See Fowler *v. State*, 58 N. J. L. 423, 34 Atl. 682; People *v. Dunn*, 157 N. Y. 528, 52 N. E. 572, 43 L. R. A. 247.

44. State *v. Slover*, 134 Mo. 607, 36 S. W. 50; Atlantic & D. R. Co. *v. Peake*, 87 Va. 130, 12 S. E. 348.

45. See the statute, and Montgomery & E. R. Co. *v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72; State *v. Slover*, 134 Mo. 607, 36 S. W. 50; State *v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.

Necessity for demanding a special or struck jury, see 16 STANDARD PROC. 919.

46. Atlantic & D. R. Co. *v. Peake*, 87 Va. 130, 12 S. E. 348, *construing*

reversal for refusal to allow one where no injustice appears.⁴⁷ Generally the jury is not granted where an ordinary jury would do as well,⁴⁸ but only in cases of special difficulty or consequence.⁴⁹ The jury will be refused where the difficulty or intricacy arises out of a question of law and not of fact.⁵⁰ Under some statutes struck juries are allowed only in civil cases,⁵¹ but under others, the jury may be permitted in criminal as well as in civil cases,⁵² but is then sometimes confined to prosecutions for offenses not amounting to felonies.⁵³

2. **Qualifications.**⁵⁴ — At common law special or struck jurors were always selected from the freeholder's book;⁵⁵ but except where it is re-

as discretionary a statute reading "any court, in a case where a jury is required, may allow a special jury."

47. *Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348, even though the court might think a special jury ought to have been allowed.

48. *Ives v. Ranger*, 65 Hun 622, 20 N. Y. Supp. 32, 47 N. Y. St. 390; *Walsh v. Sun Mut. Ins. Co.*, 2 Robt. (N. Y.) 646, 17 Abb. Pr. 356, collecting many cases.

[a] It is clearly proper to refuse to grant the motion for a special jury where a fair and impartial trial will be more likely to be obtained with an ordinary jury. *Nesmith v. Atlantic Ins. Co.*, 8 Abb. Pr. (N. Y.) 423, where in there had been a mistrial for misbehavior of one jury, a second jury has disagreed, but the court says that each juror's partiality can be discovered and he be excluded therefor.

49. *Atlantic & D. R. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

[a] In New York under a statute permitting a struck jury when it appears to the court that the importance or intricacy of the case demands it, the jury is granted only in extreme cases. *People v. McGuire*, 43 How. Pr. (N. Y.) 67; *Walsh v. Sun Mut. Ins. Co.*, 2 Rob. 646, 17 Abb. Pr. 356.

[b] Mere interest of the public is not sufficient. *People v. McGuire*, 43 How. Pr. (N. Y.) 67, approving and following *Patchin v. Sands*, 10 Wend. (N. Y.) 570; *Poucher v. Livingston*, 2 Wend. (N. Y.) 296, and *Hartshorn v. Gelston*, 3 Caines (N. Y.) 84, where it was suggested that the United States was interested.

[c] Mere difficulty of establishing the case to the satisfaction of an ordinary jury is not ground for a special jury. "With the aid of learned counsel, the ability of skillful witnesses,

and a charge from a learned judge technical terms if employed by witnesses, can be made appreciable to the common understanding." *Walsh v. Sun Mut. Ins. Co.*, 17 Abb. Pr. (N. Y.) 356, 2 Rob. 646.

[d] In a case requiring jurors with a particular knowledge of bookkeeping, it was held error to refuse to order a special jury. *Kellogg v. Clinton*, 23 La. Ann. 674.

50. *Emerson v. McCullough*, 1 Mart. (La.) 342; *Wemys v. Greenwood*, 2 Car. & P. 483, 12 E. C. L. 688.

51. *In re Calling Jurors*, 1 Pa. Co. Ct. 644; *State v. Pearis*, 35 W. Va. 320, 13 S. E. 1006.

52. N. J.—*State v. Barker*, 68 N. J. L. 19, 52 Atl. 284. N. Y.—*People v. Hall*, 169 N. Y. 184, 62 N. E. 170. Ohio. *Hulse v. State*, 35 Ohio St. 421.

53. See *infra*, the cases cited in this note.

[a] In Maryland the statute applies "to all criminal cases where the right of peremptory challenge is not allowed." So it clearly applies in every criminal case where the punishment is not death or imprisonment in the penitentiary. *Hamlin v. State*, 67 Md. 333, 10 Atl. 214, 301.

[b] In New Jersey, see to the same effect, *Cook v. State*, 24 N. J. L. 843. But see also *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284, where defendant objected to a struck jury in a felony case on the ground that the panel had not been selected from among those persons who were in the opinion of the judge best qualified, as to talents, knowledge, integrity and independence, to try the case.

54. **Qualifications of jurors generally**, see *supra*, VII, F.

55. *McDermott v. Hoffman*, 70 Pa. 31; *Anonymous*, 1 Salk. 405, 91 Eng. Reprint 352. See also *King v. Ed-*

quired for regular jurors,⁵⁶ the freehold requirement is not necessary in the case of a special or struck jury.⁵⁷ It is clear that they must have all the qualifications required of regular jurors.⁵⁸

3. Selection, Striking, etc.—The list of special or struck jurors is not usually made up by lot as in the case of ordinary juries, but the jurors are selected with reference to their supposed special fitness, by some officer designated by the statute, or by the court.⁵⁹ Who shall be selected is thus a matter of discretion in the court or officer making the selection;⁶⁰ but under some statutes, the list is merely drawn from the regular panels.⁶¹ The statutes sometimes provide for the selection to be in the presence of the parties or their attorneys,⁶² and failure so to do is ground for reversal.⁶³ If the person designated by the statute be disqualified to act, the court may select some other suitable person;⁶⁴ but it has been held that the proper officer's deputy cannot act merely because the officer is absent.⁶⁵ The number to be selected is fixed by local statutes.⁶⁶ If a sufficient number of talesmen do not appear the practice is to call talesmen to fill the panel,⁶⁷ as in ordinary

monds, 4 Barn. & Ald. 471, 6 E. C. L. 564, 106 Eng. Reprint 1009, where this is recognized as the regular practice.

56. See *supra*, VII, F, 9, b.

57. *McDermott v. Hoffman*, 70 Pa. 31.

58. *Golding v. Petit*, 27 La. Ann. 86.

[a] **The parties are entitled to twenty qualified and disinterested jurors from which to strike.** *Guy v. State*, 96 Md. 692, 54 Atl. 879; *Hamlin v. State*, 67 Md. 333, 10 Atl. 214, 301; *Lee v. Peter*, 6 Gill & J. (Md.) 447.

59. See the statutes.

[a] **The Legislature May Change the Method.**—*State v. Slover*, 134 Mo. 607, 36 S. W. 50; *State v. Barker*, 68 N. J. L. 19, 52 Atl. 284.

Selection of regular jury, see 16 STANDARD PROC. 966, et seq., and *supra*, VII, B, 1.

60. *Riley v. Chicago, M. & St. P. Ry. Co.*, 67 Minn. 165, 69 N. W. 718.

[a] **The term "special jury" imports the idea of selection "of choice, of the exercise of judgment and discretion by the jury commissioner, not the blind turning of a wheel."** *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43. To same effect *State v. Lehman*, 175 Mo. 619, 75 S. W. 139; *State v. Faulkner*, 175 Mo. 546, 75 S. W. 116.

61. *Maddox v. Cunningham*, 68 Ga. 431 45 Am. Rep. 500.

62. See the statutes.

Necessity that prisoner be present during striking, see the title "Trial."

63. *Industrial & General Trust v. Tod*, 104 App. Div. 517, 93 N. Y. Supp. 725.

[a] **This is waived where the attorneys attended but then accepted a list previously made out by the sheriff.** *Riley v. Chicago, M. & St. P. Ry. Co.*, 67 Minn. 165, 69 N. W. 718.

64. *Hulse v. State*, 35 Ohio St. 421.

[a] **That the officer was formerly attorney for one of the parties is not such a disqualification if the relation has terminated and he has no interest.** *Beatty v. Hatcher*, 13 Ohio St. 115.

[b] **Formation or expression of opinion by the officer does not disqualify him.** *Webb v. State*, 29 Ohio St. 351.

65. *Hulse v. State*, 35 Ohio St. 421.

66. See the statutes.

67. **U. S.**—Anonymous, 2 Dall. 382, 1 Fed. Cas. No. 443, 1 L. ed. 425. **Ind.**—*Evansville & S. I. Traction Co. v. Johnson* (Ind. App.), 97 N. E. 176. **Mo.**—*Barr v. Kansas City*, 121 Mo. 22, 25 S. W. 562. **N. J.**—*Denn ex dem. Lee v. Evald*, 1 N. J. L. 283. **N. Y.**—*People v. Tweed*, 50 How. Pr. 286. **Ohio.**—*Hulse v. State*, 35 Ohio St. 421. **Pa.**—*Atlee v. Shaw*, 4 Yeates 236.

[a] **In Indiana under a statute which provided that if more than eight and less than twelve were present, the case should be tried by the regular petit jury, the proper practice when nine**

cases. The panel must be full before the striking commences;⁶⁸ and if, after striking, one of the selected jury is excused, the panel must be filled before the parties are required to strike again.⁶⁹ Either party may challenge for cause before the striking begins;⁷⁰ or one may make his objection by requesting that the disqualified jurors be excused,⁷¹ or by a general motion that the panel be put on its voir dire and questioned as to their competency and impartiality.⁷² The court may excuse jurors on its own motion.⁷³

After the selection of the jury list, the parties, or their counsel, strike off the names until the number is reduced to the number fixed by the statute for the jury,⁷⁴ the striking being usually by the alter-

appeared, was to summon additional jurors as in the case of petit juries, though the statute providing for the calling of talesmen to fill the regular jury does not mention special or struck jury. *Evansville & S. I. Traction Co. v. Johnson* (Ind. App.), 97 N. E. 176, *construing Burns' St.*, 1908, \$550, and *Acts*, 1909, p. 103.

Calling talesmen to fill list, see 16 STANDARD PROC. 978, et seq.

68. *Ala.*—*Morris v. McClellan*, 169 *Ala.* 90, 53 *So.* 155; *Smith v. Kaufman*, 100 *Ala.* 408, 14 *So.* 111; *Birmingham Union St. Ry. Co. v. Ralph*, 92 *Ala.* 273, 9 *So.* 222. *Ga.*—*Hilton & Dodge Lumb. Co. v. Ingram*, 135 *Ga.* 696, 70 *S. E.* 234; *Atlantic Coast Line R. Co. v. Bunn*, 2 *Ga. App.* 305, 58 *S. E.* 538. *Md.*—*Hamlin v. State*, 67 *Md.* 333, 10 *Atl.* 214, 301; *Lee v. Peter*, 6 *Gill & J.* 447.

Generally as to the right to have a full panel presented before challenge, see *supra*, VII, E, 2, c.

[a] Where List From Which To Strike Too Small.—Where the list offered to defendant from which to strike contains only twenty-three instead of twenty-four names as the statute requires, it is error to compel defendant to strike. *Gresham v. State*, 1 *Ala. App.* 220, 55 *So.* 447.

[b] Error Not Cured by Prosecution Waiving a Strike.—The list lacking one of the number required by statute the error is not cured by the prosecutor's offering to "strike" or waive one of his strikes, as to a name not on the venire and which did not in fact exist. *Gresham v. State*, 1 *Ala. App.* 220, 55 *So.* 447.

[c] A party does not waive his right to have a full panel before striking, where he protests at every stage of the proceeding and properly pre-

serves his exception, although he exercises peremptories as offered by the court. *Birmingham Union St. Ry. Co. v. Ralph*, 92 *Ala.* 273, 9 *So.* 222.

[d] Alabama Rule in Criminal Cases. In capital cases if the number of competent jurors falls below twenty, the court must cause the list to be filled up to at least thirty. In other cases if it falls below twenty-four, twice the number necessary to supply the deficiency are summoned. *Special Sess. Acts*, 1909, p. 305, §32.

69. *Birmingham Union St. Ry. Co. v. Ralph*, 92 *Ala.* 273, 9 *So.* 222.

70. See *supra*, VII, E, 4, a, (I).

After improper allowance of challenge for cause to juror on struck list, one cannot complain because he was excused. See *supra*, VII, E, 4, m, (IV).

71. *Atlantic Coast Line R. Co. v. Bunn*, 2 *Ga. App.* 305, 58 *S. E.* 538.

72. *Howell v. Howell*, 59 *Ga.* 145, it is not necessary to single out particular jurors as being objectionable.

Right to examine jurors where struck jury demanded, see *supra*, VII, E, 4, i, (I).

Re-examination not permitted where party failed to bring matter out on original examination, see *supra*, VII, E, 4, l, (I).

73. See *supra*, VII, D, 1.

[a] The question as to whether the court has properly excused one of the jurors should be raised by objecting to the list submitted from which to strike. *Zininam v. State*, 186 *Ala.* 9, 65 *So.* 56. See also *Gibbs v. State*, 7 *Ala. App.* 30, 60 *So.* 999.

That question may be raised by challenge to the array, see *supra*, VII, E, 2, a.

74. *Minn.*—*Riley v. Chicago, M. & St. P. Ry. Co.*, 67 *Minn.* 165, 69 *N. W.* 718. *N. J.*—*State v. Barker*, 68 *N. J.*

nating rule;⁷⁵ and if there be more than one party plaintiff or defendant, they must unite in striking.⁷⁶ The statutory procedure for striking a jury should be strictly followed;⁷⁷ the rule as to errors and irregularities is more strict than in the case of ordinary juries.⁷⁸ The jurors must be called as they stand upon the panel.⁷⁹ One party cannot demand an inspection of the other party's list before striking where each party is furnished with a list from which to strike.⁸⁰ If the striking be from a wrong list, it cannot be complained of for the first time after verdict.⁸¹ Other irregularities are waived by a failure to strike,⁸² or by striking without objection.⁸³ If jurors are stricken

L. 19, 52 Atl. 284. N. Y.—*People v. Tweed*, 50 How. Pr. 273.

Effect of failing to strike down to the required number, see *infra*, VII, H.

Failure to strike as waiving incompetency, see *supra*, VII, E, 6, c.

Curing error by striking off incompetent juror, see *supra*, VII, E, 6, a.

75. See the statutes, and *People v. Tweed*, 50 How. Pr. (N. Y.) 273.

[a] In Alabama after jurors are examined the defendant first and then prosecution strike alternately in criminal cases. Special Sess. Acts, 1909, p. 305, §32.

As to alternating rule in exercise of peremptory challenges, see *supra*, VII, E, 5, b, (V).

76. *Richmond & D. R. Co. v. Greenwood*, 99 Ala. 501, 14 So. 495; *Diamond State Tel. Co. v. Blake*, 105 Md. 570, 66 Atl. 631; *Hamlin v. State*, 67 Md. 333, 10 Atl. 214, 301.

[a] If they cannot agree the court may compel them to alternate among themselves. *Montgomery & E. R. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep. 72.

[b] In Alabama after the court examines and finds jurors competent, if there is but one defendant he strikes two and prosecution one until only twelve remain. But if there be more than one defendant each strikes one in turn. Special Sess. Acts, 1909, p. 305, §32.

As to compelling parties to join in peremptory challenge, see *supra*, VII, E, 5, j, k.

77. U. S.—*Gulf, C. & S. F. Ry. Co. v. Shane*, 157 U. S. 348, 15 Sup. Ct. 641, 39 L. ed. 727. N. Y.—*Industrial, etc. Trust v. Tod*, 104 App. Div. 517, 93 N. Y. Supp. 725, following *Hildreth v. Troy*, 101 N. Y. 234, 4 N. E. 559, 54 Am. Rep. 686, and *People v. Tweed*,

50 How. Pr. 262. Wis.—*Gallagher v. State*, 26 Wis. 423.

[a] The court cannot by rule or practice vary the statutory procedure. *State v. Withrow*, 133 Mo. 500, 34 S. W. 245, 36 S. W. 43.

[b] The statutory provisions are mandatory and where expressed in clear terms leave nothing for construction. *Riley v. Chicago, M. & St. P. Ry. Co.*, 67 Minn. 165, 69 N. W. 718.

78. *People v. Tweed*, 50 How. Pr. (N. Y.) 262.

79. *Riley v. Chicago, M. & St. P. Ry. Co.*, 67 Minn. 165, 69 N. W. 718.

80. *Vernon v. State* (Tex. Crim.), 33 S. W. 364.

[a] Assuming that under the statute defendant is entitled to know what jurors have been struck from the list by plaintiff, before he is compelled to strike, no reversible error arises through the court's failure to follow that procedure, where in fact the parties struck off different names. *Railway Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147.

81. *Milledgeville Mfg. Co. v. Etheridge*, 63 Ga. 568.

[a] One striking a jury from regular panels and trying the case without objection, cannot object to the jury after verdict. *Maddox v. Cunningham*, 68 Ga. 431, 45 Am. Rep. 500.

82. *Mackey v. State*, 186 Ala. 23, 65 So. 330, holding that a person named in the list by a wrong Christian name having qualified, defendant waives the irregularity by not striking him off, as it will be presumed he knew of the error before the jury was completed.

83. *Smith v. State*, 1 Ala. App. 140, 55 So. 449, holding that where more than the number ordered by the court are placed on the venire, assuming that it is an error, it is cured by defendant's striking without objection.

from the list in excess of the proper number, the court may order their names restored.⁸⁴

II. **DISPOSING OF EXCESS JURORS.**—Where because of the failure of either party to use all his strikes or peremptories, more than the full number necessary for a jury remain, some statutes require that the twelve be chosen by lot;⁸⁵ others that the first twelve drawn shall serve,⁸⁶ others that the court or some officer shall strike off the number in excess of the number required for the jury,⁸⁷ or that the opposite party may so strike.⁸⁸

VIII. OATH OF JURY.¹—A. **NECESSITY FOR SWEARING JURY.** The swearing of the jury is absolutely essential in a criminal case;²

84. *Pool v. Gramling*, 88 Ga. 653, 16 S. E. 52.

[a] Where the fact that the juror was on the list under a wrong name, was discovered as soon as the jury was completed, and the court thereupon offered to permit the juror to be stricken from the list, and the name of the last juror stricken from the list substituted, defendant waives the irregularity by refusing to consent to such substitution. *Mackey v. State*, 186 Ala. 23, 65 So. 330.

85. See the statutes, and Va. Code, 1904, §4023.

86. See the statutes, and *Ariz.*—Pen. Code, §1032. *Ark.*—Kirby's Dig., 1904, §4540. *Mo.*—Rev. St., 1909, §5228. *Tex.*—Vernon Sayles' St., art. 5209; Code Crim. Proc., art. 692, or first six in county court.

[a] If either party declines to challenge three jurors, thus leaving more than twelve on the panel the practice is to take the first twelve on the list. *Rees v. Chicago, B. & Q. R. Co.*, 156 Mo. App. 52, 135 S. W. 981.

[b] **Substantial Error To Take Others.**—It is substantial error calling for a reversal for the court over defendant's objection to take other than the first twelve. In determining upon his peremptory challenges the defendant is presumed to have taken into consideration that the first twelve would be selected. *State v. Holme*, 54 Mo. 153.

[c] **In Georgia by rule of court** if either party fails to strike he forfeits a strike and if more than twelve remain the first twelve not stricken constitute the jury. *Cohen v. Cohen*, 140 Ga. 398, 78 S. E. 841.

[b] **Formation or expression of opinion.** Full Number Not Presented.—Though the better practice is to present a full panel of twenty-four from which to

strike no prejudice can result where only eighteen were presented, but the appellant exercised his six strikes, and the remaining twelve were taken as the jury. *Cohen v. Cohen*, 140 Ga. 398, 78 S. E. 841.

87. See the statutes, and *Wis. St.*, 1915, §2851.

[a] **May Permit Prosecution To Strike.**—After defendant struck off his last two names, the remaining jurors were sworn to try the case. It was then discovered that thirteen were on the jury. The court then properly permitted the prosecutor to strike off one more name notwithstanding defendant's objection. *Lewis v. State*, 10 Ala. App. 31, 64 So. 537.

[b] **Judge Cannot Appoint Self.** Under a statute providing that if a party fails to strike, the court shall appoint a disinterested person to do so the judge himself cannot act. *Gallagher v. State*, 26 Wis. 423.

88. See the statutes, and *W. Va. Code*, §5579.

[a] **Where Defendant Strikes None Prosecution Strikes All.**—If defendant fails to exercise his right, the prosecuting attorney might strike eight and defendant could not object. *State v. Cooper*, 74 W. Va. 472, 82 S. E. 358.

1. As to oath of grand jury, see 10 STANDARD PROC. 627, et seq.; of jury upon voir dire, see *supra*, VII, E, 4, f.

As to oaths generally, see the title "Oath and Affirmation."

2. *Ala.*—*Gerald v. State*, 128 Ala. 6, 29 So. 614. *Ga.*—*Slaughter v. State*, 100 Ga. 323, 28 S. E. 159, conviction by an unsworn jury is a mere nullity. *Ind.*—*Hunzel v. State*, 86 Ind. 431. *Pa.*—*Alexander v. Com.*, 105 Pa. 1. *Tex.*—*Arthur v. State*, 3 Tex. 403; *Dresch v. State*, 14 Tex. App. 175. *W. Va.*—*State v. Moore*, 57 W. Va. 146, 49 S. E. 1015.

the oath taken by the jury gives the measure of its duty.³ But in a civil case the swearing of the jury is not so essential to the validity of the verdict;⁴ and failure to object to the omission of swearing the jury or a juror will constitute a waiver thereof.⁵

B. TIME OF SWEARING.—The time and order of swearing in the jury varies in the different jurisdictions. Sometimes it is held to be a discretionary matter with the court;⁶ while some courts deem it the

[a] "Until one summoned as a juror to try a cause has been sworn as such, he does not become a juror to try it." *Gerald v. State*, 128 Ala. 6, 29 So. 614.

[b] A trial does not begin until the full jury is impaneled and sworn. *Alexander v. Com.*, 105 Pa. 1; *McFadden v. Com.*, 23 Pa. 12, 62 Am. Dec. 308; *Com. v. Fritch*, 9 Pa. Co. Ct. 164. As to impaneling jury, see *supra*, VII.

[c] **Cannot Be Waived.**—A total failure to swear the jury in a criminal case cannot be waived either by the accused or his counsel, either expressly or by silence. *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159.

As to necessity of record showing that jury was sworn, see *infra*, VIII, E.

As to necessity of record showing that the accused was present in court at the time the oath is administered to the jury, see *infra*, VIII, C, 1, note 13, [b].

3. *Stratton v. People*, 5 Colo. 276.

4. **Mo.**—*Ross v. Grand Pants Co.*, 241 Mo. 296, 145 S. W. 410. **N. Y.** *Jenkins v. Hudson*, 16 Abb. N. C. 137, 8 Civ. Proc. 70, 2 How. Pr. (N. S.) 244; *Hardenburgh v. Cray*, 15 How. Pr. 307, failure to swear one juror, unaccompanied by injury or prejudice, not ground for setting aside verdict. **Tex.** *Texas & P. R. Co. v. Butler*, 52 Tex. Civ. App. 327, 135 S. W. 1064; *Texas & Pac. Ry. Co. v. Butler*, 52 Tex. Civ. App. 323, 114 S. W. 671.

5. *Jenkins v. Hudson*, 16 Abb. N. C. (N. Y.) 137, 2 How. Pr. (N. S.) 244, 8 Civ. Proc. 70; *Becker v. Becker*, 92 Misc. 382, 156 N. Y. Supp. 995; *Collison v. Wier*, 91 Misc. 501, 154 N. Y. Supp. 951; *Cahill v. Delaney*, 68 N. Y. Supp. 842. See *Powell v. Haley*, 28 Tex. 52 (affidavit insufficient as it did not show that the counsel was ignorant of the fact that the juror was not sworn); *Brewer v. State*, 12 Tex. 248 (holding it not error for court to re-

fuse to hear affidavits that two of the jurors were not sworn); *Scott v. Moore*, 41 Vt. 205, 98 Am. Dec. 581, failure to show that party and his counsel were ignorant of the fact that juror was not sworn justifies inference that all were not ignorant and that the irregularity should be treated as waived.

6. **Fla.**—*Mathis v. State*, 45 Fla. 46, 34 So. 287. **Idaho.**—*People v. Kuok Wah Choi*, 2 Idaho 90, 6 Pac. 112. **N. Y.** *People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. **Pa.**—*Com. v. Fritch*, 9 Pa. Co. Ct. 164.

[a] In a criminal action the court may require the parties to exercise all their challenges peremptorily, or for cause, and the juror, if accepted, to be sworn to try the cause as each appears and before another is called, or may, in its discretion, allow the clerk to draw from the box twelve names before any challenges are interposed, and after these are examined for cause and passed upon draw others to take the place of those excused and allow the parties to examine and pass upon all those thus called before exercising their peremptory challenges, provided that in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted for cause at the time of taking recess or adjournment, and those not excused be sworn to try the cause and thus placed under the control of the court. *People v. Kuok Wah Choi*, 2 Idaho 90, 6 Pac. 112.

[b] **Swearing After Retiring of Jury.**—Where seven tales jurors were added to the panel, and, although sworn on their voir dire, were not sworn as jurors until the case was closed and the jury had retired for consideration, but before entering into a consideration of the case were recalled and duly sworn, no prejudice resulted in the omission to swear in the jurors at an earlier stage of the trial. *Boroum v. State*, 105 Miss. 887, 63 So. 297, 457.

better practice to swear each juror as he is selected;⁷ other courts swear the jury when it is complete, so as to give the longest possible time for the exercise of peremptory challenges.⁸ Some courts follow the practice of swearing in at one time all jurors selected and accepted from each panel upon the exhaustion of such panel.⁹

For Each Case or for Term.—The oath may, in some jurisdictions, be administered for the term or week instead of for each individual case,¹⁰ but in criminal cases it is generally required that the jury be sworn for each case.¹¹

7. **Ala.**—*Allen v. State*, 60 Ala. 19. **Conn.**—*State v. Potter*, 18 Conn. 166, English practice. **Minn.**—*State v. Brown*, 12 Minn. 538. **N. Y.**—*People v. Carpenter*, 102 N. Y. 238, 6 N. E. 584. **N. D.**—*Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003. **Pa.**—*Alexander v. Com.*, 105 Pa. 1 (either collectively or individually); *Com. v. Fritch*, 9 Pa. Co. Ct. 164. **Tex.**—*Rippey v. State*, 29 Tex. App. 37, 14 S. W. 448 (rule in capital cases; but in felony cases less than capital, the jury is sworn in a body); *Ellison v. State*, 12 Tex. App. 557; *Caldwell v. State*, 12 Tex. App. 302.

[a] But failure to do so is not such an irregularity as will reverse a judgment, even in a capital case, where no timely objection was made. *Caldwell v. State*, 12 Tex. App. 302.

8. **Cal.**—*People v. Scoggins*, 37 Cal. 676, rule in civil cases. **Conn.**—*State v. Potter*, 18 Conn. 166. **Fla.**—*Mathis v. State*, 45 Fla. 46, 34 So. 287. See also *O'Connor v. State*, 9 Fla. 215, usual practice in trial for felony is to swear jurors one at a time, but a variance from such a practice is no ground of reversal. **Ga.**—*Brown v. State*, 141 Ga. 5, 80 S. E. 320, following *Roberts v. State*, 65 Ga. 430. **La.**—*State v. Wiggins*, 50 La. Ann. 330, 23 So. 334. **Nev.**—*State v. Anderson*, 4 Nev. 265, although such is the best practice, pursuing a different course is not a violation of the law. **Pa.**—*Alexander v. Com.*, 105 Pa. 1; *Com. v. Fritch*, 9 Pa. Co. Ct. 164. **Tenn.**—*Bass v. State*, 6 Baxt. 579, code directs that jury impaneled for the trial of a felony shall not be sworn until the whole number are selected. **Tex.**—*Rippey v. State*, 29 Tex. App. 37, 14 S. W. 448 (rule in felony cases less than capital); *Ellison v. State*, 12 Tex. App. 557.

[a] **Effect of Swearing Singly.** Where, as a matter of precaution, the

court, in a felony case less than capital, swore in those jurors selected before an adjournment, it was not relieved of the necessity of again swearing those jurors in a body with the full jury. *Rippey v. State*, 29 Tex. App. 37, 14 S. W. 448.

[b] **After Exhausting Challenges.** The jury should not be sworn in the cause until the parties have exhausted their challenges or accepted the jury. *State v. Hunter*, 118 Iowa 686, 92 N. W. 872; *Lamb v. State*, 36 Wis. 424.

9. *Hurley v. State*, 29 Ark. 17.

[a] **In California** (1) the practice, in criminal cases, is to swear in those jurors accepted from each twelve names drawn from the jury box. *People v. Iams*, 57 Cal. 115; *People v. Scoggins*, 37 Cal. 676. See *People v. Reynolds*, 16 Cal. 128. (2) But in civil cases, the jury is sworn collectively after it is complete. *People v. Scoggins*, 37 Cal. 676.

10. See generally the statutes, and the following: **Ala.**—Code, 1907, §7273. **Ark.**—*Kirby's Dig.*, 1904, §§4530, 4531. **Ga.**—Pen. Code, 1910, §860; *Taylor v. State*, 121 Ga. 348, 49 S. E. 303; *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159. **Miss.**—*Waddell v. Magee*, 53 Miss. 687; *Hewett v. Cobb & Co.*, 40 Miss. 61. **N. Y.**—*Jenkins v. Hudson*, 16 Abb. N. C. 137; *People v. Albany*, 6 Wend. 548. And see *Hardenburgh v. Crary*, 15 How. Pr. 307. **Tex.**—*Clark v. Davis*, 7 Tex. 556.

[a] **Tales Jurors Are Sworn for the Day.**—*Waddell v. Magee*, 53 Miss. 687; *Furniss v. Meredith*, 43 Miss. 302; *Hewett v. Cobb & Co.*, 40 Miss. 61. To same effect, see *Wallace v. Columbia*, 48 Me. 436.

11. **Ark.**—*Mabry v. State*, 50 Ark. 492, 8 S. W. 823; *Chiles v. State*, 45 Ark. 143; *Barbour v. State*, 37 Ark. 61. **Ga.**—Pen. Code, 1910, §1005; *Taylor v. State*, 121 Ga. 348, 49 S. E. 303; *Slaughter v. State*, 100 Ga. 323, 28 S.

After Joinder of Issue. — In civil cases, the issues between the parties should be joined before the jury is sworn.¹²

C. MODE OF SWEARING. — **1. In General.** — The swearing is always done orally in the presence of the court, the prisoner and his counsel.¹³ Where the statute does not expressly provide the manner in which the oath should be administered, the common law principle that it be administered to all persons according to their opinions and as most affects their consciences is applicable.¹⁴

2. Form of Oath. — **a. In General.** — Statutes as a general rule provide the form of the oath that is administered to the jury about to try the issues joined in a case.¹⁵ Under some statutes but one form of oath is given whether the case be a criminal or civil one.¹⁶

A substantial compliance with the legal or statutory form of oath required to be administered to the jury is generally sufficient;¹⁷ but in

E. 159, administration of oath in each particular case cannot be waived. **Ill.** *Kitter v. People*, 25 Ill. 27; *Barney v. People*, 22 Ill. 160. **Tex.** — *Stephens v. State*, 33 Tex. Crim. 101, 25 S. W. 286; *Clark v. Davis*, 7 Tex. 556; *Nels v. State*, 2 Tex. 280.

[a] **Where the same jury tries a number of cases against the same defendant, it must be sworn in each case.** *Kitter v. People*, 25 Ill. 27.

[b] **Waiver of Objection.** — In misdemeanor cases, however, the defendant waives his objection that the jurors were only sworn generally for the term and not specially for his case, if he fails to make such objection before going to trial. *Ruble v. State*, 51 Ark. 126, 10 S. W. 23.

[c] **Presumption.** — Where a jury was impeached for the trial of joint offenders, and the jurors put upon their oath at the same time that an order for separate trials was formally entered in the record, it will be deemed that the jury were sworn in the case proceeded with. *People v. Cummins*, 47 Mich. 334, 11 N. W. 184.

12. *Kerstetter v. Raymond*, 10 Ind. 199; *Ostrander v. Clark*, 8 Ind. 211; *Swan v. Rary*, 2 Blackf. (Ind.) 291.

[a] **Waiver of objection that jury were sworn for the trial of a case before it was at issue.** *Peninsular Stove Co. v. Osmun*, 73 Mich. 570, 41 N. W. 693.

13. U. S. — *Baldwin v. Kansas*, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. ed. 640, affirming 36 Kan. 1, 12 Pac. 318. **Fla.** *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232. **Ill.** — *Barney v. People*, 22 Ill. 160. **Kan.** — *State v.*

Baldwin, 36 Kan. 1, 12 Pac. 318.

[a] **Irregularity in swearing some of the jurors in the absence of one of the judges may be waived by failing to object before proceeding to trial.** *People v. De Camp*, 57 Hun 591, 10 N. Y. Supp. 811.

[b] **The record must show that the prisoner was present in court at the time the jury is sworn.** *State v. Prater*, Man. Unrep. Cas. (La.) 307; *Younger v. State*, 2 W. Va. 579, 98 Am. Dec. 791.

14. *State v. Angelo*, 18 Nev. 425, 4 Pac. 1080.

15. See generally the statutes and the following: **Ala.** — Code, 1907, §7273. **Ariz.** — Civ. Code, 1913, §3556. **Ark.** *Kirby's Dig.*, 1904, §4530. **Ga.** — Pen. Code, 1910, §§1005, 860. **Ky.** — *Carroll's St.*, 1909, §2259.

16. See generally the statutes and the following: **Ala.** — Code, 1907, §§4633, 7273. **Alaska.** — *Carter's Ann. Code*, 1900, Pt. II, §136. **Ariz.** — Civ. Code, 1913, §3556.

17. **Ala.** — *Washington v. State*, 60 Ala. 10, 31 Am. Rep. 28; *De Bardelaben v. State*, 50 Ala. 179; *Hendrix v. State*, 50 Ala. 148; *Walker v. State*, 49 Ala. 369; *McGuire v. State*, 37 Ala. 161. **Fla.** — *State v. Pearce*, 14 Fla. 153. **Ia.** *Wrocklege v. State*, 1 Iowa 167; *Harriman v. State*, 2 G. Gr. 270; *Humphreys v. Humphreys & Co.*, 1 Morris 359. **Kan.** — *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318. **Ky.** — *Young v. Com.*, 19 Ky. L. Rep. 929, 42 S. W. 1141. **N. J.** *Earle v. Vanburen*, 7 N. J. L. 344. **N. C.** — See *State v. Owen*, 72 N. C. 605. **Ohio.** — *Kerr v. State*, 36 Ohio St. 614. **Tenn.** — *Baxter v. State*, 15 Lea

some states only the oath as prescribed by statute can be given.¹⁸

b. *In Civil Cases.*—The customary form of oath in civil cases is, that the juror will well and truly try each and all of the issues submitted and a true verdict render according to the evidence.¹⁹ The word "issue" as used in the administration of the oath is used collectively;²⁰ and hence, where there are several issues an oath is not

657; *Fitzhugh v. State*, 13 Lea 258. Tex.—*Clements v. Crawford*, 42 Tex. 601 (rule in civil but not in criminal cases); *McConnell v. Ryan*, 1 White & W. Civ. Cas., §1020. W. Va.—*Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547; *Baltimore & O. R. Co. v. Wilson*, 2 W. Va. 528.

[a] Oath (1) must be given either literally or substantially as statute directs. *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159. (2) The substance of the oath as prescribed by statute cannot be dispensed with. *State v. Angelo*, 18 Nev. 425, 4 Pac. 1080.

[b] **The omission (1) of immaterial phrases** such as "so help you God," etc., which add nothing to the explanation of the jury's duties will not vitiating the proceedings. *Minich v. People*, 8 Colo. 440, 9 Pac. 4. See **N. C.** *State v. Paylor*, 89 N. C. 539. **Ohio.** *Kerr v. State*, 36 Ohio St. 614. **W. Va.** *State v. Sutfin*, 22 W. Va. 771. (2) Neither will the omission of the words "and true deliverance make" from the oath render it insufficient. *Lancaster v. State*, 91 Tenn. 267, 18 S. W. 777; *Fitzhugh v. State*, 13 Lea (Tenn.) 258. See *State v. Hargrove*, 13 Lea (Tenn.) 178.

[c] For cases holding oath not a substantial compliance with required form, see *Walker v. State*, 72 Ala. 218; *Perkins v. State*, 60 Ala. 7; *Commander v. State*, 60 Ala. 1; *Lewis v. State*, 51 Ala. 1.

18. *State v. Rollins*, 22 N. H. 528. See *Morgan v. State*, 42 Tex. 224; *Bray v. State*, 41 Tex. 560; *Sutton v. State*, 41 Tex. 513; *Bawcom v. State*, 41 Tex. 189; *Martin v. State*, 40 Tex. 19; *Arthur v. State*, 3 Tex. 403.

[a] "Where . . . the legislature has prescribed the form of oath to be administered, it is not within the province of the court to allow another form to be substituted in its stead, either upon the ground that it is a mere formal proceeding, or that the substituted oath is, in its terms, equivalent to the prescribed form, and is of equally bind-

ing and obligatory force upon the minds and consciences of jurors." *State v. Rollins*, 22 N. H. 528.

19. See generally the statutes, and the following: **Ala.**—Code, 1907, §7273. **Alaska.**—*Carter's Ann. Code*, 1900, Pt. II, §136. **Ariz.**—*Civ. Code*, 1913, §3556. **Ark.**—*Kirby's Dig.*, 1904, §4530; *Vaden v. Ellis*, 18 Ark. 355. **Fla.**—*Burk v. Clark*, 8 Fla. 9, oath held sufficient. **Ga.**—*Pen. Code*, 1910, §860. **Ky.**—*Carroll's St.*, 1909, §2259. **Mich.**—See *The Milwaukie v. Hale*, 1 Dougl. 306. **W. Va.**—*Peters v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S. E. 190 (oath held proper); *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

[a] **Where No Issue Joined.**—It is harmless error that the jury were sworn to try the issue between plaintiffs and the defendants when no issue had been joined with two of the defendants. *Buhl v. Trowbridge*, 42 Mich. 44, 3 N. W. 245.

[b] **An oath is not rendered insufficient** by the omission of the words to "well and truly try the issues" where the jury is sworn to give a true verdict according to the law and the evidence. *Henry v. Brown*, 18 Hawaii 263.

[c] **Swearing the jury to try the "matters in controversy"** held appropriate in *Sharp v. Harrison*, 10 Heisk. (Tenn.) 573.

[d] **In ejectment proceedings**, an oath that the jury shall speak the truth of and upon the premises is more comprehensive and appropriate than the oath, truly to try the issue joined. *Mercer Academy v. Rusk*, 8 W. Va. 373.

As to form of oath in condemnation proceedings, see 8 STANDARD PROC. 319.

20. **Ky.**—*Fowler v. Garret*, 3 J. J. Marsh. 681; *Bate v. Lewis' Exrs.*, 1 J. J. Marsh. 313; *Hatcher v. Fowler*, 1 Bibb 337. **Tenn.**—*Pointer v. Rust*, 7 Humph. 532. **W. Va.**—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511.

objectionable because it swears the jury to try the "issue" joined.²¹

In actions upon penal bonds, the jury should be sworn to inquire into the breaches and assess the damages.²²

In default cases the proper practice is to swear the jury "to assess the plaintiff's damages,"²³ and not to "try the issues."²⁴ In some jurisdictions, where the jury are sworn only to "try the issues" in a default case, the practice is to reverse the judgment;²⁵ but in other jurisdictions, the fact that the jury were so sworn does not vitiate the verdict.²⁶

Default of Several of Defendants.—Where there are several defendants, some of whom are in default and some of whom stand trial, the proper practice is to swear the jury to try the issues joined, and also to assess the damages as to the defaulting defendants.²⁷ Where issues have been joined, it is erroneous for the court to direct the jury to be sworn to inquire of damages only.²⁸

21. *Ind.*—*Lindley v. Kindall*, 4 Blackf. 189. *Ky.*—*Fowler v. Garret*, 3 J. J. Marsh. 681; *Bate v. Lewis' Exrs.*, 1 J. J. Marsh. 313; *Hatcher v. Fowler*, 1 Bibb 337; *Worford v. Isbel*, 1 Bibb 247, 4 Am. Dec. 633. *Miss.* *Montgomery v. Tillotson*, 1 How. 215. *Tenn.*—*Pointer v. Rust*, 7 Humph. 532. *Va.*—*White v. Clay's Exrs.*, 7 Leigh (34 Va.) 68; *Mackey v. Fuqua*, 3 Call (7 Va.) 19. *W. Va.*—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511; *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757.

22. *State v. Gibson*, 21 Ark. 140; *McLain v. Taylor*, 9 Ark. 358; *Adams v. State*, 6 Ark. 497.

[a] It is not sufficient to swear them to assess the damages; they should be sworn to inquire into the breaches also. *Adams v. State*, 6 Ark. 497.

[b] Swearing the jury to inquire into, or try, the truth of the breaches is equivalent to swearing them to try the issues joined and is not objectionable. *McCoy v. State*, 22 Ark. 308. See also *McLain v. Taylor*, 9 Ark. 358.

23. *Colo.*—*Colorado Springs Co. v. Hewitt*, 3 Colo. 275; *McNasser v. Sherry*, 1 Colo. 12. *Ill.*—*Elia v. Bavuso*, 187 Ill. App. 487. *Ky.*—*Roberts v. Swearngen*, Hard. 121.

[a] **Jury Sworn To Assess Damages at Greater Amount Than Prayed for.** Where the record shows that the jury were sworn to assess the plaintiff's damages at \$92.75 which was more than the amount claimed by the plaintiff, the judgment will be reversed, although

such recital is doubtless a clerical error. *Roberts v. Smith*, 1 Morris (Iowa) 417. See *First Nat. Bank v. Miller*, 235 Ill. 135, 85 N. E. 312.

24. *Colo.*—*Colorado Springs Co. v. Hewitt*, 3 Colo. 275; *McNasser v. Sherry*, 1 Colo. 12. *Ill.*—*Elia v. Bavuso*, 187 Ill. App. 487. *Ky.*—*Hopkins v. Preston*, 2 A. K. Marsh. 64; *Everhart's Admr. v. Hickman*, 4 Bibb 341; *Roberts v. Swearngen*, Hard. 121.

25. *U. S.*—*Miles v. Rose*, Hempst. 37, 17 Fed. Cas. No. 9,544a. *Colo.*—*McNasser v. Sherry*, 1 Colo. 12. *Ill.*—*Elia v. Bavuso*, 187 Ill. App. 487. *Ky.* *Everhart's Admr. v. Hickman*, 4 Bibb 341; *Goodloe v. Chapman*, Sneed 226; *Handley v. Travis*, Sneed 139. But see *Roberts v. Swearngen*, Hard. 121, such an oath informal but not erroneous. *Pa.*—*Strause v. Braunreuter*, 14 Pa. Super. 125. *W. Va.*—*Good v. Chester*, 65 W. Va. 13, 63 S. E. 615; *Ruffner v. Hill*, 21 W. Va. 152. See *Tully v. Despard*, 31 W. Va. 370, 6 S. E. 927 (action commenced in justice's court); *High v. Pearce*, 9 W. Va. 291; *Supervisors v. Ellison*, 8 W. Va. 308; *Baltimore & O. R. Co. v. Christie*, 5 W. Va. 325.

26. *Garrett v. Felt*, 32 Miss. 137, the verdict and judgment being in substance the same which the court would have rendered if judgment by default had been entered, the judgment will not be reversed.

27. *McDonald v. Fairbanks, Morse & Co.*, 161 Ill. 124, 43 N. E. 783.

28. *Bruce v. Mathers*, 2 Bibb (Ky.) 294; *Roberts v. Swearngen*, Hard. (Ky.) 121; *Williams v. Cheek*, Sneed

Where the case is one to be tried by the court, the jury should be sworn only to try such particular questions of fact as the court for its information might submit to it.²⁹

c. *In Criminal Cases.*—Some of the more common provisions for the form of the oath in criminal cases are as follows: that the juror will well and truly try all the issues joined,³⁰ or that he will well and truly try the case of the state of ——— against A. B.,³¹ and a true verdict render according to the evidence.³² Where the statute prescribes a different oath for capital cases and cases not capital, it is error to administer in one case the oath prescribed for the other case.³³ It is also reversible error to administer the oath prescribed for civil cases to a jury in a criminal trial.³⁴

3. **Objection to.**—An objection to the form of the oath should be

(Ky.) 64. But see *Louisville, etc. R. Co. v. Hampton's Exrx.*, 7 Ky. Opin. 296, held immaterial.

[a] Where it appears from the record that the jury were sworn only "to ascertain and assess the plaintiff's damages," they could not give a verdict upon the issues in the cause. *Townsend v. Jeffries' Exrs.*, 17 Ala. 276.

[b] **Effect of Entry in Record.** Where the parties intended and understood that the jury were sworn to try the issues, and the jury so understood and rendered a verdict upon the issues, an entry in the record that they were sworn to inquire of damages will be deemed a clerical misprision and will not affect the verdict. *Caldwell v. Irvine's Admrs.*, 4 J. J. Marsh. (Ky.) 107.

29. *Hornbrook v. Powell*, 146 Ind. 39, 44 N. E. 802 (jury should not be sworn generally); *Pence v. Garrison*, 93 Ind. 345; *Lake Erie & W. R. Co. v. Griffin*, 92 Ind. 487.

30. See the statutes generally and the following: Ala.—Code, 1907, §7273; *Walker v. State*, 49 Ala. 369. Alaska. *Carter's Ann. Code*, 1900, Pt. II, §136. Ariz.—Civ. Code, 1913, §3556. Colo. *Stratton v. People*, 5 Colo. 276.

31. Ark.—*Kirby's Dig.*, 1904, §2373; *Chiles v. State*, 45 Ark. 143; *Anderson v. State*, 34 Ark. 257. Ga.—Penal Code, 1910, §1005; *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159, Pen. Code, §979. Mich.—*Howell's Ann. St.*, §§15-121, 15,122. Nev.—*State v. Angelo*, 18 Nev. 425, 4 Pac. 1080. Wash.—*State v. Tommy*, 19 Wash. 270, 53 Pac. 157; *State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961; *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872.

[a] The Florida statute provides

that in capital cases the oath shall be to "well and truly try and true deliverance make, between the state of Florida and the prisoner at the bar, whom you shall have in charge. So help you God." *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; *Smith v. State*, 25 Fla. 517, 6 So. 482.

32. See generally the statutes, and the following: Ala.—Code, 1907, §7273; *Walker v. State*, 49 Ala. 369. Alaska. *Carter's Ann. Code*, 1900, Pt. II, §136. Ariz.—Civ. Code, 1913, §3556. Ark. *Kirby's Dig.*, 1904, §2373; *Anderson v. State*, 34 Ark. 257. Colo.—*Stratton v. People*, 5 Colo. 276. Ga.—Pen. Code, 1910, §1005; *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159, Pen. Code, §979. La.—*State v. Johnson*, 37 La. Ann. 421; *State v. Logan*, 37 La. Ann. 778. Mich. *Howell's Ann. St.*, §§15,121, 15,122. Nev.—*State v. Angelo*, 18 Nev. 425, 4 Pac. 1080. W. Va.—*State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813.

[a] The addition of the words "and the law as given by the court" to the oath prescribed by statute does not render it erroneous. *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872; *Hartigan v. Washington Territory*, 1 Wash. Ter. 447.

[b] **Jury Judge of Law.**—Where the jury are the judges as well of the law as the facts, the oath is insufficient unless they are sworn to try the case according to both. *Burrow v. State*, 12 Ark. 65; *Sandford v. State*, 11 Ark. 328; *Bell v. State*, 10 Ark. 536; *Patterson v. State*, 7 Ark. 59, 44 Am. Dec. 530.

33. *Maheir v. State*, 3 Minn. 444.

34. *State v. Rollins*, 22 N. H. 528; *Burch v. State*, 43 Tex. 376; *Stephens*

made at the time of its administration;³⁵ in no event can such objection be made for the first time in the appellate court.³⁶

4. Waiver of Informality in.—By proceeding to trial without objecting to the informality of the oath administered, the objection is waived;³⁷ thus, where the defendant remains silent until after his conviction,³⁸ or until after a verdict rendered against him,³⁹ it is then too late to object to an irregularity in the form of the oath.

D. RESWEARING.—The usual oath taken by jurors includes any issue submitted to them on the trial of the cause,⁴⁰ and where the issues

v. State, 33 Tex. Crim. 101, 25 S. W. 286.

35. U. S.—*Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547, 30 Sup. Ct. 581, 54 L. ed. 877. **Fla.**—*Dunaway v. Ferst*, 51 Fla. 180, 41 So. 451; *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; *Seymour v. Purnell*, 23 Fla. 232, 2 So. 312. **Ill.**—*Edwards v. Edwards*, 31 Ill. 474; *Cornelius v. Boucher*, 1 Ill. 32. **Ia.**—*Wrockle v. State*, 1 Iowa 167. **Kan.**—*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, *affirmed* in *Baldwin v. Kansas*, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. ed. 640. **Ky.**—*Thompson v. Blackwell*, 17 B. Mon. 609. **La.**—*State v. Robinson*, 36 La. Ann. 873; *State v. Wilson*, 36 La. Ann. 864. **Miss.**—*Welborn v. Spears*, 32 Miss. 138; *Dyson v. State*, 26 Miss. 362. **N. C.**—*State v. Council*, 129 N. C. 511, 39 S. E. 814. **Tenn.**—*Hobbs v. State*, 121 Tenn. 413, 118 S. W. 262; *Manufacturing Co. v. Morris*, 105 Tenn. 654, 58 S. W. 651. **Tex.**—*McConnell v. Ryan*, 1 White & W. Civ. Cas., §1020. **Wash.**—*State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961. **W. Va.**—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511; *Wells v. Smith*, 49 W. Va. 75, 38 S. E. 547; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695.

As to effect of failure to object, see *infra*, VIII, C. 4.

36. Fla.—*Dunaway v. Ferst*, 51 Fla. 180, 41 So. 451; *Jacksonville, T. & K. W. Ry. Co. v. Neff*, 28 Fla. 373, 9 So. 653; *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; *Smith v. State*, 25 Fla. 517, 6 So. 482. **Ill.**—*Edwards v. Edwards*, 31 Ill. 474. **Ind.**—*Applegate v. Boyles*, 10 Ind. 435. **Tenn.**—*Hobbs v. State*, 121 Tenn. 413, 118 S. W. 262; *Looper v. Bell*, 1 Head 373. **Wash.**—*State v. Gin Pon*, 16 Wash. 425, 47 Pac. 961.

37. Ill.—*McDonald v. Fairbanks, Morse & Co.*, 161 Ill. 124, 43 N. E. 783;

Cornelius v. Boucher, 1 Ill. 32. **Kan.**—*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318. **Me.**—*Wallace v. Columbia*, 48 Me. 436. **N. Y.**—*People v. DeCamp*, 57 Hun 591, 10 N. Y. Supp. 811. **Pa.**—*Com. v. Fritch*, 9 Pa. Co. Ct. 164. **Tenn.**—*Manufacturing Co. v. Morris*, 105 Tenn. 654, 58 S. W. 651; *Looper v. Bell*, 1 Head 373. **Tex.**—*Caldwell v. State*, 12 Tex. App. 302, that jurors in a capital case were not sworn in as selected. **W. Va.**—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511.

38. Ga.—*Slaughter v. State*, 100 Ga. 323, 28 S. E. 159; *Smith v. State*, 63 Ga. 168. **Ind.**—*Dolan v. State*, 122 Ind. 141, 23 N. E. 761, that jury was sworn before arraignment. **Kan.**—*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, *affirmed* in *Baldwin v. Kansas*, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. ed. 640. **La.**—*State v. Wilson*, 36 La. Ann. 864. **N. C.**—*State v. Council*, 129 N. C. 511, 39 S. E. 814. **Tenn.**—*Hobbs v. State*, 121 Tenn. 413, 118 S. W. 262.

39. U. S.—*Columbia Heights Realty Co. v. Rudolph*, 217 U. S. 547, 30 Sup. Ct. 581, 54 L. ed. 877. **Ga.**—*Candler v. Hammond*, 23 Ga. 493. **Ky.**—*Thompson v. Blackwell*, 17 B. Mon. 609. **Tex.**—*Clements v. Crawford*, 42 Tex. 601; *Texas & Pac. Ry. Co. v. Butler*, 52 Tex. Civ. App. 323, 114 S. W. 671. **W. Va.**—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511; *Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

40. See the following: **Colo.**—*Londoner v. People*, 15 Colo. 557, 26 Pac. 135. **Ia.**—*Hinkle v. Davenport*, 38 Iowa 355; *Arnold v. Arnold*, 20 Iowa 273; *Williams v. Miller*, 10 Iowa 344, *overruling* *Cole v. Swan*, 4 G. Gr. 32. **Kan.**—*Grant v. Penderly*, 15 Kan. 236. **Miss.**—*Waddell v. Magee*, 53 Miss. 687.

[a] Under the ordinary oath (1)

have not been changed after the trial began, no necessity exists for reswearing the jury;⁴¹ nor need the jury be resworn to try the remaining issues where some of the issues have been stricken out or withdrawn.⁴² Though considered better practice to do so,⁴³ the jury need not be resworn merely because the name of a party is stricken out or added to the pleadings,⁴⁴ or corrected therein.⁴⁵ But if the amendment changes the issues, or makes a new issue, the jury must be resworn before the trial is proceeded with.⁴⁶ So also, where the jury was improperly sworn, the court may upon objection thereto, reswear the jury.⁴⁷

"to well and truly try the matters at issue and a true verdict render," a general or special verdict may be returned, or special findings may be made in cases where general verdicts are rendered. *Londoner v. People*, 15 Colo. 557, 26 Pac. 135. (2) Such an oath gives the jury the right to assess the damages. *Goggin v. O'Donnell*, 62 Ill. 66.

Form of oath, see generally *supra*, VIII, C, 2.

41. *Londoner v. People*, 15 Colo. 557, 26 Pac. 135; *Jackson Hill C. & C. Co. v. Bales*, 183 Ind. 276, 108 N. E. 962; *Rogers v. State ex rel. Grimes*, 99 Ind. 218; *Knowles v. Rexroth*, 67 Ind. 59; *Hackney v. Williams*, 46 Ind. 413; *Parry Mfg. Co. v. Eaton*, 41 Ind. App. 81, 83 N. E. 510; *Smith & Stoughton Corp. v. Byers*, 20 Ind. App. 51, 49 N. E. 177; *Sandford Tool, etc. Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448.

[a] **Immaterial amendments** made to an answer, after trial, so as to make it conform to the proof, does not have the effect of changing the issues and the jury need not be resworn. *Indianapolis Traction, etc. Co. v. Formes*, 40 Ind. App. 202, 80 N. E. 872.

[b] **Time for Objection**.—If a party wishes to reserve any alleged error in proceeding with a case after an amendment which did not change the issues was made, without reswearing the jury, he should object and except at the time. *Knowles v. Rexroth*, 67 Ind. 59; *Hackney v. Williams*, 46 Ind. 413; *Sandford Tool, etc. Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448.

42. *Gerard v. Jones*, 78 Ind. 378; *Wilson v. Poole*, 33 Ind. 443.

43. *Maffitt's Admr. v. Rynd*, 69 Pa. 380; *Vann v. Downing*, 20 Phila. (Pa.) 348, 48 Leg. Int. 264.

44. *Hinkle v. Davenport*, 38 Iowa 355; *Merrill v. St. Louis*, 83 Mo. 244,

53 Am. Rep. 576, affirming 12 Mo. App. 466.

[a] **The omission to do so is not error**, at least when there is no request to do it. *Vann v. Downing*, 20 Phila. (Pa.) 348, 48 Leg. Int. 264.

[b] **Adding words descriptio personae** of one of the parties does not necessitate a reswearing of the jury. *Weikel v. Beekel*, 4 Walk. (Pa.) 336.

45. *State v. Holmes*, 23 La. Ann. 604, an amendment correcting in an indictment for larceny, the name of the owner of the stolen property, does not necessitate the reswearing of the jury. 46. *Record v. Ketcham*, 76 Ind. 482; *Maxwell v. Day*, 45 Ind. 509; *Wilson v. Poole*, 33 Ind. 443; *Hoot v. Spade*, 20 Ind. 326; *Kerschbaugher v. Slusser*, 12 Ind. 453; *Ostrander v. Clark*, 8 Ind. 211; *Smith & Stoughton Corp. v. Byers*, 20 Ind. App. 51, 49 N. E. 177; *Merrill v. St. Louis*, 12 Mo. App. 466, affirmed in 83 Mo. 244, 53 Am. Rep. 576.

[a] **In Iowa** (1) it seems that even though the amendment broadens the issue, the jury need not be resworn. *Hinkle v. Davenport*, 38 Iowa 355. (2) But if the oath administered to the jury did in its terms limit the consideration of the jury to the issue then formed, under such circumstances it would be proper to reswear the jury. *Williams v. Miller*, 10 Iowa 344.

[b] **Effect of Filing Reply**.—Where the jury were sworn to "well and truly try the matters submitted to them in the case in hearing, etc.," they need not be resworn if a reply is submitted thereafter. *Grant v. Pendery*, 15 Kan. 236.

[c] **Changing Form of Action**. Where the original writ and the narr. were amended by changing the form of action from assumpsit to covenant, it was not necessary to reswear the jury. *Clagett v. Easterday*, 42 Md. 617.

47. *Leas v. Patterson*, 38 Ind. 465.

Where one of several defendants is given a separate trial, a jury sworn to try all the defendants should be resworn to try the case of such defendant.⁴⁸ So also, where an incompetent juror is discharged after the jury is sworn, the proper practice is to reswear the jury after filling the vacancy.⁴⁹ If, after a trial has commenced, it is discovered that one juror did not take the oath because of conscientious scruples, it is proper for the court to affirm such juror, reswear the others and begin the trial anew.⁵⁰ Where a defendant, after a dismissal of the case, consents to go to trial before the same jury which had been duly sworn before such dismissal, the jury need not be resworn.⁵¹

E. WHAT RECORD MUST SHOW.—Since the jury must always be sworn in a criminal case,⁵² a judgment in such case will be reversed if the record fails to show that the jury was sworn;⁵³ but the record may

[a] If a juror has been sworn in chief, but is under the impression that he was sworn only upon the voir dire, he should be resworn. *Com. v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491.

[b] **Defendant by Wrong Name.** (1) It is the proper practice to reswear a jury which had been sworn to try a defendant under an erroneous given name (*Widmaier v. Mellert*, 6 Phila. [Pa.] 515), (2) but it is not necessary to reswear a jury which had been sworn to try J. C. Clark, whose name was corrected to read Joseph Clark. *Clark v. State*, 45 Tex. Crim. 456, 76 S. W. 573.

48. *Babcock v. People*, 15 Hun (N. Y.) 347, not sufficient if jury is sworn to try the case of several defendants.

49. *Keech v. State*, 15 Fla. 591. See *Jefferson v. State*, 52 Miss. 767.

[a] But where after the jury was sworn, one of the jurors was held to be disqualified and was removed from the panel, and the defendants thereupon moved that the remaining eleven jurors "be sworn de novo to try the case," and the court overruled the motion for the reason that the jurors had already been sworn, it was held that the motion implied an acceptance of the eleven jurors, and that swearing them over again to try the case would have been an idle and useless ceremony. *State v. Duvall*, 135 La. 710, 65 So. 904.

[b] **Under an early act in Tennessee**, if a juror became sick and another was sworn in his place, the other eleven were not resworn. *State v. Curtis*, 5 Humph. (Tenn.) 601; *Garner v. State*, 5 Yerg. (Tenn.) 160.

50. *State v. Herold*, 68 Wash. 654,

123 Pac. 1076, 40 L. R. A. (N. S.) 1213.

51. *Lyons v. State* (Tex. Crim.), 189 S. W. 269.

52. See *supra*, VIII, A.

53. *Ala.*—*Lacey v. State*, 58 Ala. 385. *Ark.*—*Carnett v. State*, 6 S. W. 513; *Chiles v. State*, 45 Ark. 143; *Barbour v. State*, 37 Ark. 61; *Lawson v. State*, 25 Ark. 106. *Fla.*—*Zapf v. State*, 35 Fla. 210, 17 So. 225; *Brown v. State*, 29 Fla. 543, 10 So. 736. *Ga.*—*Slaughter v. State*, 100 Ga. 323, 28 S. E. 159. *La.* *State v. Calvert*, 32 La. Ann. 224; *State v. King*, 28 La. Ann. 425; *State v. Douglass*, 28 La. Ann. 425; *State v. Phillips*, 28 La. Ann. 387; *State v. Gates*, 9 La. Ann. 94. *Mo.*—*State v. Duff*, 253 Mo. 415, 161 S. W. 683; *State v. McKinney*, 221 Mo. 467, 120 S. W. 608; *State v. Mitchell*, 199 Mo. 105, 97 S. W. 561. *Tex.*—*Nels v. State*, 2 Tex. 280; *Dresch v. State*, 14 Tex. App. 175; *McHenry v. State*, 14 Tex. App. 209; *Drake v. Brander*, 8 Tex. 351; *Clark v. Davis*, 7 Tex. 556; *Biles v. State* (Tex. App.), 4 S. W. 902. *W. Va.*—*State v. Moore*, 57 W. Va. 146, 49 S. E. 1015.

[a] It will not suffice if the record show that the jury "were elected according to law to well and truly try and true deliverance make;" it must show that the jury were sworn according to law. The word *sworn* is absolutely essential. *State v. Moore*, 57 W. Va. 146, 49 S. E. 1015.

[b] **Presumption on Appeal.**—(1) Where no issue is raised during the trial as to whether the jury was sworn, and the record recites that the jury was duly sworn, upon appeal it will be conclusively presumed that the jury was sworn. *Lyons v. State* (Tex. Crim.), 189 S. W. 269. (2) But where

be amended so as to speak the truth in this respect.⁵⁴ But in civil cases, the record need not show that the jury were sworn,⁵⁵ unless the statute demands it.⁵⁶

Though the fact that the jury was sworn must appear from the record in criminal cases,⁵⁷ the form of the oath need not be shown thereby;⁵⁸ and it is the safer and better practice not to set out in the record

the record of conviction was defective, in not showing that the jurors who tried the issue were sworn, the original entry on the minutes enumerating the jury, but not stating that they were sworn, it was held that this material fact could not be supplied in a criminal case by the presumption of *omnia rite acta*, but should appear upon the record. *State v. Douglass*, 28 La. Ann. 425; *State v. Phillips*, 28 La. Ann. 387; *State v. Gates*, 9 La. Ann. 94. (3) Compare *Hobbs v. State*, 121 Tenn. 413, 118 S. W. 262, wherein the court said: "The ground, however, on which it is earnestly insisted a reversal should be had, is that the minute entry showing the arraignment, trial and verdict failed to recite that the jury were sworn. This objection is made for the first time in this court. If the fact was that the jury were not sworn, and this had been called to the attention of the court below, there is no doubt a new trial would have been promptly granted. That this was not done raises at least a presumption that they were sworn, but by a clerical omission the fact was not made a part of the minute entry. In addition, the failure to swear the jury would have been so great a departure from orderly procedure that it is hardly possible for this at the time to have escaped the attention of the court and of counsel. This being so, with the presumption, which exists in this court, of the regularity of judicial proceedings of trial courts, nothing appearing in the record of an affirmative character to the contrary, we are satisfied that the omission pointed out does not authorize a reversal of this case. . . . *Bass v. State*, 6 Baxt. (Tenn.) 579, which seems to announce a contrary view, was overruled by this court at Nashville, December term, 1905, in the case of *Pearson v. State*, unreported, from Wayne County." To same effect, see *McFarland v. State*, 110 Miss. 482, 70 So. 563.

54. *Goddard v. State*, 78 Ark. 226, 95 S. W. 476; *State v. Gates*, 9 La. Ann. 94.

As to amendment of record generally, see 2 STANDARD PROC. 380 et seq.

55. Ala.—*Perdue v. Burnett*, Minor 138; *Goyne v. Howell*, Minor 62. Miss. *Waddell v. Magee*, 53 Miss. 687. Tex. *Freiberg, Klein & Co. v. Lowe*, 61 Tex. 436 (no ground for reversal); *Drake v. Brander*, 8 Tex. 351.

[a] **Presumption That Jury Was Sworn.**—"It has been several times decided in this state that the record must show that the jury were sworn to try the issue; but these decisions will not be followed by this court, as they are not supported by reason. The law provides for the empanelling of petit juries and requires them to be sworn for the term. . . . As swearing the jury does not constitute any part of the proceedings of a particular case, but is a duty devolved on the court, it is not necessary that the record of the entry of a verdict should show that the jury were sworn; but, in the absence of evidence to the contrary, the presumption will be indulged that the court performed its duty in having the petit jurors sworn for the term, and that the issue was tried by a jury thus lawfully empanelled and sworn, as the law directs." *Waddell v. Magee*, 53 Miss. 687. To same effect, see *Clark v. Davis*, 7 Tex. 556.

As to record in condemnation proceedings, see 8 STANDARD PROC. 319.

56. *Botsford v. Yates*, 25 Ark. 282, default case.

57. See *supra*, this section.

58. Ark.—*Anderson v. State*, 34 Ark. 257. Fla.—*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232. Tex. *Cotton v. State*, 32 Tex. 614; *Holland v. State*, 14 Tex. App. 182; *Chambliss v. State*, 2 Tex. App. 396. Va.—*Lawrence v. Com.*, 30 Gratt. (71 Va.) 845. Wash.—*Leschi v. Territory*, 1 Wash. Ter. 13. W. Va.—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.*, 66 W. Va. 505, 66 S. E. 713, 28 L. R. A. (N. S.) 511; *State v. Moore*, 57 W. Va. 146, 49 S. E. 1015; *State v. Helli-*
son, 56 W. Va. 690, 47 S. E. 166; *Wells*

the form of the oath administered,⁵⁹ for it will be presumed that the correct oath was administered, when it appears that the jury was sworn.⁶⁰ But if the record purports to set out the full oath administered, it must express every essential element or ingredient of such oath, as prescribed by the statute, or a reversal will result,⁶¹ though inasmuch as the entry in the record as to the swearing of the jury is not intended to be a record of the form of the oath, but only of the fact

v. Smith, 49 W. Va. 78, 38 S. E. 547; *State v. Sutfin*, 22 W. Va. 771.

59. *Ala.*—*Johnson v. State*, 74 Ala. 537; *Storey v. State*, 71 Ala. 329; *Schamberger v. State*, 68 Ala. 543; *Roberts v. State*, 68 Ala. 515. *Fla.*—*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232. *Tex.*—*Edmondson v. State*, 41 Tex. 496; *Everett v. State*, 4 Tex. App. 159. *W. Va.*—*Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

60. *U. S.*—*Dillingham v. Skein*, *Hempst.* 181, 7 Fed. Cas. No. 3,912a. *Ala.*—*Mitchell v. State*, 58 Ala. 417; *De Bardelaben v. State*, 50 Ala. 179; *Walker v. State*, 49 Ala. 369; *McCuller v. State*, 49 Ala. 39; *Crist v. State*, 21 Ala. 137; *Townsend v. Jeffries' Exrs.*, 17 Ala. 276; *McRae v. Tillman*, 6 Ala. 486. *Ark.*—*Neal v. Peevey*, 39 Ark. 337; *Anderson v. State*, 34 Ark. 257; *Hurley v. State*, 29 Ark. 17; *Harper v. State*, 25 Ark. 83; *State v. Gibson*, 21 Ark. 140; *Greenwood v. State*, 17 Ark. 332; *Bivens v. State*, 11 Ark. 455. *Colo.*—*Minich v. People*, 8 Colo. 440, 9 Pac. 4. *Fla.*—*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232; *Smith v. State*, 25 Fla. 517, 6 So. 482. *Ga.*—*Hammond v. Candler*, 22 Ga. 281. *Ind.*—*Mann v. Clifton*, 3 Blackf. 304; *Judah v. McNamee*, 3 Blackf. 269. *Ia.*—*State v. Ostrander*, 18 Iowa 435; *Harriman v. State*, 2 G. Gr. 270. *Kan.*—*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, *affirmed in Baldwin v. Kansas*, 129 U. S. 62, 9 Sup. Ct. 193, 32 L. ed. 640. *Ky.*—*Young v. Com.*, 19 Ky. L. Rep. 929, 42 S. W. 1141. *La.*—*State v. Christian*, 30 La. Ann. 367. *Miss.*—*Edwards v. State*, 47 Miss. 581; *Furniss v. Meredith*, 43 Miss. 302; *Welborn v. Spears*, 32 Miss. 138; *Pierce v. Tate*, 27 Miss. 283. *Mo.*—*State v. Duncan*, 237 Mo. 195, 140 S. W. 882. *Neb.*—*Smith v. State*, 4 Neb. 277. *Ohio.*—*Wareham v. State*, 25 Ohio St. 601. *Tex.*—*Morgan v. State*, 42 Tex. 224; *Sutton v. State*, 41 Tex. 513; *Bawcom v. State*, 41 Tex. 189; *Arthur v. State*, 3 Tex. 403; *Clark v. State*, 18 Tex. App. 467; *Leer v. State*, 2 Tex.

App. 495; *Chambliss v. State*, 2 Tex. App. 396. *Va.*—*Crump v. Com.*, 98 Va. 833, 23 S. E. 760; *Brown v. Com.*, 86 Va. 466, 10 S. E. 745. *W. Va.*—*State v. Kellison*, 56 W. Va. 690, 47 S. E. 166; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *State v. Sutfin*, 22 W. Va. 771.

[a] This presumption will be indulged in if the record states that the jury were duly sworn although only eight of them are expressly mentioned as having been sworn. *State v. Christian*, 30 La. Ann. 367.

[b] No presumption will be indulged in which impeaches the verity of the record as to the form of oath administered. *Bawcom v. State*, 41 Tex. 189; *Martin v. State*, 40 Tex. 19; *Leer v. State*, 2 Tex. App. 495; *Rich v. State*, 1 Tex. App. 206.

61. *U. S.*—*Baldwin v. Kansas*, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. ed. 640, *affirming* 36 Kan. 1, 12 Pac. 318. *Ala.*—*Cary v. State*, 76 Ala. 78; *Johnson v. State*, 74 Ala. 537; *Storey v. State*, 71 Ala. 329; *Peterson v. State*, 74 Ala. 35; *Schamberger v. State*, 68 Ala. 543; *Mitchell v. State*, 58 Ala. 417; *Gardner v. State*, 48 Ala. 263. *Ark.*—*Anderson v. State*, 34 Ark. 257; *Bivens v. State*, 11 Ark. 455. *Colo.*—*Minich v. People*, 8 Colo. 440, 9 Pac. 4. *Fla.*—*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232. *Ia.*—*Dixon v. State*, 4 G. Gr. 381; *Harriman v. State*, 2 G. Gr. 270; *Warren v. State*, 1 G. Gr. 106. *Kan.*—*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318. *Miss.*—*Graham v. Busby*, 34 Miss. 272; *Holt v. Mills*, 4 Smed. & M. 110. *Tex.*—*Bray v. State*, 41 Tex. 560; *Sutton v. State*, 41 Tex. 515; *Edmondson v. State*, 41 Tex. 496; *Martin v. State*, 40 Tex. 19; *Arthur v. State*, 3 Tex. 403; *Holland v. State*, 14 Tex. App. 182; *Everett v. State*, 4 Tex. App. 159. *W. Va.*—*Wells v. Smith*, 49 W. Va. 78, 38 S. E. 547.

[a] Thus where the recital is that the jury were "sworn to well and truly try the issue joined between the state of Alabama and the defendant" but

that the jury had been sworn and acted under oath,⁶² it has been held that a recital in the record that the jury "were duly sworn,"⁶³ or "sworn according to law,"⁶⁴ or other similar expressions,⁶⁵ are sufficient.

The record need not state "when, where and before whom" the jur-

fails to state that they were sworn to "a true verdict render according to the evidence; so help you God," it is fatally defective. *Cary v. State*, 76 Ala. 78; *Johnson v. State*, 74 Ala. 537; *Walker v. State*, 72 Ala. 218; *Storey v. State*, 71 Ala. 329; *Schamberger v. State*, 68 Ala. 543; *Stephens v. State*, 47 Ala. 696.

Form of oath, see *supra*, VIII, C, 2.

62. Ala.—*Mitchell v. State*, 58 Ala. 417. Fla.—*Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232. Kan.—*State v. Baldwin*, 36 Kan. 1, 12 Pac. 318. Mo.—*State v. Temple*, 194 Mo. 237, 92 S. W. 869; *State v. Schoenwald*, 31 Mo. 147. Ohio.—*Bartlett v. State*, 28 Ohio St. 669.

[a] "It is no part of the duty of the clerk to place on the record the exact formulary of words in which the oath was couched." *State v. Baldwin*, 36 Kan. 1, 12 Pac. 318, *affirmed* in *Baldwin v. Kansas*, 129 U. S. 52, 9 Sup. Ct. 193, 32 L. ed. 640; *Furniss v. Meredith*, 43 Miss. 302; *Dyson v. State*, 26 Miss. 362.

[b] No presumption that entire oath was intended to be set out in record. *Garner v. State*, 28 Fla. 113, 9 So. 835, 29 Am. St. Rep. 232.

63. Ala.—*Johnson v. State*, 74 Ala. 537; *Peterson v. State*, 74 Ala. 35; *Storey v. State*, 71 Ala. 329; *Schamberger v. State*, 68 Ala. 543; *Roberts v. State*, 68 Ala. 515; *De Bardelaben v. State*, 50 Ala. 179; *Gardner v. State*, 48 Ala. 263. Ark.—*Pruitt v. State*, 11 S. W. 822; *Harper v. State*, 25 Ark. 83; *McDaniel v. Hanauer*, 25 Ark. 48; *Bell v. State*, 10 Ark. 536. Colo.—*Minich v. People*, 8 Colo. 440, 9 Pac. 4. Miss.—*McFarland v. State*, 110 Miss. 482, 70 So. 563. Mo.—*State v. Duff*, 253 Mo. 415, 161 S. W. 683; *State v. Duncan*, 237 Mo. 195, 140 S. W. 882; *State v. Temple*, 194 Mo. 237, 92 S. W. 869; *State v. Schoenwald*, 31 Mo. 147. Tex.—*Morgan v. State*, 42 Tex. 224; *Bray v. State*, 41 Tex. 560; *Sutton v. State*, 41 Tex. 513; *Cotton v. State*, 32

Tex. 614; *Russell v. State*, 10 Tex. 288; *Arthur v. State*, 3 Tex. 403; *Lyons v. State* (Tex. Crim.), 189 S. W. 269; *Clark v. State*, 18 Tex. App. 467. Wash.—*Leschi v. Territory*, 1 Wash. Ter. 13. W. Va.—*Good v. Town of Chester*, 65 W. Va. 13, 63 S. E. 615, word "sworn" sufficient recital where there is issue joined.

64. Ala.—*Johnson v. State*, 74 Ala. 537; *Peterson v. State*, 74 Ala. 35; *Storey v. State*, 71 Ala. 329; *Schamberger v. State*, 68 Ala. 543; *Roberts v. State*, 68 Ala. 515; *Mitchell v. State*, 58 Ala. 417; *De Bardelaben v. State*, 50 Ala. 179. Ark.—*Wells v. State*, 16 S. W. 577; *Palmore v. State*, 29 Ark. 248. Colo.—*Minich v. People*, 8 Colo. 440, 9 Pac. 4. Miss.—*New Orleans, etc. R. Co. v. Hemphill*, 35 Miss. 17; *Graham v. Busby*, 34 Miss. 272. Tex.—*Bray v. State*, 41 Tex. 560; *Sutton v. State*, 41 Tex. 513; *Edmondson v. State*, 41 Tex. 496; *Holland v. State*, 14 Tex. App. 182; *Smith v. State*, 4 Tex. App. 626; *Everett v. State*, 4 Tex. App. 159; *Leer v. State*, 2 Tex. App. 495. W. Va.—*State v. Ice*, 34 W. Va. 244, 12 S. E. 695.

65. See the cases cited *infra*, this note.

[a] A recital in the record that the jury "were sworn the truth of and upon the premises to speak" is sufficient. *Crump v. Com.*, 98 Va. 833, 23 S. E. 760; *Brown v. Com.*, 86 Va. 466, 10 S. E. 745; *Lawrence v. Com.*, 30 Gratt. (71 Va.) 845.

[b] A judgment entry which sets forth that the jury were sworn "well and truly to try the issue joined" sufficiently shows that they had taken the lawful oath and is not to be understood as reciting the oath that was administered and showing it to be different from that prescribed by law. *Atkins v. State*, 60 Ala. 45; *Moore v. State*, 52 Ala. 424; *Blair v. State*, 52 Ala. 343; *Bush v. State*, 52 Ala. 13; *Edwards v. State*, 49 Ala. 334; *McNeil v. State*, 47 Ala. 498.

ors were sworn or affirmed,⁶⁶ or that those jurors who were affirmed had conscientious scruples against taking the oath.⁶⁷

IX. CUSTODY, CONDUCT AND DELIBERATIONS OF JURY.

A. CUSTODY.—1. *In General*.—The jury selected and impanelled to try a case is sometimes placed in custody of an officer of the court during the trial of the case and not allowed to separate.⁶⁸ And generally after submission of a case to the jury, it is placed in custody and not allowed to separate during its deliberations.⁶⁹

2. *Attention to Physical Wants*.—a. *In General*.—The jury-room should be made comfortable and pleasant.⁷⁰ During prolonged deliberations, the jury may be removed from the regular juryroom to more comfortable and suitable quarters.⁷¹ The jurors should be given an opportunity to sleep at night.⁷² During a protracted trial and when the jury is not allowed to separate, a barber may be allowed to render the jurors services, in the presence of the sheriff;⁷³ but individual jurors should not be taken to a barber shop.⁷⁴ Necessary attentions to a sick juror by his relatives are not improper.⁷⁵ A physician may be called to attend a juror who has suddenly been taken ill during the deliberations of the jury,⁷⁶ even without an order of court being first

66. *State v. Price*, 11 N. J. L. 203. See *McClure v. State*, 1 Yerg. (Tenn.) 206, need not state that they were "then and there sworn." But see *Younger v. State*, 2 W. Va. 579, 93 Am. Dec. 791, must appear when and how the jury were sworn.

67. *Clark v. Collins*, 15 N. J. L. 473; *Anonymous*, 3 N. J. L. 487.

68. See *infra*, IX, D, 1, b.

As to officer in charge, see *infra*, IX, B.

69. See *infra*, IX, D, 1, c.

Place of deliberation generally, see *infra*, IX, J, 1.

70. *Newkirk v. State*, 27 Ind. 1; *State v. Riggs*, 110 La. 509, 34 So. 655.

[a] **Effect of Hardships**.—The fact that the jury was taken to and confined in a small room and thereby suffered inconvenience does not of itself require a new trial. *Newkirk v. State*, 27 Ind. 1.

[b] A remark by the foreman, after the verdict had been returned and as the jury were about to separate that their room had been cold and that if it had been properly heated there would or might have been a different verdict, does not require that the verdict should be set aside. *Woods v. Klein*, 223 Pa. 256, 72 Atl. 523.

Place of deliberation generally, see *infra*, IX, J, 1.

71. *Ga.*—*Spier v. State*, 89 Ga. 737, 15 S. E. 633. *Wash.*—*State v. Boyce*,

24 Wash. 515, 64 Pac. 719. *Wis.* *Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 295, 309, 7 Am. Rep. 81.

72. *Russell v. State*, 66 Neb. 497, 92 N. W. 751. See *State v. Riggs*, 110 La. 509, 34 So. 655.

As to lodging jury, see *infra*, IX, A, 2, c.

73. *Ill.*—*Gott v. People*, 187 Ill. 249, 58 N. E. 293. *La.*—*State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878, practice is disapproved of. *Miss.* See *Boles v. State*, 13 Smed. & M. 398. *Pa.*—*Com. v. Lombardi*, 221 Pa. 31, 70 Atl. 122.

74. *Kan.*—*State v. Nelson*, 65 Kan. 689, 70 Pac. 632. *Pa.*—*Com. v. Fisher*, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009; *Com. v. Gearhardt*, 205 Pa. 387, 54 Atl. 1029. *S. C.*—*State v. Williams*, 76 S. C. 135, 56 S. E. 783, harmless irregularity.

[a] **Presumption**.—Visits by jurors to a barber shop, unattended by an officer, are presumptively prejudicial. *Westmoreland v. State*, 45 Ga. 225, 282; *State v. Prescott*, 7 N. H. 287, 294.

75. *Chant v. State*, 73 Tex. Crim. 345, 166 S. W. 513.

76. *Ala.*—*Cardwell v. State*, 1 Ala. App. 1, 56 So. 12. *Ia.*—*Wesley v. Chicago, St. P. & K. C. Ry. Co.*, 84 Iowa 441, 51 N. W. 163. *Mass.*—*Nichols v. Nichols*, 136 Mass. 256, physician called to attend a juror even though an order

obtained,⁷⁷ though that is the better practice.⁷⁸ Medicine may also be furnished a juror.⁷⁹ So also newspapers and magazines are properly furnished the jury,⁸⁰ but not newspapers containing accounts of the trial without an order of court.⁸¹ Changes of clothing may be sent for by the bailiff, at the request of the jurors.⁸²

b. *Furnishing Food and Refreshment to Jurors.*—(I.) *In General.* Under the common law, jurors were confined in rooms like prisoners, and kept without meat, drink, fire or candle, except by permission of the court, until they had agreed upon a verdict.⁸³ Under some later authorities, however, if the jury ate and drank at their own expense it was cause for fining them, but did not vitiate their verdict.⁸⁴ The modern practice, however, is to allow the jury all necessary food and refreshments,⁸⁵ under the express order and direction of the court.⁸⁶ Indeed, the modern statutes usually provide that the sheriff shall supply the jury with necessary food and lodging in all criminal cases;⁸⁷

of court was not first obtained. **N. Y.** *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846. **Tex.**—*Chant v. State*, 73 Tex. Crim. 345, 166 S. W. 513.

77. *Goersen v. Com.*, 106 Pa. 477, 51 Am. Rep. 534.

78. *State v. Sly*, 11 Idaho 110, 80 Pac. 1125, holding it to be the duty of the bailiff to call the court's attention to the fact of the sickness of a juror and get instructions from the court instead of taking the matter in his own hands and presuming to be the judge of the matter himself.

[a] The better way is for the court to select a suitable physician, and caution him not to enter into any conversation with any of the jury upon the case, or upon any matter except such as may be directly connected with the needed relief for the juror whom he is called upon to attend. *Nichols v. Nichols*, 136 Mass. 256.

79. *O'Shields v. State*, 55 Ga. 696.

80. See *infra*, IX, G, 6.

81. See *infra*, IX, G, 6.

82. *State v. Caulfield*, 23 La. Ann. 148.

83. **Colo.**—*Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526. **Ind.**—*Murphy v. Wilson*, 46 Ind. 537. **Va.**—*Ragland v. Wills' Admr.*, 6 Leigh (33 Va.) 1. **Eng.**—*King v. Stone*, 6 T. R. 527, 101 Eng. Reprint 684.

84. **Me.**—*Purinton v. Humphreys*, 6 Greenl. 379. **Mass.**—*Com. v. Roby*, 12 Pick. 496. **N. C.**—*State v. Sparrow*, 7 N. C. 487. **Va.**—*Ragland v. Wills' Admr.*, 6 Leigh (33 Va.) 1. **Eng.**—*Rex v. Burdett*, 2 Salk. 645, 91 Eng. Reprint 546.

85. **U. S.**—*Johnson v. Hobart*, 45

Fed. 542. **Ga.**—*Physioc v. Shea*, 75 Ga. 466. **La.**—*State v. Brunetto*, 13 La. Ann. 45. **Neb.**—*Russell v. State*, 66 Neb. 497, 92 N. W. 751. **S. C.**—*State v. Kelley*, 45 S. C. 659, 24 S. E. 45; *State v. McKee*, 1 Bailey 651, 21 Am. Dec. 499.

[a] *Review on Appeal.*—What constitutes necessary refreshments is a question of fact, and as such cannot be revised by the appellate court. *State v. Brunetto*, 13 La. Ann. 45.

86. **U. S.**—*Harrison v. Rowan*, 4 Wash. 32, 11 Fed. Cas. No. 6,142. **Ga.**—*O'Barr v. Alexander*, 37 Ga. 195, where refreshments furnished without leave of court it is good ground for new trial. **Kan.**—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769. **Me.**—*Purinton v. Humphreys*, 6 Greenl. 379. **Ohio.**—*State v. Town*, Wright 75.

[a] *Repetition of such orders at each adjournment is unnecessary.* *Cooper v. Robertson*, 87 Ind. 222.

[b] *Supplying Food After Verdict Returned.*—Supper may be furnished them after a verdict has been returned it having been ordered prior thereto. *State v. Costa*, 78 Vt. 198, 62 Atl. 33.

[c] *Request of Judge That Parties Furnish Food.*—Where no provision is made by law for furnishing meals to jurors, a new trial will be granted if the court, in the presence of the jury, asks if both parties will share the expense and the defendant refuses to do so, the verdict being for the plaintiff. *Johnson v. Hobart*, 45 Fed. 542. And see *State v. Summers*, 4 La. Ann. 26, jury to be furnished refreshments at their own expense.

87. See generally the statutes.

and provision is also made for the feeding of jurors in civil cases.⁸⁸

Meals may be taken in the common dining room of a hotel or boarding house if the jury is assigned a table by itself and is properly guarded;⁸⁹ and it is usually considered simply a harmless irregularity for the jury to eat at the same table with other persons.⁹⁰ The jury should not be boarded at the home of any counsel engaged in the trial of the case,⁹¹ or at the home of the parties, their relatives, or friends, unless no other place is available.⁹²

(II.) Food Furnished by Either Party.—The furnishing of food or refreshments to jurors, by either party, is sometimes held to vitiate the verdict,⁹³ though where the act was committed by accident, without

Officer furnishing refreshments, see *infra*, IX, B, 4, a.

[a] **Effect of Failure To Furnish Food.**—Where the sheriff was instructed by the court not to furnish the jury any supper and no food was furnished until next morning there was no error in the absence of a showing that the jury desired food or objected to the order. *Templeton v. State*, 5 Tex. App. 398.

88. See generally the statutes, and *Physioc v. Shea*, 75 Ga. 466.

89. **II.**—*Jumpertz v. People*, 21 Ill. 375. **Miss.**—*Riggs v. State*, 26 Miss. 51; *Boles v. State*, 13 Smed. & M. 398. **N. J.**—*State v. Cucuel*, 31 N. J. L. 249, 259. **Pa.**—*Com. v. Lombardi*, 221 Pa. 31, 70 Atl. 122.

90. *Browning v. State*, 33 Miss. 47; *Rowe v. State*, 11 Humph. (Tenn.) 491.

91. *Napier v. Com.*, 33 Ky. L. Rep. 635, 110 S. W. 842. See *Wilson v. State*, 6 Baxt. (Tenn.) 206, harmless where no intercourse with others takes place.

[a] **Reason.**—"It has a tendency to excite suspicion and create unfavorable comment, and for these reasons, if none others were presented, it would be better for the jury to engage board at some other place." *Napier v. Com.*, 33 Ky. L. Rep. 635, 110 S. W. 842.

[b] **Invitation Before Acceptance as Juror.**—Where an individual juror was requested to stay at the home of counsel before he was selected as a juror, it was held not to be reversible error for him to do so. *Koester v. Ottumwa*, 34 Iowa 41. See *People v. Lyle*, 66 Cal. xviii, 4 Pac. 977.

92. See *Brinson v. Faircloth*, 82 Ga. 185, 7 S. E. 923.

As to party to suit furnishing food, see *infra*, IX, A, 2, b, (II).

[a] **During View.**—Meal furnished

at house of prevailing party, during a view, there being no other place available, and the jury being in charge of a bailiff who had been instructed to provide them with food, does not require a new trial. *Johnson v. Greim*, 17 Neb. 447, 23 N. W. 338.

[b] **Distinction between public inn and private boarding house kept by a party, and at which a juror stops,** see *Birmingham Ry. L. & P. Co. v. Drennen*, 175 Ala. 338, 57 So. 876, Ann. Cas. 1914C, 1037.

93. **U. S.**—*Platt v. Threadgill*, 80 Fed. 192; *Johnson v. Hobart*, 45 Fed. 542; *Harrison v. Rowan*, 4 Wash. 32, 11 Fed. Cas. No. 6,142. **Ala.**—*Craig v. Pierson Lumb. Co.*, 169 Ala. 548, 53 So. 803. **Ga.**—*Central of Georgia Ry. Co. v. Hammond*, 109 Ga. 383, 34 S. E. 594; *Walker v. Walker*, 11 Ga. 203, during recess juror entertained in home of plaintiff. **Ill.**—*Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; *Doud v. Guthrie*, 13 Ill. App. 653; *Lyons v. Lawrence*, 12 Ill. App. 531. **Me.**—*Cottle v. Cottle*, 6 Greenl. 140, 19 Am. Dec. 200. **Mich.**—*Harrington v. Calhoun*, 153 Mich. 660, 117 N. W. 62; *Detroit & Toledo, etc. R. Co. v. Campbell*, 140 Mich. 384, 103 N. W. 856. **N. J.**—*Drake v. Newton*, 23 N. J. L. 111; *Demund v. Gowen*, 5 N. J. L. 687. **N. C.**—*State v. Sparrow*, 7 N. C. 487. **Ohio.**—*Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507. **Pa.**—*Redmond v. Royal Ins. Co.*, 7 Phila. 167 (where it did not appear who paid for the refreshments); *Keegan v. McCandless*, 7 Phila. 248. **Tex.**—*Marshall v. Watson*, 16 Tex. Civ. App. 127, 40 S. W. 352. **Can.**—*Ferguson v. Troop*, 15 N. Bruns. 183; *McNeil v. Moore*, 14 N. Bruns. 234. See *Spence v. Trenholm*, 12 N. Bruns. 77, where it was a matter of necessity. Compare *Gould v. Gould*, 3 Nova Scotia 87.

any improper design, and no prejudice appears to have followed from it, the verdict will not be disturbed.⁹⁴

c. *Lodging Jury*.⁹⁵—Comfortable lodgings should be furnished the jury at places not conducted by counsel, parties to the suit, their relatives or friends,⁹⁶ although circumstances may sometimes justify a liberal application of this rule.⁹⁷ The jury may be kept at a public inn;⁹⁸ but, if possible, it should be lodged at a place removed from the center of business activities and gossip.⁹⁹ Jurors are not to be treated as prisoners, but are to be given as much freedom of action as, under all the surrounding conditions, is compatible with the necessity of keeping them separate and apart from the general public.¹

3. **Entertainment.**—Under the supervision of their custodian, the jury will be allowed to take and receive needed exercise and recreation.² They should not be taken to a public park, however;³ nor should they for purposes of amusement or recreation visit the jail,⁴ in which the

Treating of jurors by a party, see *infra*, IX, F, 8.

94. Ia.—Koester v. Ottumwa, 34 Iowa 41. Kan.—Wichita & W. R. Co. v. Fecheimer, 49 Kan. 643, 31 Pac. 127. Me.—Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253. Minn.—Gurney v. Minneapolis & St. C. Ry. Co., 41 Minn. 223, 43 N. W. 2. Mo.—Kennedy v. Holladay, 105 Mo. 24, 16 S. W. 688. N. J.—Eakin v. Morris Canal & Bkg. Co., 24 N. J. L. 538. Pa.—Goodright v. McCausland, 1 Yeates 372, 1 Am. Dec. 206. S. C.—McCarty v. McCarty, 4 Rich. L. 594. Tenn.—Vaughn v. Dotson, 2 Swan 348. Vt.—Carlisle v. Sheldon, 38 Vt. 440.

95. Effect of separation resulting from lodging jurors in different rooms, see *infra*, IX, D, 2, b.

96. Walker v. Hunter, 17 Ga. 364 (counsel); Hensley v. Com., 25 Ky. L. Rep. 48, 74 S. W. 677, they should not be kept at lodgings conducted by an uncle of a murdered man.

[a] Keeping and feeding horses of jurors, by one of counsel free of charge, requires a new trial. Springer v. State, 34 Ga. 379.

97. Hardy v. Spoule, 32 Me. 594.

[a] Customary Lodging Place May Be Patronized.—A person who is accustomed to lodging the juries may properly do so although he is remotely interested in the case. Dumas v. State, 63 Ga. 600.

98. State v. Cucuel, 31 N. J. L. 249.

99. Com. v. Fisher, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. F. A. (N. S.) 1009; Hempton v. State, 111 Wis. 127, 150, 86 N. W. 596, prac-

tice of taking jurors to public hotels in capital cases not favored.

1. Com. v. Lombardi, 221 Pa. 31, 70 Atl. 122.

Effect of intercourse between jurors and other persons, see *infra*, IX, F.

2. State v. Cucuel, 31 N. J. L. 249, 257.

[a] Recreation during adjournment over Sunday permitted. State v. Perry, 44 N. C. 330.

[b] Walks by the jury should preferably not be taken near or past the premises in question, though prejudice will seldom result even if the jurors pass the place in dispute. Palmer v. State, 65 N. H. 221, 19 Atl. 1003.

[c] Rides.—The jury may be taken out for a ride. State v. Mowry, 21 R. I. 376, 43 Atl. 871.

[d] Going Beyond the Jurisdiction of the Court.—(1) The fact that, while on a walk, jurors go into an adjoining county does not work a constructive dissolution or separation of the jury and is harmless error. Thompson v. Com., 8 Gratt. (49 Va.) 637. (2) The same is true where the jury "left the state of Tennessee, crossed the Mississippi river into the state of Arkansas," and there visited different places. *In re King*, 51 Fed. 434; *King v. State*, 91 Tenn. 617, 20 S. W. 169. To same effect, see *State v. Mowry*, 21 R. I. 376, 43 Atl. 871.

3. Obeare v. Gray, 68 Ga. 182.

4. State v. Baber, 74 Mo. 292, 41 Am. Rep. 314.

[a] No prejudice arises from such a visit, however. State v. Bone, 114 Iowa 537, 87 N. W. 507.

defendant, or one of his witnesses,⁵ is incarcerated. Under no circumstances should they be allowed to enter saloons.⁶ They may properly be taken to theatrical performances,⁷ or to church,⁸ though at such times great care must be taken to see that they are kept apart from the public at large and hold no intercourse with outside persons;⁹ and because of the likelihood of some such intercourse taking place the practice is not a favored one,¹⁰ especially in criminal cases.¹¹ It frequently results in the granting of a new trial for prejudice to the rights of the defendant.¹² Previous permission of the court should be obtained by the bailiff before taking the jury to public entertainments.¹³

B. OFFICER IN CHARGE.—1. Necessity for Appointment.—The jury before retiring to deliberate upon their verdict should be placed in

5. *People v. Beverly*, 108 Mich. 509, 105 Pa. 1.

6. *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13; *Darter v. State*, 39 Tex. Crim. 40, 44 S. W. 850.

Use of intoxicating liquors by jurors, see *infra*, IX, G, 5.

7. *Colo.*—*Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526. *Idaho.*—*State v. Levy*, 9 Idaho 483, 75 Pac. 227. *Ky.* *Mansfield v. Com.*, 163 Ky. 488, 174 S. W. 16, moving picture show. *La.* *State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878.

[a] **Subject Matter of the Play Seen.**—The fact that the play seen was a satire on judicial proceedings does not require a reversal of the judgment. *Moore v. People*, 26 Colo. 213, 57 Pac. 857.

8. *Taylor v. State*, 86 Neb. 795, 126 N. W. 752.

[a] **Subject Matter of Sermons.** The fact that the sermon was in relation to "doubting Thomas" and "that the whole tenor of the sermon was such as to induce the jurors to accept facts as proven on less positive and convincing evidence than they would otherwise have done," does not affect the verdict. *State v. Kent*, 5 N. D. 516, 67 N. W. 1052, 35 L. R. A. 518.

[b] The fact that the sermon they heard was on the prevalence of crime, does not establish prejudice, the officers having taken them out as soon as they discovered the nature of the address, and the court having instructed them not to be influenced by anything they may have heard. *People v. Constantino*, 153 N. Y. 24, 47 N. E. 37.

[c] A new trial is not required from the fact that a juror in a murder trial, listened to a sermon on the text "thou

shalt not kill." *Alexander v. Com.*, 105 Pa. 1.

[d] Even though the minister directs general remarks to the jury and prays for them, the verdict will not be set aside, though such conduct on his part is condemned. *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31.

[e] Fact that the minister was the prosecuting witness was held to make such a visit prejudicial in *Shaw v. State*, 83 Ga. 92, 9 S. E. 768.

9. *Mansfield v. Com.*, 163 Ky. 488, 174 S. W. 16, wherein the record shows without contradiction, that the place where the moving picture show was exhibited was not crowded; that the jury sat on the front seats, while the sheriff occupied a seat nearby from which he could and did see what the jurors did; and that no one approached any of them, nor was any conversation relating to the trial had in their presence, and it was held in this circumstance no misconduct on the part of the officer or jury.

10. *Idaho.*—*State v. Levy*, 9 Idaho 483, 75 Pac. 227, a murder trial. *La.* *State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878. *Tex.*—*Gant v. State*, 55 Tex. Crim. 284, 116 S. W. 801, where the jury was taken to an open air theatrical performance.

11. *Moore v. People*, 26 Colo. 213, 57 Pac. 857; *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614.

12. *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 13.

[a] Listening to a prohibition campaign speech by a jury empaneled to try a case involving a violation of the liquor laws calls for a new trial. *Rigsby v. State*, 64 Tex. Crim. 504, 142 S. W. 901.

13. *Shaw v. State*, 83 Ga. 92, 9 S. E.

charge of an officer of the court;¹⁴ and whenever it becomes necessary to keep the jury together, without separation, an officer of the court must be placed in charge of them;¹⁵ failure to place the jury in charge of an officer is harmless where no improper communication could be,¹⁶ or was,¹⁷ had with them, however. Where the jurors arrive at a verdict without leaving their seats or retiring from the court room, there is no necessity to place them in charge of an officer.¹⁸

2. Qualifications.—Ordinarily the sheriff, bailiff, or other regular court officer is to be given charge of the jury, unless he is disqualified.¹⁹

768. See *State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878.

14. *Carter v. State*, 78 Miss. 348, 29 So. 148 (prejudice is presumed where a jury is allowed to leave the court room unattended); *Douglass v. Blackman*, 14 Barb. (N. Y.) 381. But see *Longley v. Com.*, 99 Va. 807, 37 S. E. 339.

[a] **Office of the Judge.**—"If it were possible to hold a continuous session, there would be no necessity of confiding the jury to any one but the judge. He is the high and responsible functionary entrusted with the conduct of criminal trials, and bound to preserve the purity of jury trial and place it beyond suspicion of all improper interference. . . . But it is not possible for him to discharge the functions at all times, hence has grown up the custom of committing the jury on the adjournment of the court for the day, to the sheriff sworn to 'keep them, and neither speak to them nor suffer any other person to speak to them touching any matter relative to the trial, until they return into court.' . . . At all times, in and out of court, the judge is constructively presiding over the jury and protecting their deliberations from all improper influence. . . . It is only from the necessity of the case and the fitness of things, they are taken from him during the adjournment of his court." *Philips v. Com.*, 19 Gratt. (60 Va.) 485, 534.

15. See *infra*, IX, D.

16. *Smith v. State*, 63 Ga. 168, jury room inaccessible except through courtroom.

17. *Jarnagin v. State*, 10 Yerg. (Tenn.) 529.

18. *Mich.*—The *Milwaukie v. Hale*, 1 Dougl. 306. *Minn.*—*State v. Parrant*, 16 Minn. 178. *N. Y.*—*Hatch v. Mann*, 9 Wend. 262; *Fink v. Hall*, 8 Johns. 437. *Wis.*—*Meyer v. Foster*, 16 Wis. 294.

19. *State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878; *Staley v. Barbite*, 2 Caines (N. Y.) 221. And see *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407; *Nicholson v. State*, 38 Fla. 99, 20 So. 818.

[a] **A constable rather than the sheriff may be selected by the court.** *Smith v. Williamson*, 11 N. J. L. 313. And see *State v. Devall*, 51 La. Ann. 497, 25 So. 384.

[b] **Minor may be appointed bailiff in such a case.** *McCann v. People*, 88 Ill. 103, 106.

[c] **Deputy.**—(1) Sheriff may leave jury in charge of one of his deputies, no prejudice appearing (*Tripp v. Bristol*, 2 Allen [Mass.] 556; *Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 295, 7 Am. Rep. 81), (2) and the fact that a sheriff takes charge of a jury while a deputy sheriff was sworn to do so, is not cause for a new trial. *People v. Hughes*, 29 Cal. 257. (3) A deputy sheriff whose appointment has not been filed or recorded and who has not taken the oath of office may be given charge of the jury. *Adams v. State*, 48 Tex. Crim. 452, 93 S. W. 116. And see *Woodson v. State*, 40 Tex. Crim. 685, 51 S. W. 918.

[d] **Additional officers may be appointed by the court when necessary, and such appointment need not be made in court nor in the presence of the parties.** *State v. Robinson*, 106 Tenn. 204, 61 S. W. 65; *Com. v. Jenkins*, *Thacher Crim. Cas.* (Mass.) 118, 130.

[e] **More Than One Custodian.**—"It is, of course, of the greatest importance that the jury should be kept together, in accordance with the spirit as well as with the letter of the law; and if one bailiff cannot succeed in keeping them from separating, two should be employed for that purpose. And in a capital case, none but ex-

But whenever by reason of the absence or disqualification of the proper officer the latter is not available for service, the court may appoint a special officer to attend the jury,²⁰ or the judge may take charge himself.²¹ It is the better practice not to place or leave the jury in charge of an officer of the court who is interested in the action,²² or is a material witness for either party to it,²³ or a near relative of a party;²⁴ but if no improper conduct on the part of the officer is shown, the fact that he was also a witness in the case is not of itself sufficient to constitute prejudicial error.²⁵ A failure to object to the incompetency of

perienced and competent men should be allowed to be placed in charge of a jury." *Territory v. Hart*, 7 Mont. 489, 506, 17 Pac. 718.

[f] **Old age** as a disqualification, see *Com. v. Fisher*, 226 Pa. 189, 193, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009.

[g] **Expression of an opinion** of a defendant's guilt, by a bailiff, while improper, does not disqualify him, where it does not appear that his opinion was communicated or known to the jury. *People v. Babcock*, 160 Cal. 537, 117 Pac. 549.

20. *Harbour v. Scott*, 12 La. Ann. 152.

[a] **An elisor** (1) is provided for by some statutes. *People v. Fellows*, 122 Cal. 233, 54 Pac. 830; *People v. Ebanks*, 117 Cal. 652, 48 Pac. 1049, 40 L. R. A. 269; *People v. Young*, 108 Cal. 8, 41 Pac. 281; *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407. (2) In California an elisor can be appointed only when both the sheriff and coroner are disqualified. See above cases, and *Bruner v. Superior Court*, 92 Cal. 239, 28 Pac. 341.

[b] **A charge of disqualification** of the regular officer raises an issue which the court must determine after a consideration of the evidence produced by both parties. *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407.

21. *Philips v. Com.*, 19 Gratt. (60 Va.) 485, during temporary absence of sheriff.

22. **Cal.**—*People v. Fellows*, 122 Cal. 233, 54 Pac. 830, sheriff shown to be biased. **Ga.**—*Cooper v. State*, 13 Ga. App. 697, 79 S. E. 908, deputy sheriff who was also the prosecutor in the case. **Tenn.**—*McElrath v. State*, 2 Swan 378.

[a] **Court commissioner** before whom statutory proceedings to recover possession of leased premises from tenant

are brought may himself shut up the jury in the juryroom. *Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682.

23. **Fla.**—*Owens v. State*, 68 Fla. 154, 67 So. 39, Ann. Cas. 1917B, 252. **Ga.**—*Patterson v. State*, 122 Ga. 587, 50 S. E. 489. **Ia.**—*McGibbons v. McGibbons*, 119 Iowa 140, 93 N. W. 55.

24. **Ky.**—*Combs v. Com.*, 160 Ky. 386, 169 S. W. 879. **La.**—*State v. Judge of Ninth Judicial Dist. Court*, 11 La. Ann. 79. **Tex.**—*Baker v. State*, 4 Tex. App. 223.

25. **Ga.**—*Wade v. State*, 65 Ga. 756. **Ill.**—*Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109. **Ia.**—*State v. Wart*, 51 Iowa 587, 2 N. W. 405. **Kan.**—*State v. Bailey*, 32 Kan. 83, 3 Pac. 769; *State v. Snyder*, 20 Kan. 306. **La.**—*State v. Bullock*, 136 La. 167, 66 So. 767; *State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878. **Mich.**—*People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *People v. Coughlin*, 65 Mich. 704, 32 N. W. 905. **Miss.**—*Ned v. State*, 33 Miss. 364. **Mo.**—*State v. Rush*, 95 Mo. 199, 8 S. W. 221. **Neb.**—*Van Syoc v. State*, 69 Neb. 520, 96 N. W. 266. **N. D.**—*State v. Rosenkrans*, 9 N. D. 163, 82 N. W. 422. **Tex.**—*Jenkins v. State*, 41 Tex. 128; *Holmes v. State*, 70 Tex. Crim. 214, 156 S. W. 1172; *Galan v. State*, 68 Tex. Crim. 200, 150 S. W. 1171; *Campbell v. State*, 57 Tex. Crim. 301, 123 S. W. 583. **Vt.**—*State v. Lockwood*, 58 Vt. 378, 3 Atl. 539; *State v. Flint*, 60 Vt. 304, 14 Atl. 178. **Wash.**—*Edwards v. Territory*, 1 Wash. Ter. 195. **W. Va.**—*State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

[a] **Illustration.**—The mere fact that a deputy sheriff had arrested an accused person and had thus acquired knowledge of facts as to which he was called to testify did not disqualify him from receiving charge of the jury. *Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631.

the officer until after the verdict is returned constitutes a waiver of the point, however.²⁶

3. Oath.²⁷ — a. *Necessity for.* — As a general rule, and in the absence of an express statutory provision to the contrary, the officer placed in charge of the jury is not required to take a special oath to guard the jury against intrusion;²⁸ but it is customary to give such an oath.²⁹ By express provision of statute in some jurisdictions, such an oath is required to be administered,³⁰ and this is frequently the rule in criminal cases.³¹ Such statutes have been construed to be mandatory in character,³² though it has also been held that failure on the part of the

26. Ariz.—*Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631. **Ga.**—*Davis v. Ragin*, 7 Ga. App. 308, 66 S. E. 806. **Ia.**—See *McGibbons v. McGibbons*, 119 Iowa 140, 93 N. W. 55. **Mass.**—*Tripp v. Bristol*, 2 Allen 556. **Tex.**—*Baker v. State*, 4 Tex. App. 223.

27. As to oaths generally, see the title "Oath and Affirmation."

28. U. S.—*United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. ed. 300; *United States v. Davis*, 103 Fed. 457. **Ariz.**—*Territory v. Dooley*, 3 Ariz. 60, 78 Pac. 138. **Cal.**—*Boreham v. Byrne*, 83 Cal. 23, 23 Pac. 212. **Fla.**—*Nicholson v. State*, 38 Fla. 99, 20 So. 818; *Cato v. State*, 9 Fla. 163; *O'Connor v. State*, 9 Fla. 215. **Ind.**—*Clayton v. State*, 100 Ind. 201. **La.**—*State v. Kennedy*, 8 Rob. 590. **Mass.**—See *Com. v. Jenkins*, Thacher Cr. Cas. 118. **Mo.**—*State v. Frier*, 118 Mo. 648, 24 S. W. 220. **Neb.**—*Deranleau v. Jandt*, 37 Neb. 532, 56 N. W. 299. **Ohio.**—*Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559. **Tex.**—*Baker v. State*, 4 Tex. App. 223. **Va.**—*Longley v. Com.*, 99 Va. 807, 37 S. E. 339; *Bennett v. Com.*, 8 Leigh (35 Va.) 745. **Wash.**—*Edwards v. Territory*, 1 Wash. Ter. 195. **W. Va.**—*State v. Hoke*, 84 S. E. 1054; *State v. Kelison*, 56 W. Va. 690, 47 S. E. 166; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695; *State v. Poindexter*, 23 W. Va. 805. **Wis.**—See *Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 295, 7 Am. Rep. 81.

[a] **In federal courts** the officer need not be sworn although that is the practice in the state in which the federal court is sitting. *United States v. Davis*, 103 Fed. 457.

29. State v. Poindexter, 23 W. Va. 805, 813. See generally the cases cited in the preceding note.

30. See generally the statutes.

31. Ark.—*Sutherland v. State*, 76

Ark. 487, 89 S. W. 462. **Ga.**—*Roberts v. State*, 72 Ga. 673. **Ill.**—*Lewis v. People*, 44 Ill. 452; *McIntyre v. People*, 38 Ill. 514; *Gibbons v. People*, 23 Ill. 518. **Ia.**—*State v. Foster*, 136 Iowa 527, 114 N. W. 36. **Kan.**—*State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341. **Ky.**—*Com. v. Shields*, 2 Bush 81. **Mich.**—*People v. Beverly*, 108 Mich. 509, 66 N. W. 379. **Miss.**—*McCann v. State*, 9 Smed. & M. 465; *Hare v. State*, 4 How. 187. **Mo.**—*State v. Armstrong*, 167 Mo. 257, 66 S. W. 961; *State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337; *State v. Underwood*, 76 Mo. 630. **Okla.**—*Jolly v. State*, 5 Okla. Crim. 301, 115 Pac. 124. **Tenn.**—*Maynard v. State*, 9 Baxt. 225. **Wis.**—*Brucker v. State*, 16 Wis. 333, stating and following the common-law rule.

[a] **Officer in charge during taking of a view** is sometimes required to take a special oath. *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684.

[b] **The officer assisting the custodian** need not be specially sworn, though it would be better practice to do so. *People v. Beverly*, 108 Mich. 509, 66 N. W. 379; *Trim v. Com.*, 18 Gratt. (59 Va.) 983, 98 Am. Dec. 765. But see *Sutherland v. State*, 76 Ark. 487, 89 S. W. 462, prejudice is presumed where there is a failure to do so.

32. State v. Foster, 136 Iowa 527, 114 N. W. 36; *State v. Crafton*, 89 Iowa 109, 56 N. W. 257; *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341.

[a] **The statute (1) is absolute** in its requirement that the jury shall be in charge of a sworn officer. The oath provided by law is one of the means of protection which the legislature, in its wisdom, has guaranteed to one on trial for a crime. It is more than a mere matter of form; it is an essen-

defendant to object, at the time, that the special oath has not been administered is a waiver of the statutory requirement,³³ and that where no communication with the jury has in fact taken place, a new trial will not be granted.³⁴ Where the custodian of the jury is not a regular officer of the court a special oath must be administered to him,³⁵ and a failure to do so is ground for a new trial.³⁶

Presumption.—It will be presumed that the special oath required by statute was administered, nothing to the contrary appearing in the record.³⁷

Record.—The form of the oath administered need not be set out in the record.³⁸ A statement that the jury retired in charge of a sworn bailiff is sufficient.³⁹

Reswearing of officer is not necessary at every recess taken by the court.⁴⁰

b. *Form and Sufficiency.*—Where required to be given, the form of oath as set forth in the statute should be closely followed;⁴¹ but

tial requisite to the due and safe administration of justice, and it cannot be dispensed with except with the defendant's consent. *State v. Crafton*, 89 Iowa 109, 56 N. W. 257. (2) A new trial will not necessarily be granted for a failure to administer the special oath, however. *State v. Foster*, 136 Iowa 527, 114 N. W. 36; *State v. Crafton*, 89 Iowa 109, 56 N. W. 257.

33. **U. S.**—See *United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. ed. 300. **Ark.**—*Atterberry v. State*, 56 Ark. 515, 20 S. W. 411, the officer in charge having taken the general oath. **Neb.**—*Deranleau v. Jandt*, 37 Neb. 532, 56 N. W. 299. **Okla.**—*Jolly v. State*, 5 Okla. Crim. 301, 115 Pac. 124. **Tex.**—*Baker v. State*, 4 Tex. App. 223. **Wis.**—*Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 295, 7 Am. Rep. 81.

34. *State v. Frier*, 118 Mo. 648, 24 S. W. 220 (no communication with them by the sheriff in charge); *State v. Hayes*, 78 Mo. 307; *State v. Hays*, 78 Mo. 600.

35. *Nicholson v. State*, 38 Fla. 99, 20 So. 818.

36. *Roberts v. State*, 72 Ga. 673; *McCann v. State*, 9 Smed. & M. (Miss.) 465; *Hare v. State*, 4 How. (Miss.) 187.

37. **Minn.**—*State v. Ryan*, 13 Minn. 370. **Mo.**—*State v. Stubblefield*, 157 Mo. 360, 58 S. W. 337. **Tenn.**—*Clark v. State*, 8 Baxt. 591. Compare *Lea v. State*, 94 Tenn. 495, 29 S. W. 900.

38. *Jolly v. State*, 5 Okla. Crim. 301, 115 Pac. 124.

39. *State v. Boyce*, 24 Wash. 514, 528, 64 Pac. 719. Compare *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684; *Day v. Wilber*, 2 Caines (N. Y.) 134; *Coughnet v. Eastenbrook*, 11 Johns. (N. Y.) 532.

40. **Ky.**—*Com. v. Shields*, 2 Bush 81. **Va.**—*Reed v. Com.*, 98 Va. 817, 36 S. E. 399. **W. Va.**—*State v. Hoke*, 84 S. E. 1054; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875; *State v. Ice*, 34 W. Va. 244, 12 S. E. 695.

Compare *Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965, 973.

41. See *McIntyre v. People*, 38 Ill. 514; *Maynard v. State*, 9 Baxt. (Tenn.) 225; *Spain v. State*, 8 Baxt. (Tenn.) 514.

[a] The officer (1) should be sworn to keep the jury separate and apart from all persons, and not allow them to communicate with any person, or any person to communicate with them, and not to communicate with them himself about the trial of the case further than to ask them if they have agreed. *Buxton v. State*, 89 Tenn. 216, 14 S. W. 480. (2) Use of word "converse" instead of "communicate" does not render oath invalid. *Scott v. State*, 7 Lea (Tenn.) 232. (3) But an entire omission of that part of the oath relating to communications invalidates the oath. *Maynard v. State*, 9 Baxt. (Tenn.) 225; *Spain v. State*, 8 Baxt. (Tenn.) 514.

As to necessity for oath, see *supra*, IX, B, 3, a.

slight deviations from the statutory form will not affect the verdict.⁴² Where no form is prescribed by statute, the common-law form of oath should be adhered to.⁴³

The administration of the oath by the clerk, in the absence of the judge, is an irregularity,⁴⁴ but not prejudicial error.⁴⁵ The oath need not be administered until the jury is sworn to try the case.⁴⁶

4. Acts and Conduct of.—**a. In General.**—The officer in charge of the jury should not allow his personal feelings or belief in reference to the case on trial to become known to the jury.⁴⁷ It is misconduct for the bailiff to take to the jury, even at their request, books or papers introduced in evidence at the trial, without an order of the court,⁴⁸ to get for them the minutes of the evidence,⁴⁹ or to obtain information as to facts for the jury from extraneous sources.⁵⁰ Nor should he attempt to give them information as to the law applicable to the case,⁵¹ or furnish them with statutes or law books.⁵² The fact that he supplies them with light refreshments, at their request, during their deliberations, does not ordinarily affect the validity of their verdict, however.⁵³

A wager by the officer on the result of the jury's deliberations, made after the jury is selected, does not require the granting of a new

42. *Hittner v. State*, 19 Ind. 48; *State v. Eldred*, 8 Kan. App. 625, 56 Pac. 153.

43. See the cases cited *infra*, this note.

[a] **Common Law Form.**—"The bailiff must swear to 'keep the jury without meat,' etc., 'to suffer no one to speak to them nor to speak to them himself, except 'to ask them whether they are agreed.'"*Brueker v. State*, 16 Wis. 333, 336. And see *McCann v. State*, 9 Smed. & M. (Miss.) 465.

44. *Duffy v. McKenna*, 82 N. J. L. 62, 81 Atl. 1101.

45. *Duffy v. McKenna*, 82 N. J. L. 62, 81 Atl. 1101.

46. *State v. Armstrong*, 167 Mo. 257, 66 S. W. 961.

47. *Owens v. State*, 68 Fla. 154, 67 So. 39, Ann. Cas. 1917B, 252.

As to officer conversing with jurors, see *infra*, IX, B, 4, c.

As to communications with outsiders generally, see *infra*, IX, F.

48. *Ga.*—*Pound v. State*, 43 Ga. 88. *Idaho.*—*People v. Page*, 1 Idaho 102. *Ind.*—*Newkirk v. State*, 27 Ind. 1. *Ia.* *State v. Kirk*, 168 Iowa 244, 150 N. W. 91. *Mass.*—*Com. v. Jenkins*, Thacher Cr. Cas. 118, statutes not in evidence. **S. C.**—*Lott's Exrs. v. Macon*, 2 Strobb. 178.

As to sending papers and articles to jury room, see generally *infra*, IX, K.

[a] **Reading instructions by bailiff** at the request of the jury is conduct for which "the officer deserves punishment." *State v. Brown*, 22 Kan. 222.

49. *State v. Griffin*, 71 Iowa 372, 32 N. W. 447.

50. *Ketchum v. Chicago*, St. P. M. & O. Ry. Co., 150 Wis. 211, 136 N. W. 634, making measurements of cars.

As to effect of intercourse between jurors and outsiders, see *infra*, IX, F.

51. *Ga.*—*Cooper v. State*, 103 Ga. 63, 29 S. E. 439. *Miss.*—*Wilkerson v. State*, 78 Miss. 356, 29 So. 170, the nature of the penalty applicable to the crime. *N. Y.*—*People v. Hartung*, 17 How. Pr. 85, 8 Abb. Pr. 132, 4 Park. Crim. 256.

52. *State v. Kirk*, 168 Iowa 244, 150 N. W. 91.

As to sending law books to jury room, see generally *infra*, IX, K, 5, j.

53. *Ind.*—*Morningstar v. Cunningham*, 110 Ind. 328, 11 N. E. 593, 59 Am. Rep. 211, apples. *Mass.*—*Tripp v. Bristol*, 2 Allen 556, cider. *Mo.*—*State v. Degonia*, 69 Mo. 485, cigars.

[a] **When Such Conduct Is Prejudicial.**—The sheriff, a reward having been offered in case of the conviction of the perpetrators of a crime, should not take jurors to a saloon and treat them. *People v. Myers*, 70 Cal. 582, 12 Pac. 719.

As to furnishing food and refresh-

trial.⁵⁴ But if the bailiff in charge of the jury be guilty of serious indiscretions in his intercourse with the jury, he may be removed and a new custodian appointed.⁵⁵ For acts of misconduct, he may be reprimanded, fined,⁵⁶ or even imprisoned, as for a contempt of court.⁵⁷

Misconduct on the part of the officer in charge of the jury is waived where, with knowledge of the facts, no objection is made until after the verdict is returned.⁵⁸

b. *Diligence in Guarding the Jury.*—It is the duty of the officer in charge to keep the jury entirely removed from the company of others,⁵⁹ and to prevent all forbidden communications between them and other persons.⁶⁰ Under the stress of necessity irregularities in allowing communications with other persons will be held harmless, however.⁶¹ In the performance of his duty it is essential that the officer should remain in a place from which he can easily and fully supervise their actions;⁶² he need not, however, keep them within his sight and hearing, where they are properly secluded.⁶³ It is improper for him to leave the jurors for a considerable period of time unattended and unguarded,⁶⁴ and the verdict will be set aside where it appears

ments to jury generally, see *supra*, IX, A, 2, b.

54. *State v. Howes*, 26 W. Va. 110, a misdemeanor case.

55. *Green v. State*, 59 Miss. 501. See *People v. Hotz*, 261 Ill. 239, 103 N. E. 1007.

56. See *Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003 (for allowing the jury to have a group photograph taken); *Booker v. State*, 54 Tex. Crim. 80, 111 S. W. 744.

57. Ill.—*Reins v. People*, 30 Ill. 256. Ind.—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138. Miss.—*Wilkerson v. State*, 78 Miss. 356, 29 So. 170.

[a] Violation of oath by the custodian of the jury constitutes a contempt of court. *Lewis v. People*, 44 Ill. 452, under a statutory provision.

58. *Messenger v. State*, 152 Ind. 227, 52 N. E. 147; *Waterman v. State*, 116 Ind. 51, 18 N. E. 63.

59. Ill.—*People v. Duncan*, 261 Ill. 339, 103 N. E. 1043. Va.—*Com. v. Wormley*, 8 Gratt. (49 Va.) 712, 56 Am. Dec. 162. W. Va.—*State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176; *State v. Cartright*, 20 W. Va. 32.

As to place of custody of jury, see *supra*, IX, A, 1.

Effect of communications between jury and other persons, see *infra*, IX, F.

60. *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169 (officer should not allow a telephone conversa-

tion); *Love v. State*, 6 Baxt. (Tenn.) 154.

61. *Nichols v. Nichols*, 136 Mass. 256.

[a] Allowing a physician to visit a sick juror is harmless misconduct. *Nichols v. Nichols*, 136 Mass. 256, 259. As to furnishing medical attention for jurors, see *supra*, IX, A, 1.

As to effect of intercourse between jurors and other persons, see generally *infra*, IX, F.

62. Ky.—*Com. v. Shields*, 2 Bush 81. Nev.—*State v. Harris*, 12 Nev. 414. Va.—*Com. v. Wormley*, 8 Gratt. (49 Va.) 712, 56 Am. Dec. 162.

[a] His Duty Stated.—“It is unquestionably the duty of the officer to remain with or near the jury so that he may protect them from intrusion. This object constitutes one of his chief duties, and neglect of it subjects him to severe punishment by the court and any willful disregard of his duty, or corrupt use of his relation to the jury, should be punished by the court with exemplary severity.” *Hoover v. State*, 5 Baxt. (Tenn.) 672.

63. *State v. Neibekier*, 184 Mo. 211, 83 S. W. 523; *Hoover v. State*, 5 Baxt. (Tenn.) 672. See *State v. Hargroves*, 104 Tenn. 112, 56 S. W. 857.

64. Ga.—*Kirk v. State*, 73 Ga. 620. Kan.—*State v. Nelson*, 65 Kan. 689, 70 Pac. 632. Wyo.—*Nicholson v. State*, 18 Wyo. 298, 106 Pac. 929.

that communications with other persons took place in his absence, unless want of prejudice is clearly established;⁶⁵ but the fact that for short intervals he leaves them, does not adversely affect the verdict where it does not appear that during such times they were actually subjected to outside influences,⁶⁶ the same strict rule applicable to a separation of the jurors not applying to a separation of the custodian of the jury from the jury itself.⁶⁷ That the officer in charge was able from his position outside the juryroom to overhear some of the discussion taking place therein and was seen by the jury looking through the keyhole does not require a new trial.⁶⁸ He should not conduct the jury to places of public entertainment without first obtaining the authorization of the court.⁶⁹ An officer is to be condemned for allowing newspapers containing accounts of the trial to reach the jury, without an order of the court.⁷⁰ He must be diligent to prevent all forms of misconduct on the part of the jurors,⁷¹ especially unauthorized separations;⁷² and he should promptly report to the court any misconduct by them or by other persons affecting them.⁷³

c. *Conversing With Jurors and Outsiders.*—(I.) *In General.*—The custodian of the jury must carefully refrain from talking to jurors concerning the merits of the case,⁷⁴ or even about other matters which

65. *Com. v. Wormley*, 8 Gratt. (49 Va.) 712, 56 Am. Dec. 162.

66. *Ala.*—*Butler v. State*, 72 Ala. 179. *Cal.*—*People v. Kelly*, 46 Cal. 355; *People v. Boggs*, 20 Cal. 432. *Ind.* *State v. Leunig*, 42 Ind. 541. *Mo.* *State v. Neibekier*, 184 Mo. 211, 83 S. W. 523. *Tenn.*—*Hoover v. State*, 5 Baxt. 672.

67. See *Hoover v. State*, 5 Baxt. (Tenn.) 672.

[a] *Reason for the Rule.*—"The purpose of the strictness of the rule is to preserve the purity of the trial by jury, and whenever there is reason to believe that there has been, or might have been, corrupt influences to the prejudice of a defendant, the court will not hesitate to set aside a verdict against him. But where there is no ground for even a suspicion of such influences having been exerted, there is no reason for interfering with such verdict. *Hoover v. State*, 5 Baxt. (Tenn.) 672.

As to effect of separation of jurors, see *infra*, IX, D, 2, c.

68. *People v. Hoffman*, 142 Mich. 531, 105 N. W. 838.

69. See *supra*, IX, A, 3.

70. See *infra*, IX, G, 6.

Effect of reading newspaper accounts of subject matter of action on qualifications of jurors, see *supra*, VII, F, —.

71. *Horton v. State*, 10 Okla. Crim. 294, 136 Pac. 177.

72. *Ark.*—*Binns v. State*, 35 Ark. 118. *Fla.*—*Gamble v. State*, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547. *Idaho.*—*State v. Sly*, 11 Idaho 110, 80 Pac. 1125. *Ill.*—*Gott v. People*, 187 Ill. 249, 58 N. E. 293; *Miller v. People*, 39 Ill. 457. *La.*—*State v. Warren*, 43 La. Ann. 828, 9 So. 559. *Nev.*—*State v. Harris*, 12 Nev. 414. *N. M.*—*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78. *Tenn.*—*Sherman v. State*, 125 Tenn. 19, 140 S. W. 209, "they should have been fined." *Tex.* *Eads v. State*, 74 Tex. Crim. 628, 170 S. W. 145; *Darter v. State*, 39 Tex. Crim. 40, 44 S. W. 850.

Effect of unauthorized separations of jurors, see *infra*, IX, D, 2.

73. *State v. Daniels*, 134 N. C. 671, 46 S. E. 991.

74. *Cal.*—*People v. Quimby*, 6 Cal. App. 482, 92 Pac. 493. *Colo.*—*Heller v. People*, 22 Colo. 11, 43 Pac. 124. *Ill.* *Reins v. People*, 30 Ill. 256. *Ind.*—*Coolman v. State*, 163 Ind. 503, 72 N. E. 568. *Ia.*—*State v. La Grange*, 99 Iowa 10, 68 N. W. 557. See *State v. Wart*, 51 Iowa 587, 2 N. W. 405. *Ky.*—*Lawless v. Reese*, 3 Bibb 486. *La.*—*State v. Langford*, 45 La. Ann. 1177, 14 So. 181, 40 Am. St. Rep. 277; *State v. Dallas*, 35 La. Ann. 899. *Miss.*—*Lewis v. State*, 109 Miss. 586, 68 So. 785; *Wil-*

will tend to distract their attention from the case in hand,⁷⁵ at times when they are, or should be, engaged in deliberating upon it.⁷⁶ While improper remarks by court officers are regarded as more likely to have resulted in prejudice to a party than remarks by other persons,⁷⁷ still remarks not pertaining to the case,⁷⁸ and remarks which do not appear to have had an influence with the jury, do not require the granting of a new trial.⁷⁹ He may well hold such conversation with them as is necessary in order to enable him to properly perform his duties as their custodian, however.⁸⁰ He may at the request of the court inquire of the jury whether they have arrived at a verdict,⁸¹ or need his presence for any purpose.⁸² Casual communications between the jurors and the officer in charge of them, even though they are recognized as irregularities will not adversely affect the verdict, unless it appears that some prejudice followed from them.⁸³

kerson v. State, 78 Miss. 356, 29 So. 170; *Brown v. State*, 69 Miss. 398, 10 So. 579; *Barnett v. Eaton*, 62 Miss. 768, 771; *Nelms v. State*, 13 Smed. & M. 500, 53 Am. Dec. 94. **Mo.**—*State v. Stark*, 72 Mo. 37. **N. J.**—*Price v. Lambert*, 3 N. J. L. 533. **N. C.**—*State v. Wiseman*, 68 N. C. 203, a mistrial was ordered. **Tex.**—*Dansby v. State*, 34 Tex. 392; *Galan v. State*, 68 Tex. Crim. 200, 150 S. W. 1171; *Hogan v. State* (Tex. Crim.), 28 S. W. 949.

[a] **Rule Stated.**—"Officers having a jury in charge while they are deliberating upon their verdict should never speak to them, except to ask them whether they have agreed. Any conversation by the officer ought to subject him to severe punishment by the court; and any verdict returned after such conversation, whether it had any influence or not in producing the verdict, ought to be set aside the moment the fact comes to the knowledge of the court. . . . It is the right of the party to have a verdict which is the result of an uninterrupted and unprejudiced deliberation." *Cole v. Swan*, 4 G. Gr. (Iowa) 32.

[b] **Bailiff Is an Outsider.**—"The bailiff is put in charge of the jury to see that no outside influences are brought to bear upon them. The bailiff is an outsider so far as the deliberations of a trial jury are concerned, he has no right to say one word to the jury which would be calculated to influence the verdict." *Lewis v. State*, 109 Miss. 586, 68 So. 785.

[c] **Non-participation of plaintiff** in the bailiff's misconduct is immaterial. *Barnett v. Eaton*, 62 Miss. 768.

As to communications with outsiders generally, see *infra*, IX, F.

75. *Rickard v. State*, 74 Ind. 375; *Barnett v. Eaton*, 62 Miss. 768.

[a] **Illustrations.**—He should not inform a jurymen of an accident sustained by a member of the latter's family. *Taylor v. Everett*, 2 How. Pr. (N. Y.) 23. But see *Daniel v. Frost*, 62 Ga. 697.

76. See *Johnson v. State*, 106 Miss. 94, 63 So. 338.

77. *Shaw v. State*, 79 Miss. 577, 31 So. 209, sheriff.

78. *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603.

79. *Phoenix Mut. L. Ins. Co. v. Clark*, 59 N. H. 345.

80. **Ark.**—*McFalls v. State*, 66 Ark. 16, 48 S. W. 492. **Ga.**—*Smith v. State*, 78 Ga. 71; *Daniel v. Frost*, 62 Ga. 697. **La.**—*State v. Summers*, 4 La. Ann. 26; *State v. Kennedy*, 8 Rob. 590. **Miss.**—*Johnson v. State*, 106 Miss. 94, 63 So. 338. **Mo.**—*State v. Shipley*, 171 Mo. 544, 71 S. W. 1039. **Ohio.**—*Reighard v. State*, 22 Ohio Cir. Ct. 340, 12 Ohio Cir. Dec. 382.

[a] **A statute prohibiting conversations between the jurors and the officer in charge does not prevent the officer from conveying to the jury such orders given by the court as pertain to their proper custody and care.** *Horton v. State*, 10 Okla. Crim. 294, 136 Pac. 177.

81. See *infra*, IX, E, 1.

82. *Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706.

83. **Ga.**—*Jones v. State*, 135 Ga. 357, 69 S. E. 527; *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154 (message given by

The officer in charge should not talk freely with other persons about the case while the jury remains in his charge,⁸⁴ or communicate to others the substance of improper inquiries made by the jurors.⁸⁵

(II.) **Urging Agreement of Jury.**⁸⁶ — The officer in charge of the jury should not urge upon it the desirability of arriving at an agreement and returning a verdict in the case,⁸⁷ nor state to them the likelihood of their being kept together⁸⁸ until they do agree, or for any particular

juror to be conveyed to his family); *Daniel v. Frost*, 62 Ga. 697. **Ia.**—*State v. Lindsay*, 161 Iowa 39, 140 N. W. 903 (conversation concerning difficulty of understanding the instructions); *State v. Wart*, 51 Iowa 587, 2 N. W. 405. **Kan.**—*State v. Barker*, 43 Kan. 262, 23 Pac. 575. **Mo.**—*State v. Shipley*, 171 Mo. 544, 71 S. W. 1039 (reference to story told by counsel); *State v. Stark*, 72 Mo. 37. **N. M.**—*Territory v. Edie*, 72 N. M. 183, 34 Pac. 46, writing out form of verdict which had been agreed upon. **N. Y.**—*People v. Carnal*, 1 Park. Crim. 256, verdicts should not depend upon the ignorance or corruption of the officer.

84. *People v. Hotz*, 261 Ill. 239, 103 N. E. 1007.

85. *State v. Stark*, 72 Mo. 37.

86. As to court urging agreement of jury, see *infra*, IX, N.

87. **U. S.**—*Charlton v. Kelly*, 156 Fed. 433, 84 C. C. A. 295. **Ala.**—*Alabama Fuel & Iron Co. v. Rice*, 187 Ala. 458, 65 So. 402. **Ga.**—*Nelling v. Industrial Mfg. Co.*, 78 Ga. 260; *Renfroe v. State*, 13 Ga. App. 655, 79 S. E. 758. **Ia.**—*State v. Cowan*, 74 Iowa 53, 36 N. W. 886. **Ky.**—*Gardner v. Arnett*, 21 Ky. L. Rep. 1, 50 S. W. 840. **Miss.**—*Lewis v. State*, 109 Miss. 586, 68 So. 785; *Shaw v. State*, 79 Miss. 577, 31 So. 209; *Brown v. State*, 69 Miss. 398, 10 So. 579. **Mo.**—*State v. Lash*, 225 Mo. 556, 125 S. W. 464, error not prejudicial. **N. J.**—*Price v. Lambert*, 3 N. J. L. 533. **Tex.**—*Booker v. State*, 54 Tex. Crim. 80, 111 S. W. 744; *Hogan v. State (Tex. Crim.)*, 28 S. W. 949. **Wis.**—*Brown v. State*, 127 Wis. 193, 106 N. W. 536.

[a] **Contempt of Court To Do So.** In a case where the officer remarked to two jurors who were holding out against the others: "You must be hard headed. Your head is so hard you could break a brick wall with it," the court in reversing the judgment said: "This conduct was very reprehensible,

and when the testimony was adduced the court would have been warranted in fining the deputy sheriff for contempt. It was an unwarranted if not a criminal, interference with the deliberations of the jury, which has never been countenanced, nor will not be recognized by this court. It matters not how obstinate a juror may be, he is entitled in the deliberations of the jury, to a free, full and fair discussion, and an untrammelled, continued expression of his views in reference to the guilt or innocence of the appellant then on trial, and any unwarranted intermeddling by the deputy sheriff or any other third party is a ruthless violation of the dignity of the court, and comes clearly within the rule of contempt of the court in that it interferes, or tends to interfere, with the due and orderly administration of justice in the courts of this state." *Booker v. State*, 54 Tex. Crim. 80, 111 S. W. 744.

88. **Ga.**—*Nelling v. Industrial Mfg. Co.*, 78 Ga. 260; *Obeare v. Gray*, 68 Ga. 182; *Gholston v. Gholston*, 31 Ga. 625; *Renfroe v. State*, 13 Ga. App. 655, 79 S. E. 758. **Ind.**—*Coolman v. State*, 163 Ind. 503, 72 N. E. 568. **Ia.**—*Brossard v. Chicago, M. & St. P. Ry. Co.*, 167 Iowa 703, 149 N. W. 915; *Cole v. Swan*, 4 G. Gr. 32. **La.**—*State v. Robertson*, 50 La. Ann. 455, 23 So. 455, not prejudicial. **Mass.**—*Leach v. Wilbur*, 9 Allen 212, not prejudicial. **Miss.**—*Lewis v. State*, 109 Miss. 586, 68 So. 785 (statement that jury would be kept together a week unless they agreed improper); *Shaw v. State*, 79 Miss. 577, 31 So. 209; *Alexander v. State*, 22 So. 871; *Brown v. State*, 69 Miss. 398, 10 So. 579; *Barnett v. Eaton*, 62 Miss. 768. **N. Y.**—*Thomas v. Chapman*, 45 Barb. 98. **Wis.**—*Brown v. State*, 127 Wis. 193, 106 N. W. 536. **Wyo.**—*Edwards v. Murray*, 5 Wyo. 153, 38 Pac. 631, not prejudicial.

[a] **Statement by sheriff to the bail-**

period of time, even in answer to their own inquiry.⁸⁹ The prejudicial effect of such remarks depends upon a consideration of all the surrounding circumstances, and frequently, the verdict will be allowed to stand in the face of such misconduct on his part.⁹⁰

d. *Presence in the Jury Room.*—The custodian of the jury should not enter or remain in the jury room during the deliberations⁹¹ of the

iff in charge of the jury, and within their hearing, as to the time the jury would be kept together, is prejudicial. *Shaw v. State*, 79 Miss. 577, 31 So. 209.

[b] **Effect Produced Is Immaterial.**

"We need not speculate in regard to the effect of the communication so made. The statute expressly prohibits the bailiff from speaking to the jury unless by order of the court, or to ask them whether they have agreed upon their verdict. . . . In the case before us there was a flagrant violation of this rule, which was speedily followed by a startling change of opinion on the part of the jury. The statement of the bailiff to the foreman that the jury could not agree to disagree; that the judge would return between 6 and 7 o'clock to receive the verdict if they did agree, and if they had not he would receive it when they did agree, may well have been understood as a warning from the court that no disagreement would be permitted and that he would keep them together until they did agree. Coming from the judge himself in the courtroom, in the presence of the defendant and his counsel, such a statement would have been improper. Made by a bailiff, at the door of the juryroom, in the absence of court, defendant and counsel, and embellished by a contemptuous reference to the possibility of an honest disagreement, it cannot be too severely condemned." *Coolman v. State*, 163 Ind. 503, 72 N. E. 568.

89. *State v. La Grange*, 99 Iowa 10, 68 N. W. 557, awarding a new trial.

[a] **Such Inquiries Improper.**—"It was improper, and therefore unlawful, in the first instance for the jurors to institute such an investigation and interview with the bailiff. An inquiry, how long the court would compel the jury to be kept together unless they agreed upon a verdict, had a direct bearing on the discharge of their duties as jurors. No communication with an outsider, whether officer or stranger, having such a bearing, is lawful. To

hold such communication is misconduct on the part of the juror who does it, as well as the officer or stranger who engages in or tolerates it; and if the verdict is produced or affected by such misconduct, whether the improper influence which entered into it was justified by anything said or done by the officer or stranger, or not, the mischief effecting injustice to a party litigant has been accomplished, for the redress of which there is no remedy but to set aside the verdict." *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 175, 13 So. 65.

90. **U. S.**—*Charlton v. Kelly*, 156 Fed. 433, 84 C. C. A. 295. **Ala.**—*Clay v. City Council of Montgomery*, 102 Ala. 297, 14 So. 646. **Ga.**—*Nelling v. Industrial Mfg. Co.*, 78 Ga. 260; *Collins v. State*, 78 Ga. 87. **Ill.**—*Larsen v. Chicago Union Tr. Co.*, 131 Ill. App. 286. **La.**—*State v. Cady*, 46 La. Ann. 1346, 16 So. 195. **Mass.**—*Leach v. Wilbur*, 9 Allen 212, not prejudicial. **Miss.**—*Alexander v. State*, 22 So. 871. **N. Y.**—*Wiggins v. Downer*, 67 How. Pr. 65. **R. I.**—*Darling v. New York, P. & B. R. Co.*, 17 R. I. 708, 24 Atl. 462, 16 L. R. A. 643. **Tex.**—*Bacon v. State*, 61 Tex. Crim. 206, 134 S. W. 691; *McGuire v. State*, 10 Tex. App. 125. **Wash.**—*State v. Zettler*, 15 Wash. 625, 47 Pac. 35. **Wyo.**—*Edwards v. Murray*, 5 Wyo. 153, 38 Pac. 631, not prejudicial.

Compare State v. La Grange, 99 Iowa 10, 68 N. W. 557.

[a] **Harmless Error.**—The "purposeless utterance of a thoughtless officer" not made as "a threat, or advice or even as a suggestion," is harmless. *State v. Cady*, 46 La. Ann. 1346, 16 So. 195.

91. **Ill.**—*Heston v. Neathammer*, 180 Ill. 150, 54 N. E. 310. **Ind.**—*Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706; *Waterman v. State*, 116 Ind. 51, 18 N. E. 63; *Rickard v. State*, 74 Ind. 275. See *McClary v. State*, 75 Ind. 260. **Ia.**—*State v. Thompson*, 87 Iowa 670, 54 N. W. 1077. **Kan.**—*State v. Brown*, 22 Kan. 222. **Mass.**—*Brady v. American Print Wks.*, 119 Mass. 98,

jury, especially where he has also been a witness in the case.⁹² His presence there will not, however, vitiate the verdict in all cases, since, although it constitutes an irregularity which is strongly condemned, the circumstances of each case will determine whether the verdict will be allowed to stand.⁹³ A few cases have considered the intrinsic danger of such misconduct to be so great as to require the verdict to be set aside on the mere showing that it has taken place,⁹⁴ and a new trial has been granted in such cases.⁹⁵

For the officer in the regular performance of his duties to sleep in the juryroom, is not improper, however.⁹⁶

C. PRESENCE OF JURY DURING ARGUMENTS AND PROCEEDINGS.⁹⁷ — 1. **In General.**—In civil cases, questions of law are usually for the court and should be argued exclusively to it;⁹⁸ but there is no absolute rule of law which requires that the jury be sent out of the court-

where the deputy sheriff stepped into the juryroom to warm himself. **Mich.** *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. **Neb.**—*Cooney v. State*, 61 Neb. 342, 85 N. W. 281; *Gandy v. State*, 24 Neb. 716, 40 N. W. 302. **S. C.**—*State v. Senn*, 32 S. C. 392, 404, 11 S. E. 292. **Tenn.**—*Clapp v. State*, 94 Tenn. 186, 30 S. W. 214. **Tex.** *McGuire v. State*, 10 Tex. App. 125.

[a] "It is the policy of the law that the verdict of every jury shall be reached by free and deliberate consultation, without bias or prejudice and be based upon the evidence. The evidence is to be carefully weighed, the instructions to the court considered, and a conclusion reached which shall satisfy each member of the jury. This can only be had by preventing an intrusion for any considerable time by the bailiff, or others, while the jury are considering their verdict." *Gandy v. State*, 24 Neb. 716, 40 N. W. 302.

92. **Kan.**—*State v. Snyder*, 20 Kan. 306. **Miss.**—*Tarkington v. State*, 72 Miss. 731, 17 So. 768. **Neb.**—*Cooney v. State*, 61 Neb. 342, 85 N. W. 281. **Vt.**—*Compare State v. Flint*, 60 Vt. 304, 14 Atl. 178.

93. See the following: **Ga.**—*Cornwall v. State*, 91 Ga. 277, 18 S. E. 154; *Smith v. State*, 78 Ga. 71. **Ill.**—*Heston v. Neathammer*, 180 Ill. 150, 54 N. E. 310; *Gainey v. People*, 97 Ill. 270, 37 Am. Rep. 109. **Ind.**—*Shular v. State*, 160 Ind. 300, 66 N. E. 746; *Fitzgerald v. Goff*, 99 Ind. 28. But see *Houk v. Allen*, 126 Ind. 563, 25 N. E. 897, 11 L. R. A. 706. **Ia.**—*State v. Beste*, 91 Iowa 565, 60 N. W. 112; *State v. Thompson*, 87 Iowa 670, 54 N. W. 1077. **Kan.**—*State v. Bailey*, 32 Kan. 83, 3

Pac. 769. **La.**—*State v. Caulfield*, 23 La. Ann. 148. **Miss.**—*Green v. State*, 59 Miss. 501. **Mo.**—*State v. Spaugh*, 200 Mo. 571, 98 S. W. 55; *State v. Hopper*, 71 Mo. 425. **Mont.**—*State v. Pepo*, 23 Mont. 473, 59 Pac. 721. **N. Y.** *People v. Draper*, 28 Hun 1, 1 N. Y. Crim. 138; *People v. Hartung*, 17 How. Pr. 85, 8 Abb. Pr. 132, 4 Park. Crim. 256; *In re Benson*, 16 N. Y. Supp. 111. **N. C.**—*State v. Harper*, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46. **Okla.** *Graves v. Territory*, 16 Okla. 538, 86 Pac. 521. **Pa.**—*White v. White*, 5 Rawle 61. **S. C.**—*State v. Sanders*, 75 S. C. 409, 56 S. E. 35; *State v. Senn*, 32 S. C. 392, 11 S. E. 292. **S. D.**—*Williams v. Chicago & N. W. Ry. Co.*, 11 S. D. 463, 78 N. W. 949. **Tex.**—*Slaughter v. State*, 24 Tex. 410; *McGuire v. State*, 10 Tex. App. 125. **Vt.**—*State v. Flint*, 60 Vt. 304, 14 Atl. 178. **Wash.**—*State v. Aker*, 54 Wash. 342, 103 Pac. 420. **Wis.**—*Crockett v. State*, 52 Wis. 211, 8 N. W. 603, 38 Am. Rep. 733.

94. **Ind.**—*Rickard v. State*, 74 Ind. 275. **Mich.**—*People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438. **Neb.**—*Gandy v. State*, 24 Neb. 716, 40 N. W. 302.

95. *Dansby v. State*, 34 Tex. 392. **96. Ga.**—*Cornwall v. State*, 91 Ga. 277, 18 S. E. 154; *Kirk v. State*, 73 Ga. 620; *Doyal v. State*, 70 Ga. 134. **Miss.** *Johnson v. State*, 106 Miss. 94, 63 So. 338; *Webb v. State*, 21 So. 133. **Mont.** *State v. Pepo*, 23 Mont. 473, 59 Pac. 721. **N. C.**—*State v. Morris*, 84 N. C. 756.

97. During argument on request that jurors be kept together, see *infra*, IX, D, 1, b, (11), note 46.

98. Province of judge and jury, see

room while such an argument is in progress, though the court may, in its discretion, do so.⁹⁹ A timely request by counsel that the jury be excused must always be preferred.¹ In criminal cases the same rule has been applied,² although in some jurisdictions it has been held that the jury should be present even where counsel was confining his argument to the law of the case.³

Where an argument takes place in the presence of the jury, they should be cautioned that they are not to be influenced by what they have heard, nor to draw inferences therefrom prejudicial to either party.⁴

Waiver of Rights.—The court should not call upon either party to waive a legal right in the presence of the jury.⁵

2. During Arguments on Admissibility of Evidence.—Whether the jury shall retire during arguments of counsel relating to the admissibility of proffered evidence rests largely in the discretion of the court.⁶ The same rule applies where a preliminary examination is required to determine the competency of either testimony or a witness.⁷

generally the title "Province of Judge and Jury."

99. See the following: **Cal.**—*Sanborn v. Cunningham*, 99 Cal. xix, 33 Pac. 894. **Ga.**—*Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69; *Rutledge v. Hudson*, 80 Ga. 266, 5 S. E. 93. **Ind.**—*Ruffing v. Tilton*, 12 Ind. 259, as to proper form of verdict. **Ia.**—*Hall v. Carter*, 74 Iowa 364, 37 N. W. 956. **N. C.**—*Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285. **Tex.**—*Gulf, B. & K. C. Ry. Co. v. Harrison* (Tex. Civ. App.), 104 S. W. 399.

See 2 STANDARD PROC. 727.

[a] "Reports of facts in other cases and opinions of courts sometimes contain matter which is not suited to be read to or before a jury." *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69, 27 L. R. A. (N. S.) 1. See *Gulf, B. & K. C. Ry. Co. v. Harrison* (Tex. Civ. App.), 104 S. W. 399.

1. *Corker v. Spurling*, 8 Ga. App. 100, 68 S. E. 557; *Hedlun v. Holy Terror Min. Co.*, 16 S. D. 261, 92 N. W. 31.

2. *United States v. Holt*, 168 Fed. 141; *Driggers v. State*, 38 Fla. 7, 20 So. 758.

[a] Reasons controlling the court in deciding legal questions may be stated in the presence of the jury. *Patterson v. State*, 86 Ga. 70, 12 S. E. 174.

3. *Patterson v. State* (Tex. Crim.), 60 S. W. 557. Compare *Upton v. State*, 48 Tex. Crim. 289, 88 S. W. 212; *Vernon v. State* (Tex. Crim.), 33 S. W. 364.

4. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285.

As to giving cautionary instructions generally, see 13 STANDARD PROC. 948 et seq.

5. *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423.

6. **Ala.**—*Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791. **Ga.** See *Higgins v. Cherokee R. R.*, 73 Ga. 149. **Ill.**—*Illinois Central R. Co. v. Whiteacre*, 122 Ill. App. 333. **La.**—*State v. Allen*, 37 La. Ann. 685. **N. Y.** *Brill v. Flagler*, 23 Wend. 354, reading writing introduced to impeach witness. **Tex.**—*Williams v. State* (Tex. Crim.), 53 S. W. 859; *Poole v. State*, 45 Tex. Crim. 348, 76 S. W. 565; *White v. State*, 10 Tex. App. 381.

7. **U. S.**—*Holt v. United States*, 218 U. S. 245, 249, 31 Sup. Ct. 2, 54 L. ed. 1021. **Ala.**—*Mose v. State*, 36 Ala. 211. **Ga.**—*Fletcher v. State*, 90 Ga. 468, 17 S. E. 100 (*explaining and modifying* *Hall v. State*, 65 Ga. 36); *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724. **La.** *State v. Wright*, 48 La. Ann. 1488, 21 So. 85. **Mass.**—See *Com. v. Rogers*, 181 Mass. 184, 63 N. E. 421. **Miss.**—*Ellis v. State*, 65 Miss. 44, 3 So. 188, 7 Am. St. Rep. 634 (the jury should retire during determination of voluntary character of confession); *Kraner v. State*, 61 Miss. 158. **Mo.**—*State v. Stebbins*, 188 Mo. 387, 87 S. W. 460, voluntariness of confession. **Neb.**—*Shepherd v. State*, 31 Neb. 389, 47 N. W. 1118. **N. H.** *State v. Wood*, 53 N. H. 484. **N. Y.** *People v. Smith*, 104 N. Y. 491, 494, 10 N. E. 873, 58 Am. Rep. 537 (dying

An offer to prove specific facts by a witness may, where the court fears that such offer might prove prejudicial to the adverse party, be required to be made only after the jury has retired;⁸ but ordinarily the jury will not be excused at such times.⁹

3. During Argument of Motion for Directed Verdict or Nonsuit. It is the better practice to excuse the jury during argument on a motion for a directed verdict, or nonsuit.¹⁰ The matter is, however, largely within the sound discretion of the court.¹¹

4. During Presentation of Complaint of Misconduct.—Alleged misconduct of parties, witnesses, counsel, or other persons should be

declaration); *People v. Kent*, 41 Misc. 191, 83 N. Y. Supp. 948, 13 N. Y. Ann. Cas. 285, mental condition of person who has confessed. *Ohio*.—*Lefevre v. State*, 50 Ohio St. 584, 35 N. E. 52. *Ore*.—*State v. Kelly*, 28 Ore. 225, 42 Pac. 217, 52 Am. St. Rep. 777; *State v. Shaffer*, 23 Ore. 555, 32 Pac. 545. *Tex*.—*Compare Carter v. State*, 37 Tex. 362.

[a] **Reason of the Rule.**—"While the jury is a component part of the court, it is not a part of its duty to determine upon the competency of evidence, nor is it necessary that it should be present while the judge examines a witness to determine upon the competency of his testimony. The practice of retiring the jury in such cases is to be commended rather than condemned, since its effect is to keep the jury wholly uninformed as to extraneous matters which in no event should be considered by it in forming the verdict." *Kraner v. State*, 61 Miss. 158.

[b] **Privilege.**—Whether relation of attorney and client existed thus making offered testimony of a witness privileged was properly determined by the court after the jury was excused. *McDonald v. McDonald*, 142 Ind. 55, 74, 41 N. E. 336.

[c] **Admissibility of Confessions.**—"The argument that if the preliminary hearing is had in the presence of the jury they will ordinarily learn the nature of the confession and be influenced thereby in arriving at a verdict, although the court may refuse to admit it in evidence, is based upon an unwarranted assumption of the ignorance and incompetency of the jury. During such an examination they are but silent spectators, who necessarily understand that out of its results something may or may not come before them as evidence, and that until the court rules the question is for its con-

sideration and not for theirs. In the judgment of the law juries are deemed capable of that amount of discrimination; it would be impossible to conduct a jury trial on any other principle." *State v. Kelly*, 28 Ore. 225, 42 Pac. 217, 52 Am. St. Rep. 777.

8. Ill.—*Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 228, 71 N. E. 863; *Maxwell v. Habel*, 92 Ill. App. 510. *Ky.*—*Marcum v. Hargis*, 31 Ky. L. Rep. 1117, 104 S. W. 693. *Mo.*—*Leicher v. Keeney*, 98 Mo. App. 394, 72 S. W. 145. *N. C.*—*State v. Moore*, 104 N. C. 743, 10 S. E. 183.

9. Ind.—*Consumers' Paper Co. v. Eyer*, 160 Ind. 424, 66 N. E. 994; *Board of Commissioners v. O'Connor*, 137 Ind. 622, 646, 35 N. E. 1006, 37 N. E. 16. *Neb.*—*Omaha Coal, Coke & Lime Co. v. Fay*, 37 Neb. 68, 55 N. W. 211. *Pa.*—*See Philadelphia v. Reeder*, 173 Pa. 281, 34 Atl. 17. *Tex.*—*Moss v. Gulf C. & S. F. Ry. Co.*, 46 Tex. Civ. App. 463, 103 S. W. 221.

10. U. S.—*Illinois Central R. Co. v. Griffin*, 80 Fed. 278, 25 C. C. A. 413. *Conn.*—*Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 76 Atl. 298. *Ga.*—*Compare Higgins v. Cherokee R. R.*, 73 Ga. 149.

[a] **Remarks of the Court.**—The trial court in ruling on the sufficiency of testimony may state the impression which certain testimony has made upon him, or to what, in his opinion, a witness has testified, even in the presence of the jury. *Corker v. Sperling*, 8 Ga. App. 100, 68 S. E. 557.

[b] **Waiver.**—Failure to ask for the retirement of the jury during argument of motion for a nonsuit, prevents a party from urging prejudice from the court's remarks in passing on the motion. *Myrberg v. Baltimore & S. M. R. Co.*, 25 Wash. 364, 65 Pac. 539.

11. Elliott v. New York, N. H. & H. R. Co., 83 Conn. 320, 76 Atl. 298.

brought to the attention of the court during the absence of the jury.¹² So also, witnesses should not be arrested for perjury in their presence.¹³

D. SEPARATION OF JURY.—1. Authorized Separations.¹⁴—a. *Prior to Impaneling of Jury.*¹⁵—Jurors, who have been examined as a whole and passed for cause but not finally selected or sworn, may be allowed to separate by the court.¹⁶ And where a portion only of the jury has been selected, it is discretionary with the court to allow such jurors to separate during an adjournment of the court,¹⁷ especially where it is the practice not to swear the jurors until the full panel is selected,¹⁸ although it is sometimes said to be the better practice not to allow a separation,¹⁹ and in some jurisdictions it is not allowed, in capital cases,²⁰ even with the consent of the defendant,²¹ unless each and all of the jurors are placed in charge of an officer of the court.²²

[a] **Instructions** should be given the jury where it has been allowed to remain during the arguments, to the effect that such arguments were designed for the court's information and not for theirs. *Elliott v. New York, N. H. & H. R. Co.*, 83 Conn. 320, 76 Atl. 298. As to instructions generally, see the title "Instructions."

12. Ga.—*Travelers' Ins. Co. v. Shepard*, 85 Ga. 751, 813, 12 S. E. 18, communications with witness placed under the rule. **Kan.**—*Achison & N. R. Co. v. Wagner*, 19 Kan. 335. **N. Y.** *People v. Koerner*, 102 N. Y. Supp. 93, *affirmed*, 191 N. Y. 528, 84 N. E. 1117, alleged communications between witness and spectator.

[a] **Alleged misconduct of a party** should be investigated by the court privately unless it has already come indirectly to the attention of the jury. *Achison & N. R. Co. v. Wagner*, 19 Kan. 335.

[b] **But an intoxicated witness** is properly arrested in the presence of the jury. *Marcum v. Hargis*, 31 Ky. L. Rep. 1117, 104 S. W. 693.

13. State v. Rothwell, 5 Boyce (Del.) 312, 92 Atl. 859.

[a] **Prejudicial Effect.**—This does not, however, constitute prejudicial error where a defendant has been convicted, since "the acts of the officers were quite as likely to have created a feeling of sympathy on the part of the jury for the prisoner as one of prejudice against him." *State v. Rothwell*, 5 Boyce (Del.) 312, 92 Atl. 859.

14. As to unauthorized separations, see *infra*, IX, D, 2.

15. As to selecting and impanelling the trial jury, see *supra*, VII.

16. Ga.—*Smith v. State*, 63 Ga. 168. **Tex.**—*Martin v. State*, 57 Tex. Crim. 595, 124 S. W. 681. **Wash.**—*State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Clark*, 58 Wash. 128, 107 Pac. 1047; *State v. Voorhies*, 12 Wash. 53, 40 Pac. 620.

17. Ark.—*Reeves v. State*, 84 Ark. 569, 106 S. W. 945. **Cal.**—*People v. Chaves*, 122 Cal. 134, 54 Pac. 596. **Fla.** *Frances v. State*, 6 Fla. 306. **Ill.**—*People v. Stowers*, 254 Ill. 588, 98 N. E. 986. **Mass.**—*Com. v. Phelps*, 209 Mass. 396, 95 N. E. 868, Ann. Cas. 1912B, 566. **Miss.**—*Compare McQuillen v. State*, 8 Smed. & M. 587. **Mo.**—*State v. Todd*, 146 Mo. 295, 47 S. W. 923; *State v. Burns*, 33 Mo. 483. **Va.**—*Curtis v. Com.*, 87 Va. 589, 13 S. E. 73; *Epes' Case*, 5 Gratt. (46 Va.) 676; *Toole v. Com.*, 11 Leigh (39 Va.) 714.

18. Jones v. State, 69 Tex. Crim. 447, 153 S. W. 897 (*overruling* *Wilecock v. State*, 64 Tex. Crim. 1, 141 S. W. 88); *Woodson v. State*, 40 Tex. Crim. 685, 51 S. W. 918.

Time of swearing jury, see *supra*, VIII, B.

19. Bowman v. Com., 146 Ky. 486, 143 S. W. 47.

20. See Heck v. Com., 163 Ky. 518, 174 S. W. 19.

21. Gant v. State, 55 Tex. Crim. 284, 116 S. W. 801; *English v. State*, 28 Tex. App. 500, 13 S. W. 775; *Grissom v. State*, 4 Tex. App. 374.

22. Gant v. State, 55 Tex. Crim. 284, 116 S. W. 801.

Separation in charge of an officer, generally, see *infra*, IX, D, 1, e.

Unaccepted jurors should not be allowed to remain with jurors who have been accepted and sworn.²³

b. *During the Trial.*—(I.) **In Criminal Cases.**—(A.) **IN GENERAL.** The early common-law rule was that when a jury was once charged with the trial of a prisoner, no separation would be allowed until a verdict had been returned.²⁴ This rule has been greatly relaxed under the modern practice, however, and a broad discretion is now usually vested in the trial court to determine the desirability of keeping the jury together during the trial.²⁵ In some jurisdictions a separation is allowed in any felony case not punishable by death or con-

23. *State v. Craighead*, 114 La. 84, 38 So. 28.

24. **Minn.**—*Bilansky v. State*, 3 Minn. 427. **N. Y.**—*People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332; *Stephens v. People*, 4 Park. Crim. 396, 497. **S. C.** *State v. M'Kee*, 1 Bailey 651, 21 Am. Dec. 499.

[a] "The reason of the rule was two fold. It was intended to prevent intemperance on the part of the jury, and accelerate the finding of a verdict. . . . The other purpose was to prevent them from having communication with any of the parties interested and from receiving any fresh evidence in private, and any violation of the rule in these latter respects vitiated the verdict." *State v. Cotts*, 49 W. Va. 615, 621, 39 S. E. 605, 55 L. R. A. 176.

[b] **Separation Amounted to an Acquittal.**—*State v. M'Kee*, 1 Bailey (S. C.) 651, 653, 21 Am. Dec. 499.

25. See the following: **U. S.**—*United States v. Holt*, 168 Fed. 141. **Ala.** *Robbins v. State*, 49 Ala. 394; *Pearson v. State*, 5 Ala. App. 68, 59 So. 526. But see *Williams v. State*, 45 Ala. 57. **Ariz.**—*Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631. **Ark.**—*Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *Johnson v. State*, 32 Ark. 309. **Cal.** *People v. Witt*, 170 Cal. 104, 148 Pac. 928; *People v. Coyne*, 116 Cal. 295, 48 Pac. 218. **Del.**—*State v. Van Winkle*, 4 Boyce 132, 86 Atl. 310. **Ga.**—*Bowdoin v. State*, 113 Ga. 1150, 39 S. E. 478. **Ill.**—*Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *Daxanbeklar v. People*, 93 Ill. App. 553. **Kan.**—*Lewis v. State*, 4 Kan. 296. **Ky.**—*Chaney v. Com.*, 149 Ky. 464, 149 S. W. 923; *Wade v. Com.*, 106 Ky. 321, 50 S. W. 271, defendant may waive right to have jury kept together. **La.**—*State v. Baudoin*, 115 La. 773, 40 So. 42;

State v. Antoine, 52 La. Ann. 488, 26 So. 1011; *State v. Magee*, 48 La. Ann. 901, 19 So. 933. **Minn.**—*State v. Salverson*, 87 Minn. 40, 91 N. W. 1. **Neb.** *Langford v. State*, 32 Neb. 782, 49 N. W. 766; *Kruger v. State*, 1 Neb. 365. **N. D.**—*State v. Glass*, 29 N. D. 620, 151 N. W. 229. **Ohio.**—*State v. Ferrell*, 69 Ohio St. 521, 69 N. E. 995; *Davis v. State*, 15 Ohio 72, 45 Am. Dec. 559; *Sargent v. State*, 11 Ohio 472. **Okla.** *Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658. **Ore.**—*State v. Morris*, 58 Ore. 397, 114 Pac. 476; *State v. Shaffer*, 23 Ore. 555, 32 Pac. 545. **Pa.** *McCreary v. Com.*, 29 Pa. 323; *Com. v. Swift*, 44 Pa. Super. 546; *Com. v. Simon*, 44 Pa. Super. 538. **S. C.**—*State v. Anderson*, 2 Bailey 565. **Utah.**—*People v. Shafer*, 1 Utah 260. **Vt.**—*State v. Lawrence*, 70 Vt. 524, 41 Atl. 1027. **Wis.**—*Baker v. State*, 88 Wis. 140, 59 N. W. 570.

[a] The court is not required to yield to a request by either party, that the jury be kept together. *State v. Nelson*, 91 Minn. 143, 97 N. W. 652.

[b] **Inherent Power of Court.**—Where a statute allows a separation except where one party objects "it is in the sound discretion of the trial court on its own motion to require the jury to be kept together." *State v. Garrity*, 98 Iowa 101, 67 N. W. 92.

[c] A statute allowing a separation is not unconstitutional as being in conflict with the provision that "the right of a trial by jury shall be secured to all and remain inviolate." *People v. Chaves*, 122 Cal. 134, 54 Pac. 596; *Burns v. State*, 8 Okla. Crim. 554, 129 Pac. 657; *Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658.

[d] **During prolonged deliberations** some degree of separation is often inevitable. The trial court must deter-

finement in the penitentiary for more than a specified period of time.²⁶ In other jurisdiction a separation is permitted in misdemeanor but not in felony cases,²⁷ except with the consent of both parties.²⁸ Statutes requiring the consent of parties to a separation of the jury are mandatory in character.²⁹ Where a defendant consents to the separation of the jury on condition that an officer shall accompany the jurors, if the condition is not complied with, the separation will be treated as an unauthorized separation and the verdict set aside.³⁰

It is preferable that a request by either party that the jury be kept together should be made in writing,³¹ in open court.³² The court

mine to what extent it shall be allowed. *People v. Dunbar Contracting Co.*, 215 N. Y. 416, 426, 109 N. E. 554.

[e] **During Recess of Court.**—Allowing a juror to leave the courtroom for a few minutes during the trial but while proceedings were temporarily suspended, is not improper. *People v. Witt*, 170 Cal. 104, 148 Pac. 928.

[f] **While a view is being taken**, jurors should not be allowed to separate. *People v. Hull*, 86 Mich. 449, 49 N. W. 288. As to view generally, see the title "**View**;" and 13 ENCY. OF EV. 953, et seq.

[g] **The discretionary power of the court is not exhausted upon its original exercise**, however; it may thereafter make such new and different order as the circumstances may call for. *Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631; *Baker v. State*, 88 Wis. 140, 59 N. W. 570. Compare *People v. Maugh's*, 149 Cal. 253, 264, 86 Pac. 187, where after the court had placed the jury in the custody of an officer it was held to be prejudicial error to allow some of the jurors to separate and visit their homes.

26. See *Johnson v. Com.*, 102 Va. 927, 46 S. E. 789; *Jones v. Com.*, 79 Va. 213, ten years.

[a] Under such a statute, (1) where two felonies are being prosecuted in the same action, the punishment for both of which together may exceed ten years, the jury must not be allowed to separate. *Johnson v. Com.*, 102 Va. 927, 46 S. E. 789. (2) And where the greater of two offenses charged is punishable by ten years imprisonment, the jury should not be allowed to separate. *Jones v. Com.*, 31 Gratt. (72 Va.) 830.

Separation in capital cases, see *infra*, IX, D, 1, b, (I), (B).

27. *Ia.*—*Grable v. State*, 2 G. Gr. 559. *Miss.*—*Prewitt v. State*, 65 Miss.

437, 4 So. 346. *Tenn.*—*Long v. State*, 132 Tenn. 649, 179 S. W. 315. *Wash.* *State v. Bennett*, 71 Wash. 673, 129 Pac. 409. Compare *State v. Tommy*, 19 Wash. 270, 53 Pac. 157.

28. *Ind.*—See *Henning v. State*, 106 Ind. 386, 396, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; *Anderson v. State*, 28 Ind. 22; *Jones v. State*, 2 Blackf. 475; *Quinn v. State*, 14 Ind. 589. *Ia.* *State v. Garrity*, 98 Iowa 101, 67 N. W. 92; *State v. Rainsbarger*, 74 Iowa 196, 37 N. W. 153; *State v. Felter*, 25 Iowa 67. The practice under the earlier statute left the question to the discretion of the court. *State v. Gillick*, 10 Iowa 98. *Mo.*—*State v. Frier*, 118 Mo. 648, 24 S. W. 220; *State v. Orrick*, 106 Mo. 111, 125, 17 S. W. 176, 329; *State v. Murray*, 91 Mo. 95, 3 S. W. 397; *State v. Mix*, 15 Mo. 153. *Nev.* *State v. McMahon*, 17 Nev. 365, 30 Pac. 1000. *N. Y.*—See *Stephens v. People*, 19 N. Y. 549. *Wash.*—*State v. Morden*, 87 Wash. 465, 151 Pac. 832.

[a] **Consent of counsel in presence of accused sufficient.** *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810. *Contra*, *Brown v. State*, 38 Tex. 482.

[b] **In Texas** even when the defendant consents to a separation, the individual jurors must be placed under the protection and control of the officers of the court. *Porter v. State*, 1 Tex. App. 394; *English v. State*, 28 Tex. App. 500, 13 S. W. 775.

29. *State v. Smith*, 102 Iowa 656, 72 N. W. 279; *State v. Morden*, 87 Wash. 465, 151 Pac. 832; *State v. Place*, 5 Wash. 773, 32 Pac. 736.

30. *Wilson v. State*, 18 Tex. App. 576.

Effect of unauthorized separations generally, see *infra*, IX, D, 2, c.

31. *Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631; *State v. Giudice*, 170 Iowa 731, 153 N. W. 336.

32. *State v. Smith*, 107 Iowa 480, 78

should be careful not to indicate to the jury from which party such a request comes,³³ and it should not ask counsel in the presence of the jury whether they will consent to a separation.³⁴ Such an inquiry may constitute reversible error,³⁵ though this is not usually the case where the court has a discretionary power to allow or refuse to allow a separation.³⁶ An objection to such an inquiry by the court must, however, be made at the time.³⁷

An adjournment during which a separation is permitted may properly be taken not merely from one day to another but for longer periods of time, during the same term of court.³⁸

(B.) IN CAPITAL CASES.—Many authorities apply the same rule to capital as to other felonies, and leave to the discretion of the trial court the determination of the propriety of allowing the jury to separate during the trial.³⁹ As a general rule, however, that discretion should be exercised by refusing to allow the jury to separate in such

N. W. 224, the presence of counsel is not required.

33. *State v. Giudice*, 170 Iowa 731, 153 N. W. 336.

[a] "The presiding judge in making the order, should assume the responsibility of so doing, for if this be cast on either party, the jury may feel resentful, and even though the order be essential to a fair trial, the announcement by counsel that it was not at the instance of the state, ought not to have been made, and the practice of the court in stating to the jury that such a request had been made and must be granted, is disapproved." *State v. Giudice*, 170 Iowa 731, 153 N. W. 336, 340.

34. *Ga.*—*Carter v. State*, 10 Ga. App. 851, 74 S. E. 440. *Tex.*—*Early v. State*, 1 Tex. App. 248, 28 Am. Rep. 409. *Wash.*—*State v. Holedegen*, 15 Wash. 443, 46 Pac. 652.

Asking party to waive legal rights in presence of jury, see *supra*, IX, C, 1.

35. *State v. Parker*, 25 Wash. 405, 65 Pac. 776, wherein a juror asked permission to go home to see his sick daughter, and the defendant in answer to the court's inquiry gave his consent, but it was held that a new trial was required, the court saying: "Here the trial had proceeded for two days without a separation of the jury, and when the case was almost ready to submit to the jury the appellant was required to say, in the presence of the juror who was asking a personal favor, whether he was willing to grant it or not. The jury could not legally separate without the consent of

the appellant, and we believe from the showing here that he did not voluntarily consent within the meaning of the statute."

36. *Ia.*—*State v. Walton*, 92 Iowa 455, 61 N. W. 179. *La.*—*State v. Veillon*, 105 La. 411, 29 So. 883. *Minn.*—*State v. Salverson*, 87 Minn. 40, 91 N. W. 1.

As to discretion of court, see *supra*, this section.

37. *Carter v. State*, 10 Ga. App. 851, 74 S. E. 440.

38. *Ossenkop v. State*, 86 Neb. 539, 126 N. W. 72 (a continuance for twenty-one days on account of the quarantining of important witnesses who had attacks of smallpox, was held not to be improper); *Bennett v. Com.*, 106 Va. 834, 55 S. E. 698.

As to continuances generally, see the title "Continuances."

39. *U. S.*—*Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021. *Ark.*—*Hamilton v. State*, 62 Ark. 543, 36 S. W. 1054; *Johnson v. State*, 32 Ark. 309. *Cal.*—*People v. Chaves*, 122 Cal. 134, 54 Pac. 596; *People v. Ebanks*, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269. *Kan.*—*State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050. *Minn.*—*State v. Williams*, 96 Minn. 351, 105 N. W. 265; *State v. Nelson*, 91 Minn. 143, 97 N. W. 652; *State v. Ryan*, 13 Minn. 370; *Bilansky v. State*, 3 Minn. 427. *Neb.*—*St. Louis v. State*, 8 Neb. 405, 1 N. W. 371; *Walrath v. State*, 8 Neb. 80. *N. Y.*—*Stephens v. People*, 19 N. Y. 549, *affirming* 4 Park. Crim. 396. *Ohio.*—*Bergin v. State*, 31 Ohio St. 111. *Okla.*—*Arms v. State*, 2 Okla. Crim. 567,

cases;⁴⁰ and in some jurisdictions, a separation is never allowed,⁴¹ even though the defendant consents to it,⁴² though upon this latter proposition there are authorities to the contrary.⁴³

(II.) **In Civil Cases.**—While the court has inherent power in civil cases, to order the jury kept together during the trial, even in the absence of a statute, it is not customary to adopt this practice.⁴⁴ The matter is left very largely to the discretion of the court,⁴⁵ and the court need not accede to the request of either party that they be kept together.⁴⁶ The fact that an adjournment was taken for several days and the jury permitted to separate in the meantime, does not constitute an abuse of the court's discretion;⁴⁷ and the court may properly allow individual jurors to leave the others on a necessity therefor arising.⁴⁸ It is also discretionary with the court to allow the jury to separate, after the evidence is in, arguments concluded and instructions given, for needed rest or meals, prior to finally submitting the case to them.⁴⁹ Jurors who have been allowed to separate during an adjournment of

103 Pac. 658. **Ore.**—*State v. Shaffer*, 23 Ore. 555, 32 Pac. 545. See *State v. Olberman*, 33 Ore. 556, 55 Pac. 866. **S. C.**—*State v. Bates*, 87 S. C. 431, 69 S. E. 1075 (after arguments made and before charge given); *State v. Stewart*, 26 S. C. 125, 1 S. E. 468; *State v. Belcher*, 13 S. C. 459; *State v. McMurray*, 3 Strobb. 33.

40. **Ark.**—*Hamilton v. State*, 62 Ark. 543, 554, 36 S. W. 1054. **Minn.**—*State v. Williams*, 96 Minn. 351, 105 N. W. 265. Compare *Bilansky v. State*, 3 Minn. 427. **Okla.**—*Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658.

41. **Del.**—*State v. Brown*, 2 Marv. 380, 36 Atl. 458. **Ill.**—*Jumpertz v. People*, 21 Ill. 375. **La.**—*State v. Hornsby*, 8 Rob. 554, 41 Am. Dec. 305; *State v. Evans*, 21 La. Ann. 321. See *State v. Walters*, 135 La. 1070, 66 So. 364. **Mo.**—*State v. Gray*, 100 Mo. 523, 13 S. W. 806; *McLean v. State*, 8 Mo. 153. **N. J.**—*State v. Cucuel*, 31 N. J. L. 249. **Pa.**—*Peiffer v. Com.*, 15 Pa. 468, 53 Am. Dec. 605. **Utah.**—*People v. Shafer*, 1 Utah 260.

[a] "The practice has varied, with perhaps a slight present tendency in the more conservative direction," *Holt v. United States*, 218 U. S. 245, 251, 31 Sup. Ct. 2, 54 L. ed. 1021.

42. **La.**—*State v. Populus*, 12 La. Ann. 710. **Miss.**—*Woods v. State*, 43 Miss. 364. **Mo.**—*State v. Murray*, 91 Mo. 95, 3 S. W. 397. See *State v. Collins*, 81 Mo. 652. **Pa.**—*Peiffer v. Com.*, 15 Pa. 468, 53 Am. Dec. 605. **Tenn.**—*Lee v. State*, 132 Tenn. 655, 179 S. W. 145, L. R. A. 1916B, 963; *Wesley*

v. State, 11 Humph. 502. **Utah.**—*People v. Shafer*, 1 Utah 260.

43. **Ill.**—*McKinney's Case*, 7 Ill. 553. **Ind.**—*Quinn v. State*, 14 Ind. 589. **N. Y.**—*Stephens v. People*, 19 N. Y. 549.

44. See *Smith's Admx. v. Middleboro Elec. Co.*, 164 Ky. 46, 174 S. W. 773, Ann. Cas. 1917A, 1164.

45. **U. S.**—*Guardian Fire Ins. Co. v. Central Glass Co.*, 194 Fed. 851, 114 C. C. A. 639. **Ga.**—*Central of Georgia Ry. Co. v. Hall*, 109 Ga. 367, 34 S. E. 605; *Stancell v. Kenan*, 33 Ga. 56. **Ky.**—*Liverpool & London & Globe Ins. Co. v. Wright*, 166 Ky. 159, 179 S. W. 49. **Tex.**—*Noel v. Denman*, 76 Tex. 306, 13 S. W. 318; *San Antonio & A. P. Ry. Co. v. Bennett*, 76 Tex. 151, 13 S. W. 319.

46. *International & G. N. R. Co. v. MeVey*, 46 Tex. Civ. App. 181, 102 S. W. 172.

[a] **Motion Is Properly Argued in Absence of Jury.**—*Central of Georgia Ry. Co. v. Hall*, 109 Ga. 367, 368, 34 S. E. 605. As to presence of jury during arguments, etc., see generally *supra*, IX, C.

47. *Kothman v. Faseler* (Tex. Civ. App.), 84 S. W. 390.

48. *Parsons v. Huff*, 38 Me. 137, a sick juror.

49. *Dozenback v. Raymer*, 13 Colo. 451, 459, 22 Pac. 787; *Adkins v. Williams*, 23 Ga. 222 (for supper); *Riggins' Exr. v. Brown*, 12 Ga. 271, from Saturday night to Monday morning.

Separation after final submission, see *infra*, IX, D, 1, c.

court have complete freedom of action, save that they must do nothing which will interfere with their ability to render a fair and impartial judgment in the case.⁵⁰

c. *After Submission of Case.*—(I.) *In Criminal Cases.*—In some jurisdictions, no distinction is made between the right of the court in its discretion to authorize a separation before and after a submission of the case to the jury.⁵¹ The more prevalent practice is not to allow a separation after submission of the case,⁵² even with the consent of the defendant,⁵³ unless the sickness of a juror,⁵⁴ or some other unavoidable necessity makes it imperative.⁵⁵ It is sometimes allowed, with the consent of both parties, if all the jurors are placed in charge of officers.⁵⁶

(II.) *In Civil Cases.*—After the jury has been charged with the case, it is the general practice not to allow it to separate until a verdict is agreed upon and returned, at least without the consent of both parties.⁵⁷

50. *Haines v. Thompson*, 129 Ill. 436.

[a] *Jurors in one case may be sworn to try another case, during an adjournment.* *Haines v. Thompson*, 129 Ill. App. 436. And see *Cissel, Talbot & Co. v. Hayden*, 41 App. Cas. (D. C.) 477.

[b] *Mingling With Others.*—The fact that jurors during intermissions mingled with persons who were excited over and discussed other accidents in the same vicinity is harmless. *Johnson v. Wasson Coal Co.*, 173 Ill. App. 414, a continuance should have been asked if conditions were deemed prejudicial.

51. *State v. Babcock*, 1 Conn. 401; *State v. McNeil*, 59 Kan. 599, 53 Pac. 876 (to allow jurors to obtain their dinner); *State v. Dugan*, 52 Kan. 23, 34 Pac. 409.

[a] *In misdemeanor cases it is permitted.* *Farris v. State*, 74 Tex. Crim. 607, 170 S. W. 310.

52. See the following: Cal.—*People v. Hawley*, 111 Cal. 78, 43 Pac. 404. Ill.—*Waller v. People*, 209 Ill. 284, 70 N. E. 681. Ky.—*French v. Com.*, 100 Ky. 63, 37 S. W. 269. La.—*State v. Hornsby*, 8 Rob. 554, 41 Am. Dec. 305. Minn.—*State v. Parrant*, 16 Minn. 173. N. H.—*State v. Prescott*, 7 N. H. 287. Ohio.—*State v. Ferrell*, 69 Ohio St. 521, 69 N. E. 995. Okla.—*Chance v. State*, 5 Okla. Crim. 194, 113 Pac. 996; *Sample v. State*, 3 Okla. Crim. 430, 106 Pac. 557; *Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658; *Bilton v. Territory*, 1 Okla. Crim. 566, 99 Pac. 163. S. D. *State v. Church*, 7 S. D. 289, 64 N. W. 152.

[a] *When Case Submitted.*—(1) The giving of the judge's charge to the jury is not an absolute test as to whether a case has been finally submitted to them; that may not take place until later. *State v. Ferrell*, 69 Ohio St. 521, 69 N. E. 995. (2) Where the charge of the court precedes the argument of counsel, the jury may be allowed to separate after the charge and before the arguments. *State v. Hendricks*, 32 Kan. 559, 4 Pac. 1050; *State v. McKinney*, 31 Kan. 570, 3 Pac. 356.

53. *People v. Hawley*, 111 Cal. 78, 43 Pac. 404.

54. *French v. Com.*, 100 Ky. 63, 37 S. W. 269, 18 Ky. L. Rep. 574.

55. *May v. State*, 120 Ga. 497, 48 S. E. 153.

[a] *Juror may be called into court from the juryroom to testify in regard to his alleged prejudice, without a separation of the jury.* *Norton v. State*, 137 Ga. 842, 74 S. E. 759.

[b] *Jurors needed as witnesses may be taken from the juryroom into court.* Ga.—*May v. State*, 120 Ga. 497, 48 S. E. 153. Kan.—*State v. Adams*, 20 Kan. 311. N. C.—*State v. Durham*, 72 N. C. 447.

56. *McCampbell v. State*, 37 Tex. Crim. 607, 40 S. W. 496.

[a] *Defendant cannot waive the provision of the statute requiring an officer to be in charge of all the jurors.* *McCampbell v. State*, 37 Tex. Crim. 607, 40 S. W. 496.

Separation in charge of an officer, generally, see infra, IX, D, 1, e.

57. *Stix & Co. v. Pump & Co.*, 37 Ga. 332. See *Vicksburg, S. & P. R. R.*

There are authorities, however, which support the practice of allowing a separation at such times;⁵⁸ and the fact that the jury were allowed to separate is not ordinarily ground for setting aside the verdict, in the absence of a showing of misconduct on their part or of prejudice to the losing party.⁵⁹

d. *After Verdict Agreed Upon.*—(I.) *In Criminal Cases.*—A jury may, by the court, be authorized to separate after signing and sealing a verdict,⁶⁰ except in capital cases.⁶¹ Such an order must be made in open court and in the presence of the accused person.⁶² In other jurisdictions, this practice is not permitted.⁶³

(II.) *In Civil Cases.*—The court may properly authorize the jury to return a sealed verdict and then separate,⁶⁴ if neither party objects to

Co. v. Elmore, 46 La. Ann. 1237, 15 So. 701.

[a] *On appeal* the action of the trial court in granting a new trial will not be reviewed. *Settee v. Charlotte Elec. Ry. Co.*, 170 N. C. 365, 86 S. E. 1050.

58. *Ark.*—*Williams v. Williams*, 112 Ark. 507, 166 S. W. 552. *Conn.*—*Brandin v. Grannis*, 1 Conn. 402, note. *Ind.*—*Haynes v. Thomas*, 7 Ind. 38. *Kan.*—*Fields v. Dewitt*, 71 Kan. 676, 81 Pac. 467.

59. *U. S.*—*Liverpool & L. & G. Ins. Co. v. Friedman Co.*, 133 Fed. 713, 66 C. C. A. 543, for Thanksgiving celebration. *Ill.*—*Sanitary Dist. v. Cullerton*, 147 Ill. 385, 35 N. E. 723. *La.*—*Vicksburg, S. & P. R. R. Co. v. Elmore*, 46 La. Ann. 1237, 15 So. 701.

[a] *Delegation of power to the bailiff*, by the court, to allow jurors to separate at night and for meals, was criticized but held to constitute only an irregularity. *Morrow v. Saline*, 21 Kan. 484.

60. *U. S.*—*United States v. Bennett*, 16 Blatchf. 338, 24 Fed. Cas. No. 14, 571. *Cal.*—*People v. Kelly*, 46 Cal. 355, with consent of defendant's counsel. *Ill.*—*Reins v. People*, 30 Ill. 256. *Ind.*—*Beyerline v. State*, 147 Ind. 125, 45 N. E. 772; *Jarrell v. State*, 58 Ind. 293. *Ia.*—*State v. Thompson*, 74 Iowa 119, 37 N. W. 104, with the consent of the defendant in misdemeanor cases. *Kan.*—*State v. Emmons*, 45 Kan. 397, 26 Pac. 679; *State v. Hodges*, 45 Kan. 389, 26 Pac. 676. *Mass.*—*Com. v. Heden*, 162 Mass. 521, 39 N. E. 181; *Com. v. Slattery*, 147 Mass. 423, 18 N. E. 399; *Com. v. Costello*, 128 Mass. 88; *Com. v. Carrington*, 116 Mass. 37; *Com. v. Dorus*, 108 Mass. 488 (failure to do so requires reversal); *Com. v. Dur-*

fee, 100 Mass. 146. *Mich.*—*People v. Duffek*, 163 Mich. 196, 128 N. W. 245, 31 L. R. A. (N. S.) 1005. *Ohio.*—*Bainbridge v. State*, 30 Ohio St. 264; *State v. Engle*, 13 Ohio 490. *Okla.*—*Kennon v. Territory*, 5 Okla. 685, 50 Pac. 172. *Pa.*—*Com. v. Heller*, 5 Phila. 123.

[a] *A second separation* while the foreman returned home to obtain the verdict which he had forgotten to bring with him was held proper. *Com. v. Heden*, 162 Mass. 521, 39 N. E. 181.

61. *State v. McCormick*, 84 Me. 566, 24 Atl. 938, felonies punishable by imprisonment for life are also included in this rule.

62. *Smith v. State*, 40 Fla. 203, 23 So. 854; *State v. McCormick*, 84 Me. 566, 24 Atl. 938.

[a] *Failure to object* to an order made in an improper case in the presence of defendant and his counsel is a waiver. *State v. Fenlason*, 78 Me. 495, 7 Atl. 385.

63. *Minn.*—*State v. Anderson*, 41 Minn. 104, 42 N. W. 786. *N. Y.*—*People v. Pickert*, 26 Misc. 112, 56 N. Y. Supp. 1090. *Wash.*—*State v. Mason*, 19 Wash. 94, 52 Pac. 525; *State v. Rogan*, 18 Wash. 43, 50 Pac. 582; *State v. Barkuloo*, 18 Wash. 141, 51 Pac. 350; *Anderson v. State*, 2 Wash. 183, 26 Pac. 267.

64. *Ia.*—*Walker v. Dailey*, 87 Iowa 375, 54 N. W. 344 (order may be made in the absence of the parties and their attorney); *Heiser v. Van Dyke*, 27 Iowa 359. *N. Y.*—*Bunn v. Hoyt*, 3 Johns. 255; *Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616. *Ohio.*—*Sutliff v. Gilbert*, 8 Ohio 405. *S. C.*—*Welch v. Welch*, 9 Rich. L. 133. *Wash.*—*Maling v. Crummey*, 5 Wash. 222, 31 Pac. 600.

this procedure;⁶⁵ and defects in the verdict may properly be cured by a resubmission of the case to them on their reassembling in court.⁶⁶ In some jurisdictions the practice is not favored, however,⁶⁷ and if allowed without the consent of the parties, a mistrial results.⁶⁸

c. *Separation in Charge of Officer.*⁶⁹ — (I.) In Criminal Cases. — Where the court has ordered a jury not to separate and placed it in charge of an officer, occasions may thereafter arise on which the presence of individual jurors at their homes, places of business or elsewhere is imperatively required; on such occasions, the court may allow the juror the privilege of attending such places in charge and custody of an officer.⁷⁰ It is improper to allow the juror to leave, unaccompanied by an officer, however.⁷¹ The court may also properly allow jurors to separate for short periods of time in charge of officers, for other necessary purposes.⁷²

65. *Deen v. Wheeler*, 7 Ga. App. 507, 67 S. E. 212.

[a] **Time for Making Objection.** If the order be given in open court and a party does not object at the time he will be taken to have consented to it. *Deen v. Wheeler*, 7 Ga. App. 507, 67 S. E. 212; *Douglass v. Tousey*, 2 Wend. (N. Y.) 352, 20 Am. Dec. 616.

66. **Ill.**—*Bissell v. Ryan*, 23 Ill. 517. **Me.**—*Beal v. Cunningham*, 42 Me. 362. See *Blake v. Blossom*, 15 Me. 394. **Mass.**—*Chapman v. Coffin*, 14 Gray 454; *Winslow v. Draper*, 8 Pick. 170. **Minn.**—*Nininger v. Knox*, 8 Minn. 140. **N. H.**—*Nims v. Bigelow*, 44 N. H. 376. **N. Y.**—*Douglass v. Tousey*, 2 Wend. 352, 20 Am. Dec. 616; *Seidenbach v. Riley*, 6 N. Y. St. 104. **Wis.**—*Victor Sewing Mach. Co. v. Heller*, 44 Wis. 265, defect discovered after discharge but before jury had left the box.

67. *Barfield v. Mullino*, 107 Ga. 730, 33 S. E. 647.

[a] **Reason of the Rule.**—"When a verdict is rendered in open court and it does not cover the issues submitted, it is within the power of the judge to deliver further instructions to the jury and permit them to consider the case again and save the parties the expense of another trial. This right is lost to the parties after the jury has dispersed before the verdict is published. . . . When a verdict is rendered in open court, the losing party has the right to request the judge to permit the jury to be polled; and this right is lost if the jury disperse before the verdict is received." *Barfield v. Mullino*, 107 Ga. 730, 33 S. E. 647.

68. *Barfield v. Mullino*, 107 Ga. 730, 33 S. E. 647. But see *Franklin v. Wiggins*, 88 Ga. 169, 14 S. E. 120.

69. **Unauthorized separations in charge of officer**, see *infra*, IX, D, 2, c, (III).

70. See the following: **Cal.**—*People v. Cord*, 157 Cal. 562, 108 Pac. 511. **Ga.**—*May v. State*, 120 Ga. 497, 48 S. E. 153, juror allowed to leave the room to give testimony in court. **Ill.**—*Jumpertz v. People*, 21 Ill. 375, 411. **Kan.**—*State v. Adams*, 20 Kan. 311, juror taken into court as a witness. **Ky.**—*Compare French v. Com.*, 100 Ky. 63, 37 S. W. 269, after submission of the case. **La.**—*State v. Scanlon*, 52 La. Ann. 2058, 28 So. 211. **Mo.**—*State v. Sansone*, 116 Mo. 1, 22 S. W. 617. **N. J.**—*State v. Cucuel*, 31 N. J. L. 249, 254, 257. **N. Y.**—*People v. Hoch*, 150 N. Y. 291, 44 N. E. 976, sick juror allowed to consult a physician. **Pa.**—*Moss v. Com.*, 107 Pa. 267.

71. **Ark.**—*Armstrong v. State*, 102 Ark. 356, 144 S. W. 195. **Cal.**—*People v. Maughs*, 149 Cal. 253, 86 Pac. 187. **Tex.**—*McCampbell v. State*, 37 Tex. Crim. 607, 40 S. W. 496.

72. See generally the cases cited *infra*, this note.

[a] **To Attend to Calls of Nature.** **Ga.**—*Neal v. State*, 64 Ga. 272. **Kan.**—*State v. Flack*, 48 Kan. 146, 29 Pac. 571. **La.**—*State v. Collian*, 109 La. 346, 33 So. 363. **Mo.**—*State v. Washburn*, 91 Mo. 571, 4 S. W. 274; *State v. Collins*, 86 Mo. 245.

[b] **In Case of Sickness of Juror.** *Com. v. Gagle*, 147 Mass. 576, 18 N. E. 417, juror left in charge of officer while the others obtained a meal.

(II.) In Civil Cases. — Either during the trial, or after the submission of the case, the court may, in its discretion allow one or more jurors to separate from the others, placing them in charge of an officer.⁷²

f. *Prejudicial Effect.* — Where the court allows jurors to separate, the burden is ordinarily upon the defendant to show that misconduct prejudicial to his rights has taken place;⁷⁴ and unless it appears that prejudice actually resulted, or the circumstances are such that it may reasonably be presumed to have resulted, the verdict will not be affected,⁷⁵ especially where the defendant consented to the separation.⁷⁶ But where the allowance of a separation was, under the circumstances and conditions of the case, improper, the verdict will be set aside in the absence of a showing of a want of prejudice by the state.⁷⁷ And in capital cases, improper separations have been held to require a reversal, irrespective of the existence of prejudice suffered by the accused,⁷⁸ especially where the separation was allowed after the case was submitted,⁷⁹ and this has been held even where the defendant has consented to it.⁸⁰ The same general rules have been applied to other felonies.⁸¹

The authorized but improper separation of the jury does not operate

73. *Stix & Co. v. Pump & Co.*, 37 Ga. 332; *Watts v. South Bound R. Co.*, 60 S. C. 67, 38 S. E. 240, to attend to calls of nature.

74. *Ark.*—*Reeves v. State*, 84 Ark. 569, 106 S. W. 945, prior to impaneling. *Kan.*—*State v. McNeil*, 59 Kan. 599, 53 Pac. 876, separation after submission. *La.*—*State v. Baudoin*, 115 La. 773, 40 So. 42. *Mo.*—See *State v. Sansone*, 116 Mo. 1, 22 S. W. 617.

[a] *No Presumption Ordinarily.*—“If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.” *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021.

75. *Ariz.*—*Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631. *La.*—*State v. Antoine*, 52 La. Ann. 488, 26 So. 1011. *N. Y.*—*People v. Dunbar Contracting Co.*, 215 N. Y. 416, 109 N. E. 554. *Okla.*—*Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658. *Pa.*—*Moss v. Com.*, 107 Pa. 267. *Tex.*—*Jones v. State*, 69 Tex. Crim. 447, 153 S. W. 897, prior to swearing.

76. *State v. Carlisle*, 57 Mo. 102; *State v. McMahon*, 17 Nev. 365, 30 Pac. 1000.

77. *Armstrong v. State*, 102 Ark.

356, 144 S. W. 195 (failure of court to appoint special officer); *People v. Shafer*, 1 Utah 260.

[a] An improper, but authorized, separation of the jury should not be assigned as misconduct of the jury, but as error of law occurring at the trial. *Henning v. State*, 106 Ind. 386, 396, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756.

78. *Ind.*—*Quinn v. State*, 14 Ind. 589. *La.*—*State v. Hornsby*, 8 Rob. 554, 41 Am. Dec. 305. *Miss.*—*Woods v. State*, 43 Miss. 364. *Mo.*—*McLean v. State*, 8 Mo. 153. *Tenn.*—*Wesley v. State*, 11 Humph. 502. *Tex.*—*Grissom v. State*, 4 Tex. App. 374, separation before swearing.

79. *French v. Com.*, 100 Ky. 63, 37 S. W. 269; *Chance v. State*, 5 Okla. Crim. 194, 113 Pac. 996; *Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658. Separation in criminal cases after submission of the case, see *supra*, IX, D, 1, c, (I).

80. *State v. Populus*, 12 La. Ann. 710; *Woods v. State*, 43 Miss. 364.

81. *Cal.*—*People v. Hawley*, 111 Cal. 78, 82, 43 Pac. 404. *La.*—*State v. Populus*, 12 La. Ann. 710. *Miss.*—*McQuillan v. State*, 8 Smed. & M. 587. *Tex.*—*Defriend v. State*, 22 Tex. App. 570, 2 S. W. 641.

as an acquittal:⁸² a prisoner cannot rely on a claim of former jeopardy for that reason.⁸³

Review. — The action of the trial court, in the exercise of its discretionary power, in allowing a jury to separate, will be reviewed on appeal, only in cases where an abuse of discretion appears.⁸⁴

g. Admonition to Jury.⁸⁵ — (I.) **In Criminal Cases.** — (A.) **NECESSITY OF GIVING.** — (1.) *In General.* — An admonition should always be given to the jury warning them against talking on any subject connected with the trial during a separation allowed by the court.⁸⁶ But a failure on the part of the court to admonish the jury is usually regarded as an irregularity which is waived if counsel does not call the court's attention to its omission at the time,⁸⁷ though where the statutory provisions are regarded as mandatory in character the rule is otherwise.⁸⁸ Such a failure is not of itself ground for a new trial, however,⁸⁹ though it has been held to raise a presumption that prejudice has followed from the omission of the court.⁹⁰

The record is not required to show affirmatively that the statutory admonition was given.⁹¹

(2.) *At Recesses.* — Failure to admonish the jury not to converse about the case, during a short recess in the trial, is not ground for a new trial,⁹² especially where the jury had theretofore been properly admonished and told that the admonishment applied to all occasions on which they might be allowed to separate during the trial.⁹³ Where no recess is taken but a separation is allowed during a short suspension of the proceedings, no harm results from a failure to give the regular admonition.⁹⁴

82. *People v. Hawley*, 111 Cal. 78, 82, 43 Pac. 404.

83. *Peiffer v. Com.*, 15 Pa. 468, 53 Am. Dec. 605, though prisoner consented to separation.

84. *Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658.

85. As to instructions generally, see 13 STANDARD PROC. 698, et seq.

86. **Kan.**—*State v. Stackhouse*, 24 Kan. 445. **Miss.**—*Prewitt v. State*, 65 Miss. 437, 4 So. 346. **Neb.**—*Walrath v. State*, 8 Neb. 80. **Pa.**—*McCreary v. Com.*, 29 Pa. 323.

[a] **Reason for an Admonishment.** "Formerly the jury were not allowed to separate at all, but remained in charge of an officer from the time they were impeached until the return of the verdict. By our statute, separation is permitted, but in lieu thereof this admonition from the court is required, and such admonition ought always to be given." *State v. Stackhouse*, 24 Kan. 445.

87. *State v. Morris*, 58 Ore. 397, 114 Pac. 476; *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810.

88. *State v. Mulkins*, 18 Kan. 16.

89. *People v. Coyne*, 116 Cal. 295, 48 Pac. 218.

90. *State v. Mulkins*, 18 Kan. 16. See *Johnson v. State*, 68 Ark. 401, 59 S. W. 34.

91. *Evans v. State*, 7 Ind. 271; *Langford v. State*, 32 Neb. 782, 49 N. W. 766; *St. Louis v. State*, 8 Neb. 405, 1 N. W. 371. *Contra*, *People v. Maughs*, 149 Cal. 253, 86 Pac. 187; *People v. Thompson*, 84 Cal. 598, 24 Pac. 384.

92. **Cal.**—*People v. Colmère*, 23 Cal. 631. **Kan.**—*State v. Stackhouse*, 24 Kan. 445. **Nev.**—*State v. Gray*, 19 Nev. 212, 8 Pac. 456. **Tex.**—*Millner v. State*, 72 Tex. Crim. 45, 162 S. W. 348.

93. *State v. Stackhouse*, 24 Kan. 445. See also *State v. Stockhammer*, 34 Wash. 262, 75 Pac. 810.

94. *People v. Witt*, 170 Cal. 104, 148 Pac. 928, "the error is technical."

(B.) FORM. — The specific language of the statute need not be employed in giving the admonition; it is sufficient if language conveying the general import of the statutory admonition is used.⁹⁵

(II.) In Civil Cases. — Failure to properly admonish the jury on an adjournment of court has been held to constitute reversible error.⁹⁶ The admonishment need not be given immediately prior to the separation, however;⁹⁷ and where the jury has been previously admonished, failure to repeat the admonishment at each recess is not reversible error.⁹⁸

2. Unauthorized Separations.⁹⁹ — a. *Casual and Necessary Separations Generally.* — (I.) In Criminal Cases. — If a juror is all the time within sight of the court,¹ the officer in charge of the jury,² or his fellow jurors,³ no prejudicial separation occurs, although for some necessary and personal reason he leaves the immediate proximity of the remainder of the jury.⁴ Even when for a brief period of time he is out of sight, no harm results, where under the surrounding circumstances it is reasonable to assume that the juror has not misconducted

95. *State v. McKinney*, 31 Kan. 570, 3 Pac. 356.

[a] The phrase "in regard to the case" is equivalent to the statutory form "on any subject connected with the trial." *State v. McKinney*, 31 Kan. 570, 3 Pac. 356.

96. *Pracht v. Whittridge*, 44 Kan. 710, 25 Pac. 192.

[a] It will be presumed on appeal that the proper admonition was administered. *Dozenback v. Raymer*, 13 Colo. 451, 22 Pac. 787.

[b] Counsel may waive the admonishment either expressly or by their conduct, however. *Fields v. Dewitt*, 71 Kan. 676, 81 Pac. 467.

97. *Fields v. Dewitt*, 71 Kan. 676, 81 Pac. 467.

98. *Stager v. Harrington*, 27 Kan. 414; *Gleason v. Strauss*, 5 Kan. App. 80, 48 Pac. 881.

99. As to authorized separations, see *supra*, IX, D, 1.

1. *Ala.*—*Nabors v. State*, 120 Ala. 323, 25 So. 529. *Ark.*—*Ince v. State*, 77 Ark. 418, 88 S. W. 818. *Ga.*—*Cohron v. State*, 20 Ga. 752. *La.*—*State v. Sims*, 117 La. 1036, 42 So. 494; *State v. Fruge*, 28 La. Ann. 657.

2. *U. S.*—*United States v. Davis*, 103 Fed. 457. *Fla.*—*Gamble v. State*, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547; *Coleman v. State*, 17 Fla. 206. *Ga.*—*Green v. State*, 71 Ga. 487. *Ind.*—*Jones v. State*, 152 Ind. 318, 53 N. E. 222. *Ky.*—*Holly v. Com.*, 18 Ky. L. Rep. 441, 36 S. W. 532. *La.*—*State v. Bullock*, 136 La. 167, 66 So.

767; *State v. White*, 52 La. Ann. 206, 26 So. 849; *State v. Bellow*, 42 La. Ann. 586, 7 So. 782; *State v. Vines*, 34 La. Ann. 1073; *State v. Tucker*, 10 La. Ann. 501. *Minn.*—*State v. Conway*, 23 Minn. 291. *Mo.*—*State v. Howell*, 117 Mo. 307, 23 S. W. 263. *Tenn.*—*Rowe v. State*, 11 Humph. 491; *Stone v. State*, 4 Humph. 27. *Tex.*—*Jenkins v. State*, 41 Tex. 128; *Galan v. State*, 68 Tex. Crim. 200, 150 S. W. 1171; *Louder v. State*, 46 Tex. Crim. 121, 79 S. W. 552; *Taylor v. State*, 38 Tex. Crim. 552, 43 S. W. 1019; *Soria v. State*, 2 Tex. App. 297. *Wyo.*—*Cook v. Territory*, 3 Wyo. 110, 4 Pac. 887.

Effect of unauthorized separation when in charge of officer generally, see *supra*, IX, D, 2, c, (II).

3. *Ga.*—*Potter v. State*, 12 Ga. App. 315, 77 S. E. 186. *Mo.*—*State v. Howell*, 117 Mo. 307, 23 S. W. 263. *N. C.*—*State v. Baker*, 63 N. C. 276; *State v. Hester*, 47 N. C. 83.

[a] Conveying jurors on a view in two wagons which were always in sight of each other is not improper. *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

4. *Mo.*—*State v. Shipley*, 171 Mo. 544, 71 S. W. 1039. *Okla.*—*Shivers v. Territory*, 13 Okla. 466, 74 Pac. 899. *Tex.*—*Barnes v. State*, 61 Tex. Crim. 37, 133 S. W. 887.

Compare *People v. Thornton*, 74 Cal. 482, 16 Pac. 244.

[a] Sickness of Juror.—There is no prejudicial separation where a sick juror is kept in the courtroom while the other jurors remain in the jury-

himself and that no attempt has been made by outsiders to tamper with or approach him.⁵ Short separations while attention is being given to calls of nature,⁶ or in case of separations necessitated by the sudden illness of jurors,⁷ while the jury is being brought into court or

room. *Chant v. State*, 73 Tex. Crim. 345, 166 S. W. 513.

5. **Ala.**—*Sanders v. State*, 181 Ala. 35, 61 So. 336. **Ark.**—*Dobson v. State*, 17 S. W. 3 (while pursuing the defendant who has attempted to escape); *Stanton v. State*, 13 Ark. 317. **Cal.**—*People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032. **Colo.**—*May v. People*, 8 Colo. 210, 6 Pac. 816. **Ga.**—*Roberts v. State*, 14 Ga. 8. **Ind.**—*Porter v. State*, 2 Ind. 435. **Ky.**—*Blyew v. Com.*, 91 Ky. 200, 15 S. W. 356; *Van Dalsen v. Com.*, 28 Ky. L. Rep. 238, 89 S. W. 255; *Sellards v. Com.*, 5 Ky. L. Rep. 329. **La.**—*State v. Spears*, 134 La. 483, 64 So. 385; *State v. Richmond*, 42 La. Ann. 299, 7 So. 459; *State v. Turner*, 25 La. Ann. 573; *State v. Forney*, 24 La. Ann. 191. **Miss.**—*Skates v. State*, 64 Miss. 644, 653, 1 So. 843, 60 Am. Rep. 70. **Mo.**—*State v. Bell*, 70 Mo. 633. **Mont.**—*Territory v. Hart*, 7 Mont. 489, 17 Pac. 718. **N. J.**—*State v. Cucuel*, 31 N. J. L. 249, 260. **N. C.**—*State v. Lytle*, 27 N. C. 58; *State v. Miller*, 18 N. C. 500. **R. I.**—*State v. Mowry*, 21 R. I. 376, 43 Atl. 871; *State v. O'Brien*, 7 R. I. 336. **Tex.**—*Nelson v. State*, 32 Tex. 71; *Powell v. State*, 49 Tex. Crim. 473, 93 S. W. 544; *Johns v. State*, 47 Tex. Crim. 161, 83 S. W. 198; *Stewart v. State*, 31 Tex. Crim. 153, 19 S. W. 908; *Eredia v. State* (Tex. Crim.), 65 S. W. 188; *Lamar v. State* (Tex. Crim.), 39 S. W. 677; *Stewart v. State*, 31 Tex. Crim. 153, 19 S. W. 908. **Va.**—*McCarter v. Com.*, 11 Leigh (38 Va.) 633; *Martin v. Com.*, 2 Leigh (29 Va.) 745. **Wash.**—*State v. Strodemier*, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012. **Wyo.**—*Nicholson v. State*, 18 Wyo. 298, 315, 106 Pac. 929.

But see *People v. Schad*, 58 Hun 571, 12 N. Y. Supp. 695.

[a] **Basis of the Rule.**—“It is the opportunity of tampering with a juror, afforded by the separation which con-

stitutes the ground for a new trial, but if such separation afforded no such opportunity, there can be no cause for a new trial.” *Cartwright v. State*, 12 Lea (Tenn.) 620, 625.

[b] **Allowing juror to change his linen**, in privacy, at his home, the officer being in an adjoining room, is harmless. *State v. O'Brien*, 7 R. I. 336.

6. **Cal.**—*People v. Moore*, 41 Cal. 238; *People v. Symonds*, 22 Cal. 348. **Colo.**—*Chesnut v. People*, 21 Colo. 512, 42 Pac. 656. **Fla.**—*Gamble v. State*, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138. **La.**—*State v. Nockum*, 41 La. Ann. 689, 6 So. 729; *State v. Turner*, 25 La. Ann. 573; *State v. Forney*, 24 La. Ann. 191. **Minn.**—*State v. Georgian*, 124 Minn. 515, 145 N. W. 385; *State v. Matakovich*, 59 Minn. 514, 61 N. W. 677. **Mo.**—*State v. Shipley*, 171 Mo. 544, 71 S. W. 1039; *State v. Sprague*, 149 Mo. 425, 50 S. W. 1117 (after agreement on verdict); *State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *State v. Woodward*, 95 Mo. 129, 8 S. W. 220. **Neb.**—*Foster v. State*, 83 Neb. 264, 119 N. W. 475. **N. C.**—*State v. Lytle*, 27 N. C. 58. **Tex.**—*Davis v. State*, 54 Tex. Crim. 236, 114 S. W. 366; *Griffey v. State* (Tex. Crim.), 56 S. W. 335. But see *Barnett v. State*, 50 Tex. Crim. 538, 99 S. W. 556, where other irregularities also existed. **W. Va.**—*State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

In charge of officer, see *infra*, IX, D, 2, c, (II).

7. **Ill.**—*Marzen v. People*, 190 Ill. 81, 60 N. E. 102. **N. Y.**—*People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846. **Pa.**—*Goersen v. Com.*, 106 Pa. 477, 51 Am. Rep. 534. **Vt.**—*State v. Lawrence*, 70 Vt. 524, 41 Atl. 1027. **Wash.**—*State v. Burns*, 19 Wash. 52, 52 Pac. 316, limited in *State v. Morden*, 87 Wash. 465, 151 Pac. 832.

taken to the juryroom,⁸ or while the jury, in charge of the officer is on the street,⁹ are usually disregarded. So also, a temporary separation resulting from unforeseen circumstances, is not usually regarded as an irregularity of substance.¹⁰ The rule is especially applicable to minor separations occurring on a view of the premises.¹¹ But where the circumstances are suspicious, where other persons had an opportunity to communicate with them, and no satisfactory explanation of the transaction is made, separations otherwise apparently trivial will justify the setting aside of the verdict,¹² or will at least cast upon the state the burden of proving a want of prejudice.¹³ Thus a voluntary separation by jurors, though no harm is intended by them, for a considerable period of time, will be treated as an actual, real, and irregular proceeding,¹⁴ especially where they mingle with people

In charge of officer, see *infra*, IX, D, 2, c, (III).

8. Ia.—State *v.* Wart, 51 Iowa 587, 2 N. W. 405. **Kan.**—State *v.* Hendricks, 32 Kan. 559, 4 Pac. 1050. **Minn.** State *v.* Conway, 23 Minn. 291. **Miss.** Compare Organ *v.* State, 26 Miss. 78. **Mo.**—State *v.* Shipley, 171 Mo. 544, 71 S. W. 1039; State *v.* Howland, 119 Mo. 419, 24 S. W. 1016. **Pa.**—Com. *v.* Williams, 209 Pa. 529, 58 Atl. 922; Com. *v.* Cressinger, 193 Pa. 326, 44 Atl. 433. **Tenn.**—King *v.* State, 91 Tenn. 617, 20 S. W. 169. **Tex.**—Latham *v.* State, 75 Tex. Crim. 575, 172 S. W. 797; Guerrero *v.* State, 75 Tex. Crim. 558, 171 S. W. 731; Ellis *v.* State, 69 Tex. Crim. 468, 154 S. W. 1010.

9. Fla.—Gamble *v.* State, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547. **Ia.**—State *v.* Wart, 51 Iowa 587, 2 N. W. 405. **Mont.**—Territory *v.* Clayton, 8 Mont. 1, 19 Pac. 293. **S. C.**—State *v.* Williams, 76 S. C. 135, 56 S. E. 783. **Tenn.**—King *v.* State, 91 Tenn. 617, 20 S. W. 169. **Tex.**—Lamar *v.* State (Tex. Crim.), 39 S. W. 677. **W. Va.**—State *v.* Belknap, 39 W. Va. 427, 19 S. E. 507. **Wyo.** Cook *v.* Territory, 3 Wyo. 110, 4 Pac. 887.

Effect of unauthorized separation when in charge of officer generally, see *infra*, IX, D, 2, c, (II).

10. See the cases cited *infra*, this note.

[a] Where an alarm of fire was given, and the jurors separated for a short time due to the existing excitement, no prejudicial separation occurred. People *v.* Cord, 157 Cal. 562, 108 Pac. 511. Compare State *v.* Church, 7 S. D. 289, 64 N. W. 152; Early *v.*

State, 1 Tex. App. 248, 28 Am. Rep. 409.

11. People *v.* Tarm Poi, 86 Cal. 225, 24 Pac. 998.

[a] **Basis of This Rule.**—"There is always necessarily some difficulty in keeping jurors closely together when viewing premises; and when a party requests that there be such a viewing he should not be heard afterwards to object, unless he can show that, without his consent or knowledge, there has been some misconduct in the proceeding which has caused him substantial injury. He should not be allowed to use it voluntarily as a means of entrapping the opposite party into mere abstract errors." People *v.* Tarm Poi, 86 Cal. 225, 231, 24 Pac. 998.

12. Ark.—Ferguson *v.* State, 95 Ark. 430, 129 S. W. 813. **Ky.**—Com. *v.* Shields, 2 Bush 81. **Nev.**—State *v.* Harris, 12 Nev. 414. **Tex.**—Darter *v.* State, 39 Tex. Crim. 40, 44 S. W. 850. **W. Va.**—State *v.* Robinson, 20 W. Va. 713, 43 Am. Rep. 799.

13. Somers *v.* State, 73 Tex. Crim. 549, 166 S. W. 1156.

14. Ga.—Daniel *v.* State, 56 Ga. 653. **Idaho.**—State *v.* West, 11 Idaho 157, 81 Pac. 107. **Ia.**—State *v.* Wright, 98 Iowa 702, 68 N. W. 440. **Kan.**—Madden *v.* State, 1 Kan. 340. **Miss.**—Cartwright *v.* State, 71 Miss. 82, 14 So. 526. **Mo.**—State *v.* Collins, 81 Mo. 652. **N. H.**—State *v.* Prescott, 7 N. H. 287. **Okla.**—Weatherholt *v.* State, 9 Okla. Crim. 161, 131 Pac. 185. **Tenn.** McLain *v.* State, 10 Yerg. 241, 31 Am. Dec. 573. **Tex.**—Eads *v.* State, 74 Tex. Crim. 628, 170 S. W. 145; Burris *v.* State, 37 Tex. Crim. 587, 40 S. W. 284; Early *v.* State, 1 Tex. App. 248, 28 Am. Rep. 409.

who are discussing the case and incidents connected with the trial.¹⁵ For jurors to visit their homes,¹⁶ for some jurors to remain behind while others obtain meals or refreshments,¹⁷ or make excursions of any nature,¹⁸ constitutes a prejudicial separation.

There is no real separation where the officer in charge takes a portion of the jurors from the juryroom, for a necessary purpose,¹⁹ meanwhile leaving the other jurors securely locked in their rooms;²⁰ and even if the juryroom was not locked, such a proceeding has been held harmless,²¹ since the jurors need not be kept under lock and key.²² For the officer to go with one or more jurors to places some distance from the juryroom, without any real necessity therefor, leaving the

[a] **Tests To Be Applied.**—A separation will be held trivial only when a juror has "been momentarily absent by reason of a pressing necessity, and not as a voluntary and deliberate act of separation." *State v. West*, 11 Idaho 157, 162, 81 Pac. 107.

[b] "Where jurors leave their fellows at will, without leave of court and without being attended by an officer, and pass out by, or among, other persons, so that it is possible for them to be tampered with or subjected to improper influences, it must be held to be a separation of the jury within the meaning of the statute." *Riley v. State*, 95 Ind. 446, 449.

15. *State v. Witten*, 100 Mo. 525, 13 S. W. 871.

16. See *Riggs v. State*, 26 Miss. 51; *Wright v. State*, 17 Tex. App. 152.

17. *Kan.*—*State v. Nelson*, 65 Kan. 689, 70 Pac. 632. *Okla.*—*Goins v. State*, 9 Okla. Crim. 35, 130 Pac. 513. *Tex.*—*Eads v. State*, 74 Tex. Crim. 628, 170 S. W. 145.

Where in charge of officer, see *infra*, IX, D, 2, c, (II).

18. *Madden v. State*, 1 Kan. 340; *Thacker v. Com.*, 23 Ky. L. Rep. 745, 63 S. W. 737.

19. See generally the cases cited *infra*, this note.

[a] **For Meals.**—*Com. v. Edgerton*, 200 Mass. 318, 86 N. E. 768; *Walker v. State*, 40 Tex. Crim. 544, 51 S. W. 234.

[b] **To Attend to Calls of Nature.** *Mo.*—*State v. Prince*, 258 Mo. 315, 167 S. W. 535; *State v. Spaugh*, 200 Mo. 571, 608, 98 S. W. 55; *State v. Gregory*, 158 Mo. 139, 59 S. W. 89; *State v. Murray*, 91 Mo. 95, 103, 3 S. W. 397; *State v. Payton*, 90 Mo. 220, 2

S. W. 394; *State v. Collins*, 86 Mo. 245. *Neb.*—*Foster v. State*, 83 Neb. 264, 119 N. W. 475. *N. C.*—*State v. Tilghman*, 33 N. C. 513. *Tex.*—*Johns v. State*, 47 Tex. Crim. 161, 83 S. W. 198; *Walker v. State*, 40 Tex. Crim. 544, 51 S. W. 234.

As to what constitutes a real separation generally, see *infra*, IX, D, 2, b, (I).

20. *Dak.*—*Territory v. King*, 6 Dak. 131, 50 N. W. 623. *Idaho.*—See *State v. Sly*, 11 Idaho 110, 80 Pac. 1125. *Md.* *Stout v. State*, 76 Md. 317, 25 Atl. 299. *Mo.*—*State v. Collins*, 86 Mo. 245. *Va.* *Trim v. Com.*, 18 Gratt. (59 Va.) 983, 98 Am. Dec. 765.

21. *Cornwall v. State*, 91 Ga. 277, 18 S. E. 154.

22. See *Wright v. State*, 35 Ark. 639.

[a] **Jurors Are Not To Be Treated as Prisoners.**—"If by keeping together and enclosing, it be meant that jurors must be so kept and enclosed as to render separation and improper communication and conversation impossible, in many if not in all cases, it would scarcely be within the compass of possibility, without resorting to the securities afforded by the four walls and the locks and bars of a prison and a prison guard in addition. Such rigor as this or anything approximating it, would no more be tolerated now than the practice which prevailed in the olden time of keeping juries together 'without meat or drink, fire or candle or holding them in duress and carting them around the circuit, until they should agree in a verdict.'" *Thompson v. Com.*, 8 Gratt. (35 Va.) 637.

As to custody of jury generally, see *supra*, IX, A.

other jurors unguarded and not locked up in the juryroom or at their lodging place is a real separation, however.²³

(II.) In Civil Cases. — Trivial separations in civil cases are seldom regarded as such irregularities as will adversely affect the verdict.²⁴

b. *At Meals and Lodgings.* — Ordinarily all of the jurors should be boarded at the same hotel;²⁵ but it is not an abuse of discretion to allow them to be taken in squads, each in charge of an officer, to different hotels.²⁶ There is no prejudicial separation where jurors eat at separate tables, even though they are in adjoining rooms;²⁷ and slight, temporary separations while entering or leaving the dining room are harmless.²⁸ For some jurors to remain in the office of the hotel while others are in the dining room, constitutes a separation, however.²⁹

At Lodgings. — There is no real separation where jurors are lodged in separate, but connecting rooms,³⁰ or even in rooms separated by a small hallway,³¹ provided they are all reasonably within the presence, sight and hearing of each other and of the officer in charge.³² But where the rooms are so separated that a considerable degree of privacy

23. *Ind.*—*Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760, for refreshments. *Kan.*—*State v. Nelson*, 65 Kan. 689, 70 Pac. 632. *Ky.*—*Campbell v. Com.*, 162 Ky. 106, 172 S. W. 110, where the bailiff accompanied one juror leaving the others unguarded at their lodging place.

24. *Cal.*—*McKenna's Estate*, 143 Cal. 580, 77 Pac. 461. See *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169. *Ind.*—*Carter v. Ford Plate Glass Co.*, 85 Ind. 180. *Neb.*—*Reed v. Chicago, B. & Q. R. R. Co.*, 98 Neb. 19, 151 N. W. 936, juror always in sight of an officer. *N. J.*—*Baizley v. Welsh*, 71 N. J. L. 471, 60 Atl. 59, allowing jurors to leave jury room to telephone their families. *Ohio.*—*Armleder v. Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530, due to a sudden alarm of fire near the jury room.

[a] *On a View.*—The fact that a juror on account of lameness did not walk over the premises with the other jurors while a view was being taken, but was in sight of the other jurors most of the time, was harmless. *Keller v. Bley*, 15 Ore. 429, 15 Pac. 705.

25. See *supra*, IX, A, 2, b, (I).

26. *People v. Dunbar Contract Co.*, 215 N. Y. 416, 109 N. E. 554.

Separation in squads in charge of officer, see generally *infra*, IX, D, 2, c, (II).

27. *Ark.*—*Wright v. State*, 35 Ark. 639; *Wilder v. State*, 29 Ark. 293; *Kee v. State*, 28 Ark. 155. *Tenn.*—*Odle v.*

State, 6 Baxt. 159. *Tex.*—*Louder v. State*, 46 Tex. Crim. 121, 79 S. W. 552.

[a] Where the jury was composed of both white and colored men, it was not improper to place them at separate tables and in different rooms. *Louder v. State*, 46 Tex. Crim. 121, 79 S. W. 552.

28. *Powell v. State*, 49 Tex. Crim. 473, 93 S. W. 544; *Cox v. State*, 7 Tex. App. 1.

29. *State v. Gray*, 100 Mo. 523, 13 S. W. 806 (even though there were not seats enough for all at the time); *State v. Murray*, 91 Mo. 95, 3 S. W. 397.

30. *State v. De Vall*, 51 La. Ann. 497, 25 So. 384; *State v. Garig*, 43 La. Ann. 365, 8 So. 934; *State v. Trull*, 169 N. C. 363, 85 S. E. 133.

As to what constitutes a real separation generally, see *infra*, IX, D, 2, b, (1).

31. *Cal.*—*People v. Bush*, 68 Cal. 623, 10 Pac. 169. *Ky.*—*Minor v. Com.*, 5 Ky. L. Rep. 176. *La.*—*State v. Spears*, 134 La. 483, 64 So. 385; *State v. Richmond*, 42 La. Ann. 299, 7 So. 459. *Pa.*—*Com. v. Manfredi*, 162 Pa. 144, 29 Atl. 404. *Va.*—*Thompson v. Com.*, 8 Gratt. (49 Va.) 637; *Kennedy v. Com.*, 2 Va. Cas. 510.

32. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. See *Folsom v. State*, 14 Ga. App. 245, 80 S. E. 677.

As to separations in charge of officers, see *infra*, IX, D, 2, c, (II).

exists making communication between the rooms impossible, an unwarranted separation takes place.³³

c. *Effect.* — (I.) *In General.* — It is difficult to lay down any general rule as to the effect of an illegal and unauthorized separation on the part of the jurors. In criminal cases, other than capital cases,³⁴ the prevailing rule is that prejudice will not be presumed to have followed from the mere separation of jurors, but that it is incumbent on the defendant to show actual prejudice, or such circumstances as will justify the court in inferring that it is reasonably probable that injury followed,³⁵ though if from all the circumstances, it appears reasonably probable that injury may have resulted the verdict will be set aside and a new trial granted.³⁶ The rule that prejudice is presumed to have resulted in the first instance obtains in some jurisdictions, however,³⁷ especially where statutory provisions involved are

33. **Cal.**—*People v. Adams*, 143 Cal. 208, 76 Pac. 954, 101 Am. St. Rep. 92, 66 L. R. A. 247, jurors kept in three rooms on different floors. **La.**—*State v. Walters*, 135 La. 1070, 1104, 66 So. 364; *State v. Foster*, 45 La. Ann. 1176, 14 So. 180. **Mo.**—*State v. Schaeffer*, 172 Mo. 335, 72 S. W. 518.

34. *As to rule in capital cases*, see *infra*, this section.

35. **U. S.**—*United States v. Davis*, 103 Fed. 457. **Ariz.**—*Rain v. State*, 15 Ariz. 125, 137 Pac. 550; *Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631. **Colo.**—*Chesnut v. People*, 21 Colo. 512, 42 Pac. 656. **Ill.**—*Miller v. People*, 39 Ill. 457; *Reins v. People*, 30 Ill. 256. **Ia.**—*State v. Wright*, 98 Iowa 702, 68 N. W. 440. **Kan.**—*State v. Dugan*, 52 Kan. 23, 34 Pac. 409. **Minn.**—*State v. Conway*, 23 Minn. 291. **Mo.**—*State v. Dougherty*, 55 Mo. 69; *State v. Matrassey*, 47 Mo. 295; *State v. Barton*, 19 Mo. 227. **Okla.**—*Shivers v. Territory*, 13 Okla. 466, 74 Pac. 899; *Burns v. State*, 8 Okla. Crim. 554, 129 Pac. 657. **Tex.**—*Wakefield v. State*, 41 Tex. 556; *Cannon v. State*, 3 Tex. 31; *Jones v. State*, 69 Tex. Crim. 447, 153 S. W. 897; *Galan v. State*, 68 Tex. Crim. 200, 150 S. W. 1171; *Kelly v. State*, 28 Tex. App. 120, 12 S. W. 505; *Ogle v. State*, 16 Tex. App. 361. **W. Va.**—*State v. Belknap*, 39 W. Va. 427, 19 S. E. 507.

[a] *Effect of Presumption of Innocence.*—"It must be remembered that after such a verdict [of conviction] sanctioned by the judgment of the court, the presumption of innocence follows him no longer; on the contrary, he comes here with the presumption of guilt against him, and it devolves upon

him to show some substantial error, or one likely to have caused him harm." *State v. Belknap*, 39 W. Va. 427, 432, 19 S. E. 507.

[b] *In federal courts*, "the rule is that the defendant must show that he has been prejudiced by setting out something more than the bare fact of separation, unless the circumstances of the particular separation indicate of themselves a suspicion of prejudice having been done." *United States v. Davis*, 103 Fed. 457, 468.

[c] *An offer by defendant to prove a separation*, which is refused by the court, will on appeal stand for the fact itself. *State v. Steifel*, 106 Mo. 129, 17 S. W. 227.

36. *Kelly v. State*, 28 Tex. App. 120, 12 S. W. 505. See also *Somers v. State*, 73 Tex. Crim. 549, 166 S. W. 1156.

[a] *Rule Stated.*—"Where there is a strong probability that injustice and wrong could have been done, this court has never hesitated to set aside the verdict upon the ground that the law in such case would presume injury and prejudice to the accused." *Kelly v. State*, 28 Tex. App. 120, 122, 12 S. W. 505.

37. **Ala.**—*Butler v. State*, 72 Ala. 179. **Ark.**—*Ferguson v. State*, 95 Ark. 430, 129 S. W. 813; *Maclin v. State*, 44 Ark. 115; *Cornelius v. State*, 12 Ark. 782. **Cal.**—*People v. Backus*, 5 Cal. 275. **Fla.**—*Gamble v. State*, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547 (*modifying State v. Madoil*, 12 Fla. 151); *Bird v. State*, 18 Fla. 493. **Ga.**—*Roberts v. State*, 14 Ga. 8; *Monroe v. State*, 5 Ga. 85; *Strickland v. State*, 16 Ga. App. 234, 85 S. E.

construed to be mandatory in character.³⁸ And a few early authorities have held that prejudice was conclusively presumed to have resulted.³⁹

In capital cases, more stringent rules are sometimes applied. A few early cases held that the mere unauthorized separation of the jury required the reversal of a judgment of conviction.⁴⁰ And the prevailing view in such cases is that an unauthorized separation is presumptively harmful, and the verdict will be set aside unless it is made to appear affirmatively that no injury resulted to the defendant.⁴¹ Still other authorities recognize the general rule applicable to other

83; *Waller v. State*, 2 Ga. App. 636, 58 S. E. 1106. **Idaho**.—*State v. West*, 11 Idaho 157, 81 Pac. 107. **Ind.**—*Riley v. State*, 95 Ind. 446. **Kan.**—*Madden v. State*, 1 Kan. 340. **Mass.**—*Com. v. Heden*, 162 Mass. 521, 39 N. E. 181. **Minn.**—*State v. Georgian*, 124 Minn. 515, 145 N. W. 385. **Miss.**—*Durr v. State*, 53 Miss. 425; *Organ v. State*, 26 Miss. 78, criticized in *Skates v. State*, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70. **N. M.**—*United States v. Spencer*, 8 N. M. 667, 47 Pac. 715. **Wash.**—*State v. Bennett*, 71 Wash. 673, 129 Pac. 409; *State v. Strodemier*, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012; *State v. Place*, 5 Wash. 773, 32 Pac. 736. **W. Va.**—*State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176. **Wis.**—*Keenan v. State*, 8 Wis. 132.

[a] "The object of this rule is apparent. . . . This protection is due to the defendant and the state should see that he receives it. It is not expected of him to employ some one to watch the jury, and report any misconduct on their part. Hence, when they separate, the burden is upon the state to show, by circumstances or directly, that the absent juror was not subjected to any injurious influence." *Ferguson v. State*, 95 Ark. 428, 430, 129 S. W. 813.

[b] The foundation of this rule in some states, at least, is that the "basis for the order of association of the jurors pending the trial is to be found in the statute, and not in the order of the court" and that the terms of the statute are mandatory. *State v. Bennett*, 71 Wash. 673, 676, 129 Pac. 409.

38. *State v. Bennett*, 71 Wash. 673, 129 Pac. 409, wherein the court said: "It may well be that, where the order to keep the jury together is based upon a discretionary order of the court, an appellate court should say, in furtherance of justice, that the case will not

be reversed unless prejudice be shown. . . . Whatever the rule may be elsewhere, the people of this state have seen fit to say, through the legislative body, that a defendant shall have not only a fair trial, but the semblance of a fair trial, for the reason no doubt, that the danger of allowing a juror to pass upon his own delinquency would be quite as dangerous as the vice at which the statute is aimed. . . . Where the statute says thou shalt or thou shalt not a presumption of prejudice follows."

39. **Ind.**—*Anderson v. State*, 28 Ind. 22. **Vt.**—*State v. Shippy*, Brayt. 169. **Va.**—*Overbee v. Com.*, 1 Rob. (40 Va.) 756, 819.

40. **Mo.**—*State v. Gray*, 100 Mo. 523, 13 S. W. 806; *State v. Collins*, 81 Mo. 652. **Tenn.**—*McLain v. State*, 10 Yerg. 241, 31 Am. Dec. 573. **Tex.**—*Walker v. State*, 37 Tex. 366. **Va.**—*Com. v. McCaul*, 1 Va. Cas. 271, strongly criticized in *Thompson v. Com.*, 8 Gratt. (49 Va.) 637.

41. **Ark.**—*Ferguson v. State*, 95 Ark. 430, 129 S. W. 813; *Maclin v. State*, 44 Ark. 115; *Palmore v. State*, 29 Ark. 248; *Coker v. State*, 20 Ark. 53. **Cal.**—*People v. Cord*, 157 Cal. 562, 108 Pac. 511; *People v. Symonds*, 22 Cal. 348. See *People v. Adams*, 143 Cal. 208, 76 Pac. 954, 101 Am. St. Rep. 92, 66 L. R. A. 247, separation after submission of case. But see *People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263. **Fla.**—*State v. Madoil*, 12 Fla. 151. **Ga.**—*Daniel v. State*, 56 Ga. 653; *Westmoreland v. State*, 45 Ga. 225; *Monroe v. State*, 5 Ga. 85. See *Robinson v. State*, 109 Ga. 506, 34 S. E. 1017; *Kirk v. State*, 73 Ga. 620. **Idaho**.—*State v. Sly*, 11 Idaho 110, 80 Pac. 1125. **Ind.**—*Creek v. State*, 24 Ind. 151. **Ky.**—*Campbell v. Com.*, 162 Ky. 106, 172 S. W. 110; *Com. v. Shields*, 2 Bush 81; *Thacker v. Com.*, 23 Ky. L. Rep. 745, 63 S. W. 737. **La.**—*State v. Warren*, 43 La. Ann. 828, 9

felonies and rely upon the presumption of a want of prejudice;⁴² the mere violation of the order of the court forbidding a separation does not give a legal right to have the verdict set aside,⁴³ and a new trial

So. 559; *State v. Evans*, 21 La. Ann. 321. But see *State v. Brette*, 6 La. Ann. 652. **Mo.**—*State v. Schaeffer*, 172 Mo. 335, 72 S. W. 518; *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938; *State v. Orrick*, 106 Mo. 111, 17 S. W. 176 (adopting the more stringent rule because of statutory modifications of the law and repudiating the rule of the earlier Missouri cases); *State v. Dougherty*, 55 Mo. 69. But see *State v. Brannon*, 45 Mo. 329; *State v. Harlow*, 21 Mo. 446, both decided under a different statute. **Nev.**—*State v. Harris*, 12 Nev. 414. **N. H.**—*State v. Prescott*, 7 N. H. 287. **N. M.**—*Roper v. Territory*, 7 N. M. 255, 33 Pac. 1014. **Pa.**—*Com. v. Eisenhower*, 181 Pa. 470, 37 Atl. 521, 59 Am. St. Rep. 670. See *Com. v. Williams*, 209 Pa. 529, 58 Atl. 922; *Com. v. Gearhardt*, 205 Pa. 387, 54 Atl. 1029. **Tenn.**—*Sherman v. State*, 125 Tenn. 19, 140 S. W. 209 (harmonizing the earlier authorities); *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Cartwright v. State*, 12 Lea 620; *Odle v. State*, 6 Baxt. 159; *Hines v. State*, 8 Humph. 597. **Va.** *Philips v. Com.*, 19 Gratt. (60 Va.) 485. See *Thompson v. Com.*, 8 Gratt. (49 Va.) 637, *criticizing Com. v. McCaul*, 1 Va. Cas. 271, and *Overbee v. Com.*, 1 Rob. (40 Va.) 756. **W. Va.**—*State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. **Wis.**—*Hempton v. State*, 111 Wis. 127, 86 N. W. 596; *State v. Dolling*, 37 Wis. 396; *Rowan v. State*, 30 Wis. 129, 11 Am. Rep. 559; *Keenan v. State*, 8 Wis. 132. **Wyo.**—*Nicholson v. State*, 18 Wyo. 298, 106 Pac. 929.

[a] **Opportunity To Tamper With Jurors Is To Be Considered.**—"The separation of a jury from his fellows, under circumstances in which communication might be held with him, would, in a capital case at least, be fatal to the regularity of the proceedings, if no other fact was shown; for, as he might have been tampered with, the law will presume that it was done. If, however, it is clearly shown that in fact the juror was not communicated with, the presumption no longer exists and the verdict will be upheld." *Green v. State*, 59 Miss. 501, 505.

[b] **Border Line Cases.**—"The question is, where lies the line on the one side of which a presumption exists in favor of the purity of the verdict, and on the other a contrary presumption arises? The answer must be that whatever is sufficient to create a well-founded suspicion in the impartial judicial mind that unlawful influences have been exerted will call upon the party in whose favor the decision rests to support the verdict, but until that much is shown in opposition to the verdict it should be upheld." *Skates v. State*, 64 Miss. 644, 654, 1 So. 843, 60 Am. Rep. 70.

42. **Ill.**—*Marzen v. People*, 190 Ill. 81, 60 N. E. 102; *Gott v. People*, 187 Ill. 249, 58 N. E. 293; *Reins v. People*, 30 Ill. 256. But see *Russell v. People*, 44 Ill. 508; *Jumpertz v. People*, 21 Ill. 375; *McKinney's Case*, 7 Ill. 553. **Kan.** *State v. Stevenson*, 74 Kan. 193, 85 Pac. 797. **Md.**—*Stout v. State*, 76 Md. 317, 25 Atl. 299. **Miss.**—*Cunningham v. State*, 94 Miss. 228, 48 So. 297; *Skates v. State*, 64 Miss. 644, 1 So. 843, 60 Am. Rep. 70, reviewing and harmonizing the earlier cases. But see *Green v. State*, 59 Miss. 501. **Mont.**—*Territory v. Hart*, 7 Mont. 489, 17 Pac. 718. **N. M.**—*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78. **N. Y.**—*Stephens v. People*, 4 Park. Crim. 396, 505. **N. C.** *State v. Trull*, 169 N. C. 363, 85 S. E. 133. But see *State v. Miller*, 13 N. C. 500. **Okla.**—*Weatherholt v. State*, 9 Okla. Crim. 161, 131 Pac. 185. But see *Bilton v. Territory*, 1 Okla. Crim. 566, 99 Pac. 163. **Tex.**—*Jenkins v. State*, 41 Tex. 128; *Jack v. State*, 26 Tex. 1; *Robinson v. State*, 58 Tex. Crim. 550, 556, 126 S. W. 276; *Boyet v. State*, 26 Tex. App. 689, 9 S. W. 275; *Ogle v. State*, 16 Tex. App. 361; *Cox v. State*, 7 Tex. App. 1.

For rule in felony cases generally, see *supra*, this section.

43. **Ark.**—*Binns v. State*, 35 Ark. 118. **N. Y.**—*People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332. **Okla.** *Weatherholt v. State*, 9 Okla. Crim. 161, 131 Pac. 185. **Ore.**—*State v. Olberman*, 33 Ore. 556, 55 Pac. 866. **R. I.** *State v. Mowry*, 21 R. I. 376, 43 Atl. 571.

granted,⁴⁴ though the circumstances surrounding the separation may be such as to rebut this presumption and lead to the conclusion that it may reasonably be assumed that prejudice actually followed.⁴⁵

The order of the lower court either granting or refusing a new trial on the ground of an illegal separation of the jury will be reviewed on appeal only for an abuse of discretion,⁴⁶ and unless the evidence considered on a motion for a new trial is embodied in the record, an appellate court will not consider the point.⁴⁷ Even where the judgment is set aside because of an unwarranted separation of the jurors, the action of the court does not operate as an acquittal and the defendant may be again tried over his plea of former jeopardy.⁴⁸ If the unauthorized separation of the jury is brought to the court's attention during the trial, he should at once investigate the matter and pass upon its prejudicial effect,⁴⁹ and a juror guilty of an unauthorized separation may be punished for contempt.⁵⁰

The rule in civil cases is treated elsewhere in this title.⁵¹

(II.) Separation in Charge of Officer. — Where there is a real separation of the jury, without an order of court,⁵² but the individual jurors

Setting aside verdicts generally, see the title "Verdict."

44. Ark.—Payne *v. State*, 66 Ark. 545, 52 S. W. 276. Ill.—Marzen *v. People*, 190 Ill. 81, 60 N. E. 102. Ind.—Masterson *v. State*, 144 Ind. 240, 43 N. E. 138; Creek *v. State*, 24 Ind. 151. See generally the title "New Trial."

45. Miss.—Cartwright *v. State*, 71 Miss. 82, 14 So. 526. Pa.—Com. *v. Fisher*, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009. Tex.—Early *v. State*, 1 Tex. App. 248, 28 Am. Rep. 409.

46. U. S.—Holt *v. United States*, 218 U. S. 245, 251, 31 Sup. Ct. 2, 54 L. ed. 1021; United States *v. Gillies*, Pet. C. C. 159, 25 Fed. Cas. No. 15,206. Ariz.—Young Chung *v. State*, 15 Ariz. 79, 136 Pac. 631. Ark.—Hooker *v. State*, 75 Ark. 67, 86 S. W. 846; Frame *v. State*, 73 Ark. 501, 84 S. W. 711; Wright *v. State*, 35 Ark. 639; Palmore *v. State*, 29 Ark. 248. Ind.—Riley *v. State*, 95 Ind. 446. La.—State *v. Tucker*, 10 La. Ann. 501. Md.—Stout *v. State*, 76 Md. 317, 25 Atl. 299. Minn.—State *v. Conway*, 23 Minn. 291. N. Y.—People *v. Buchanan*, 145 N. Y. 1, 39 N. E. 846. N. C.—State *v. Barber*, 89 N. C. 523; State *v. Hester*, 47 N. C. 83. Tex.—Somers *v. State*, 73 Tex. Crim. 549, 166 S. W. 1156.

[a] Failure to urge the separation as a ground for a new trial, cannot deprive the accused of urging the error on appeal. Ferguson *v. State*, 95

Ark. 430, 129 S. W. 815. But see Gabler *v. State*, 49 Tex. Crim. 623, 95 S. W. 512.

[b] In Kentucky the early rule that the ruling of the trial court on the effect of an improper separation of the jury, on a motion for a new trial, could not be reviewed on appeal, has been abrogated by statute. Campbell *v. Com.*, 162 Ky. 106, 172 S. W. 110, collecting the earlier cases.

47. Jones *v. Com.*, 31 Gratt. (72 Va.) 830.

48. Ala.—Williams *v. State*, 45 Ala. 57. Fla.—Smith *v. State*, 40 Fla. 203, 23 So. 854; Tervin *v. State*, 37 Fla. 396, 20 So. 551. Ind.—Wyatt *v. State*, 1 Blackf. 257. La.—State *v. Costello*, 11 La. Ann. 283. Wash.—State *v. Haras*, 22 Wash. 57, 60 Pac. 58.

Compare Hopkins *v. State*, 6 Ga. App. 403, 65 S. E. 57.

49. See State *v. Madoil*, 12 Fla. 151, 160.

[a] Failure of counsel to object after such an investigation is made is a waiver of the irregularity. Barrow *v. State*, 80 Ga. 191, 5 S. E. 64. As to effect of failure to object, see generally *infra*, IX, D, 2, c, (VI).

50. Ark.—Binns *v. State*, 35 Ark. 118. Fla.—State *v. Madoil*, 12 Fla. 151. Minn.—State *v. Conway*, 23 Minn. 291. Tex.—Cannon *v. State*, 3 Tex. 31.

51. See *infra*, IX, D, 2, c, (VII).

52. See the following: Cal.—People *v. Bemmerly*, 98 Cal. 299, 33 Pac.

are at all times in charge of officers of the court, the verdict will not be affected in the absence of a showing of misconduct, though it is, of course, an act of impropriety.⁵³ The general rule is especially applicable where the separation was made necessary by reason of the sudden illness of a juror,⁵⁴ by the necessity of attending to calls of nature,⁵⁵ or by the necessity of lodging jurors in separate rooms.⁵⁶ It has also been applied where jurors were taken by the officer to obtain meals or refreshments without an order of the court.⁵⁷ It is immaterial whether the separation in such cases is before or after the jury has retired to consider the verdict.⁵⁸

Separation Into Squads.—The separation of the jury into sections or squads for purposes of convenience or pleasure, each section being in charge of an officer does not require a new trial, though the practice is deprecated.⁵⁹

263; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032. **Ill.**—*Gott v. People*, 187 Ill. 249, 254, 58 N. E. 293. See *Waller v. People*, 209 Ill. 284, 70 N. E. 681, after submission of the case. **Kan.** *State v. Stevenson*, 74 Kan. 193, 85 Pac. 797. **Mass.**—*Com. v. Gagle*, 147 Mass. 576, 18 N. E. 417. **Mo.**—*State v. Dyer*, 139 Mo. 199, 40 S. W. 768; *State v. Avery*, 113 Mo. 475, 502, 21 S. W. 193 (although there is a presumption of prejudice); *State v. Crawford*, 99 Mo. 74, 12 S. W. 354. **N. M.**—*United States v. Swan*, 7 N. M. 306, 315, 34 Pac. 533. **Ore.**—*State v. Olberman*, 33 Ore. 556, 55 Pac. 866, jurors visited their homes. **Pa.**—*Com. v. Gearhardt*, 205 Pa. 387, 54 Atl. 1029, officer taking jurors to a barber shop. **Tex.** *Taylor v. State*, 38 Tex. Crim. 552, 43 S. W. 1019. See *Boyet v. State*, 26 Tex. App. 639, 9 S. W. 275. **Va.**—*Trim v. Com.*, 18 Gratt. (59 Va.) 983, 98 Am. Dec. 765; *Thomas v. Com.*, 2 Va. Cas. 479. **W. Va.**—*State v. Cotts*, 49 W. Va. 615, 625, 39 S. E. 605, 55 L. R. A. 176. **Wis.**—*Crockett v. State*, 52 Wis. 211, 8 N. W. 603, 38 Am. Rep. 733.

See also *supra*, IX, D, 2, a, (I), and b.

Compare State v. Strodemier, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012.

[a] Where the separation is accompanied by other misconduct on the part of the jurors or other persons the verdict may be affected. *Com. v. Fisher*, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009. Effect of misconduct generally, see *infra*, IX, G.

53. *State v. Prescott*, 7 N. H. 287.

54. **Ia.**—*State v. Griffin*, 71 Iowa 372, 32 N. W. 447, sick juror allowed to take a walk with an officer. **Mo.** *State v. Schmidt*, 137 Mo. 266, 38 S. W. 938. **Tex.**—*Ogle v. State*, 16 Tex. App. 361. **Wash.**—*State v. Burns*, 19 Wash. 52, 52 Pac. 316, where a juror was taken sick and conveyed to the courthouse by an officer, apart from the other jurors.

Separation on account of illness generally, see *supra*, IX, D, 2, c, a, (I).

55. **Cal.**—*People v. Wheatley*, 88 Cal. 114, 26 Pac. 95; *People v. Bonney*, 19 Cal. 426. **Ind.**—*Cooper v. State*, 120 Ind. 377, 22 N. E. 320. **Ia.**—*State v. Bowman*, 45 Iowa 418. **La.**—*State v. Veillon*, 105 La. 411, 29 So. 883; *State v. Johnson*, 30 La. Ann. 921. **Miss.** *Green v. State*, 51 Miss. 501. **Mo.**—*State v. Payton*, 90 Mo. 220, 2 S. W. 394. **S. C.**—*State v. Sanders*, 75 S. C. 409, 56 S. E. 35. **Tex.**—*Johns v. State*, 47 Tex. Crim. 161, 83 S. W. 198. **Wash.** *Edwards v. Territory*, 1 Wash. Ter. 195.

Separation for such purpose generally, see *supra*, IX, D, 2, a, (I).

56. See *supra*, p. 471.

57. *State v. Harper*, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46. *Compare Johns v. State*, 47 Tex. Crim. 161, 83 S. W. 198.

Separation to obtain meals or refreshments, see generally *supra*, IX, D, 2, a and b.

58. *State v. Washburn*, 91 Mo. 571, 574, 4 S. W. 274.

59. **Ark.**—*Palmore v. State*, 29 Ark. 248. **Cal.**—*People v. Bemmerly*, 98 Cal. 299, 33 Pac. 263. **N. Y.**—*People*

(III.) **Separation Prior to Impaneling.** — An improper and unauthorized separation of the jurors prior to the selection, acceptance, and swearing of the entire jury does not prejudice the rights of either party.⁶⁰ And failure of counsel to again test the impartiality of the jurors, after acquiring knowledge of their alleged misconduct, is a waiver of the irregularity.⁶¹

(IV.) **Separation Prior to or After Submission of the Case.** — A separation after a case has been submitted to the jury, is an absolute ground for a new trial,⁶² or at least raises a presumption of prejudice;⁶³ but a separation prior to submission of the case does not raise a presumption of prejudice.⁶⁴

(V.) **Separation After Verdict Agreed Upon.** — The mere separation of the jury after they have agreed upon their verdict, written it down and sealed it, though without an order of court, does not require the reversal of the verdict,⁶⁵ though there are some authorities to the contrary.⁶⁶

(VI.) **Failure To Object.**⁶⁷ — Failure of counsel to promptly and properly object to an order authorizing the jury to separate,⁶⁸ or to

v. Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. 554. **Tenn.**—*Sherman v. State*, 125 Tenn. 19, 140 S. W. 209, allowing a portion of the jury to attend a vaudeville show. **W. Va.**—*State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176, stating reason why practice is condemned.

But see *State v. Morden*, 87 Wash. 465, 151 Pac. 832, error to allow one juror to remain away from a Sunday theatrical performance because of religious scruples.

60. **Ala.**—*Bell v. State*, 140 Ala. 57, 37 So. 281. **Ark.**—*Ince v. State*, 77 Ark. 418, 88 S. W. 818. **Tex.**—*Bailey v. State*, 26 Tex. App. 706, 9 S. W. 270. Compare *Hines v. State*, 8 Humph. (Tenn.) 597.

61. *Bell v. State*, 140 Ala. 57, 37 So. 281.

As to effect of failure to object, see *infra*, IX, D, 2, c, (VI).

62. *State v. Howland*, 119 Mo. 419, 24 S. W. 1016; *State v. Orrick*, 106 Mo. 111, 126, 17 S. W. 176. See generally the title "New Trial."

63. **Cal.**—*People v. Adams*, 143 Cal. 208, 76 Pac. 954, 101 Am. St. Rep. 92, 66 L. R. A. 247; *People v. Brannigan*, 21 Cal. 337. See *People v. Thornton*, 74 Cal. 482, 16 Pac. 244; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032. **Minn.**—*Maher v. State*, 3 Minn. 444. **Okla.**—*Goins v. State*, 9 Okla. Crim. 35, 130 Pac. 513; *Selstrom v. State*, 7 Okla. Crim. 345, 123 Pac. 557. **S. D.**—*State*

v. Church, 7 S. D. 289, 64 N. W. 152.

64. *Weatherholt v. State*, 9 Okla. Crim. 161, 131 Pac. 185. *Contra*, *State v. Howland*, 119 Mo. 419, 24 S. W. 1016; *State v. Avery*, 113 Mo. 475, 502, 21 S. W. 193; *State v. Steifel*, 106 Mo. 129, 17 S. W. 227; *State v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329.

65. **Mass.**—*Com. v. McCauley*, 156 Mass. 49, 30 N. E. 76. **Miss.**—*James v. State*, 55 Miss. 57, 30 Am. Rep. 496. **Mo.**—*State v. Sprague*, 149 Mo. 409, 50 S. W. 901; *State v. Weber*, 22 Mo. 321. **Mont.**—*Territory v. Hexter*, 3 Mont. 206. **N. M.**—*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78.

66. *Silvey v. State*, 71 Ga. 553; *Strickland v. State*, 16 Ga. App. 234, 85 S. E. 83; *Hopkins v. State*, 6 Ga. App. 403, 65 S. E. 57; *State v. Fertig*, 84 Iowa 79, 50 N. W. 545; *State v. Callahan*, 55 Iowa 364, 7 N. W. 603, defendant is deprived of his right to poll the jury. But see *Sanders v. State*, 2 Iowa 230.

67. In civil cases, see *infra*, IX, D, 2, c, (VII), (E).

68. **Ala.**—*James v. State*, 53 Ala. 380. **Ind.**—*Henning v. State*, 106 Ind. 386, 396, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756, a capital case. **Ky.**—*Heck v. Com.*, 163 Ky. 518, 174 S. W. 19 (separation prior to empanelment of full jury); *Wilkerson v. Com.*, 88 Ky. 29, 9 S. W. 836; *Arnold v. Com.*, 23 Ky. L. Rep. 182, 62 S. W. 15. **Mo.**—*State v. Blunt*, 110 Mo. 322, 19 S. W.

call the court's attention to an unauthorized separation and make complaint thereof,⁶⁹ will constitute a waiver of the alleged error, though where the statute applicable in such cases is mandatory in character, there is no waiver of its provisions by a failure to make an objection.⁷⁰

(VII.) **In Civil Cases.**⁷¹—(A.) **PRIOR TO FINAL SUBMISSION OF THE CASE.** An unauthorized separation prior to final submission of the case is harmless in the absence of a showing that the jury has been tampered with,⁷² especially in a case where the jury's verdict is advisory only and not binding on the court.⁷³

Whether a violation of an order of the trial court requiring the jury not to separate during the trial has been prejudicial is a matter lying peculiarly within its knowledge, and its order will not be reviewed save for an abuse of discretion.⁷⁴

(B.) **AFTER FINAL SUBMISSION OF THE CASE.**—An unauthorized separation after final submission of the case will not affect the verdict, unless it affirmatively appears that the defeated party suffered prejudice.⁷⁵

650. **Okla.**—*Armstrong v. State*, 2 Okla. Crim. 567, 103 Pac. 658.

69. **U. S.**—*United States v. Gibert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. **Ga.**—*Kirk v. State*, 73 Ga. 620; *Waller v. State*, 2 Ga. App. 636, 58 S. E. 1106. **Neb.**—*Polin v. State*, 14 Neb. 540, 16 N. W. 898. **Wash.**—*State v. Shuck*, 38 Wash. 270, 80 Pac. 444.

[a] **An Objection Would Render an Investigation Possible.**—“If the separation were thought to be at all prejudicial to the prisoner, it ought to have been brought to the notice of the judge at once upon discovery, so that an investigation could have been made, to the end that without further fruitless expense, if justice required it, the trial could have been stopped, that jury discharged, and a new one empaneled to try the case. Parties litigant, even defendants in criminal cases, must deal fairly by the court. They are not permitted to withhold information of matters transpiring in the progress of a trial, whether prejudicial or otherwise, and thus, without objection, permit it to proceed to a conclusion and then take advantage of them.” *Polin v. State*, 14 Neb. 540, 549, 16 N. W. 898.

[b] **The burden of showing that knowledge of the separation came to defendant or his counsel only after verdict is upon them.** *State v. Jefferson*, 125 La. 296, 51 So. 203.

70. *State v. Bennett*, 71 Wash. 673, 129 Pac. 409.

71. **In criminal cases**, see *supra*, IX, D, 2, c., (1) to (VI).

72. **Ind.**—*Stutsman v. Barringer*, 16 Ind. 363. **Me.**—See *Parsons v. Huff*, 38 Me. 137. **Nev.**—*Abel v. Hitt*, 30 Nev. 93, 93 Pac. 227. **N. Y.**—*Ex parte Hill*, 3 Cow. 355.

73. *Burrill v. Phillips*, 1 Gall. 360, 4 Fed. Cas. No. 2,200; *Abel v. Hitt*, 30 Nev. 93, 93 Pac. 227.

74. **Ky.**—See *Smith's Admx. v. Middleboro Elec. Co.*, 164 Ky. 46, 174 S. W. 773, Ann. Cas. 1917A, 1164. **S. C.**—*Pulaski, Jacks & Co. v. W. W. Ward & Co.*, 2 Rich. L. 119. **Vt.**—*Downer v. Baxter*, 30 Vt. 467.

75. **U. S.**—*Walton v. Wild Goose Min. & T. Co.*, 123 Fed. 209, 60 C. C. A. 155. **Cal.**—*McKenna's Estate*, 143 Cal. 580, 77 Pac. 461. **Colo.**—*Beals v. Cone*, 27 Colo. 473, 492, 62 Pac. 948, 83 Am. St. Rep. 92. **Ga.**—*Medlock v. Comrs. of Roads*, 115 Ga. 337, 41 S. E. 579. **Ill.**—See *Sanitary Dist. v. Culbertson*, 147 Ill. 385, 35 N. E. 723. **Ind.**—*New Albany v. McCulloch*, 127 Ind. 500, 26 N. E. 1074; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Alexander v. Dunn*, 5 Ind. 122; *Drummond v. Leslie*, 5 Blackf. 453. **Ia.**—*Iowa Sav. Bank v. Frink*, 92 N. W. 916. **Kan.**—*Perkins v. Ermel*, 2 Kan. 325. **Ky.**—*Bledsoe's Exrx. v. Bledsoe*, 8 Ky. L. Rep. 55, 10 S. W. 10. **Me.**—*Milo v. Gardiner*, 41 Me. 549; *Newell v. Ayer*, 32 Me. 234. **Mass.**—See *Winslow v. Draper*, 8 Pick. 170. **Miss.**—*Graves v. Monet*, 7 Smed. & M. 45. **Mo.**—*Compton v. Arnold*, 54 Mo. 149. **N. J.**—*Oram v. Bishop*, 12 N. J. L. 153; *Clarke v. Cole*,

But where the surrounding circumstances are such as to cast a suspicion upon the actions of the juror, a new trial is properly awarded.⁷⁶

(C.) SEPARATION AFTER VERDICT AGREED UPON. — For the jury to disperse after sealing a verdict, but without an order of court or the consent of the parties to such a practice, is an irregularity, not vitiating the verdict, however, according to some authorities.⁷⁷ Under other authorities, however, the power of the jury to return a sealed verdict, without a special order of the court, is denied.⁷⁸ Where a jury improperly separates after agreeing on only a part of the issues submitted to them, their verdict on such issues will be allowed to stand, if they are not closely connected with or related to the remaining issues in the case.⁷⁹

An unauthorized separation by a single juror is usually considered harmless.⁸⁰

2 N. J. L. 278. **N. Y.**—*Smith v. Thompson*, 1 Cow. 221; *Anthony v. Smith*, 4 Bosw. 503. **S. C.**—*Pulaski, Jacks & Co. v. W. W. Ward & Co.*, 2 Rich. L. 119. **Tex.**—*Burns v. Paine*, 8 Tex. 159; *Edgington v. Kiger*, 4 Tex. 89. **Vt.**—*Downer v. Baxter*, 30 Vt. 467.

But see *Lester v. Stanley*, 3 Day 287, 15 Fed. Cas. No. 8,277; *Howard v. Cobb*, 3 Day 309, 12 Fed. Cas. No. 6,755; *Howle's Admr. v. Dunn & Co.*, 1 Leigh (28 Va.) 455.

[a] **An innocent separation** due to the mere mistake or ignorance of the juror is harmless. *Burrill v. Phillips*, 1 Gall. 360, 4 Fed. Cas. No. 2,200.

[b] **Successful Party Should Not Be Punished.**—"No reason is perceived why the party, in whose favor a verdict has been rendered, should be punished for what he was in no way responsible, by setting aside a verdict which he has fairly obtained." *Inhab. of Milo v. Inhab. of Gardiner*, 41 Me. 549, 551.

[c] **Burden of Proof.**—"The rule in this state, I take it to be, in civil cases, that a separation, against the instructions of the court, with evidence that improper influence might have been brought to bear upon the juror, puts the burden upon the party seeking to sustain the verdict to negative the presumption and show that no such attempt was made." *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169.

[d] **Affidavits of jurors are admissible** to show that they had no conversation with other persons, during their separation, concerning the case. *Cal. Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169. **Mass.**—*Chemical*

Elec. L. & P. Co. v. Howard, 150 Mass. 495, 23 N. E. 317. **S. D.**—*Edward Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764. **Vt.**—*Downer v. Baxter*, 30 Vt. 467. As to use of affidavits of jurors generally, see 8 ENCY. OF EV. 975 et seq.

76. *Murphy v. Hindman*, 37 Kan. 267, 15 Pac. 182.

77. **Ill.**—*Cleveland, C. C. & St. L. Ry. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869; *De Haven v. United States Brewing Co.*, 153 Ill. App. 126. **Ia.** *Heiser v. Van Dyke, Martin & Co.*, 27 Iowa 359; *Cook v. Walters*, 4 Iowa 72. **Ky.**—*Doe v. Harrow*, 3 Bibb 446; *Brown v. McConnel*, 1 Bibb 265. **Miss.**—*James v. State*, 55 Miss. 57, 30 Am. Rep. 496. **N. H.**—*Evans v. Foss*, 49 N. H. 490. **N. Y.**—*Horton v. Horton*, 2 Cow. 589. **N. C.**—See *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573. **Ohio.**—*Sutliff v. Gilbert*, 8 Ohio 405. **S. C.**—*Sartor v. McJunkin*, 8 Rich. L. 451.

[a] **The jury may be reassembled** and allowed to reduce to writing a finding which they had made before separating. *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573.

[b] **Separation after agreeing on a verdict** to the effect that they agreed to disagree is misconduct which vitiates a verdict subsequently rendered. *Short v. West*, 30 Ind. 367. As to misconduct of jurors generally, see *infra*, IX, G.

78. *Prescott v. Augusta*, 118 Ga. 549, 45 S. E. 431. See *Ehrhard v. McKee*, 44 Kan. 715, 25 Pac. 193, and generally the title "**Verdict.**"

79. *Vennard v. McConnell*, 11 Allen (Mass.) 555.

80. *Chemical Elec. L. & P. Co. v.*

(D.) SEPARATION IN CHARGE OF OFFICER.⁸¹ — An unauthorized separation of jurors, who, however, are all the time in the custody of officers, is harmless.⁸²

(E.) FAILURE TO OBJECT.⁸³ — If a party makes no objection to the action of the court allowing the jury to separate,⁸⁴ or fails to promptly bring to the court's attention knowledge he has acquired of an unauthorized separation on the part of the jury, during the trial, or after the submission of the case to them,⁸⁵ he will be taken to have impliedly assented to it.

3. **Proof of the Separation and Its Effect.** — Affidavits used to establish a prejudicial separation of the jury should be definite and certain in their averments;⁸⁶ an affidavit which does not state who the jurors were who were separated from the others should be excluded for indefiniteness.⁸⁷ They should not be made on information and belief.⁸⁸

Use of Jurors. — The general rule that jurors will not be allowed to impeach their own verdict,⁸⁹ requires the exclusion of their testimony or affidavits tending to show that an improper separation of the jury took place,⁹⁰ unless such evidence is expressly rendered competent by statute, as is sometimes the case.⁹¹ The testimony or affidavits of jurors are, however, admissible to disprove or explain any separation of which complaint is made.⁹² But the uncorroborated

Howard, 150 Mass. 495, 23 N. E. 317; Ragland v. Will's Admr., 6 Leigh (33 Va.) 1.

81. In criminal cases, see *supra*, IX, D, 2, 6, (II).

82. Spencer v. Johnson, 185 Mich. 85, 151 N. W. 684 (sick juror); Edward Thompson Co. v. Gunderson, 10 S. D. 42, 71 N. W. 764.

83. In criminal cases, see *supra*, IX, D, 2, c, (VI).

84. Ga.—Adkins v. Williams, 23 Ga. 222; Riggins' Exr. v. Brown, 12 Ga. 271; Pelham & H. R. R. Co. v. Elliott, 11 Ga. App. 621, 75 S. E. 1062. Ill. Sanitary Dist. v. Cullerton, 147 Ill. 385, 35 N. E. 723, after submission of the case. Me.—Parsons v. Huff, 38 Me. 137.

85. Medlock v. Comrs. of Roads, 115 Ga. 337, 41 S. E. 579; Stix & Co. v. Pump & Co., 37 Ga. 332.

86. People v. Symonds, 22 Cal. 348.

[a] **Illustrations.**—Affidavits to the effect that affiants saw some of the jurors but that the others were not in view are insufficient: "Where the affiants took their position, how far from the place where the jurors were, or what intervening objects there may have been, the affiants do not state. Nor do they state that the officer who

had charge of the jury was not with or near the jurors seen by them upon the common; nor that other persons were about the jurors who might have approached them, or spoken in their hearing in reference to the trial." Coker v. State, 20 Ark. 53, 61.

87. Cornelius v. State, 12 Ark. 782; State v. Cotts, 49 W. Va. 615, 629, 39 S. E. 605, 55 L. R. A. 176.

[a] **Reason for This Rule.**—"It should at least have appeared who they were, as without that fact it would have been impossible for the state to have negatived the legal presumption of undue influence." Cornelius v. State, 12 Ark. 782, 811.

88. Marzen v. People, 190 Ill. 81, 60 N. E. 102.

89. See 3 ENCY. OF EV. 220 et seq.; 8 ENCY. OF EV. 964 et seq.

90. Ill.—Marzen v. People, 190 Ill. 81, 60 N. E. 102. La.—State v. Garig, 43 La. Ann. 365; State v. Richmond, 42 La. Ann. 299, 7 So. 459. Miss. Riggs v. State, 26 Miss. 51.

91. See generally the statutes, and Kelly v. State, 28 Tex. App. 120, 12 S. W. 505; Early v. State, 1 Tex. App. 248, 28 Am. Rep. 409.

92. Mont.—State v. Gay, 18 Mont. 51, 44 Pac. 411. Vt.—State v. Law-

testimony or affidavit of a juror is insufficient to satisfactorily explain an unauthorized separation,⁹³ though other authorities have reached a contrary conclusion.⁹⁴ Production of the affidavits of jurors, themselves, is not an absolute necessity, in such cases.⁹⁵

Affidavits of jurors, to rebut the charge of misconduct, should cover all phases of the transaction,⁹⁶ and should especially deny hearing any discussion of the case between other persons.⁹⁷

E. COMMUNICATIONS BETWEEN COURT AND JURY.⁹⁸—**1. In General.**—After the case has been submitted to the jury and it has retired to deliberate upon a verdict, the judge should hold no communications with it upon the merits of the issues involved, except in open court and in the presence of the parties and their counsel.⁹⁹ Inquiries as to whether the jury has agreed, or is likely to agree,¹ or whether further instructions are desired,² may properly be made, through the bailiff in charge of the jury, however, as may directions to the jury to seal their verdict, and then separate, returning into court at a stated time.³ Papers, or exhibits which the jury is entitled

rence, 70 Vt. 524, 41 Atl. 1027. **W. Va.** State v. Cotts, 49 W. Va. 615, 625, 39 S. E. 605, 55 L. R. A. 176 (received with great caution); State v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224; State v. Robinson, 20 W. Va. 713, 43 Am. Rep. 799. **Wyo.**—Nicholson v. State, 18 Wyo. 298, 106 Pac. 929.

Contra, Organ v. State, 26 Miss. 78.

93. Cal.—People v. Backus, 5 Cal. 275. **Idaho.**—State v. Sly, 11 Idaho 110, 80 Pac. 1125. **Miss.**—Organ v. State, 26 Miss. 78. **Tenn.**—Hines v. State, 8 Humph. 597. **Wis.**—Hempton v. State, 111 Wis. 127, 86 N. W. 596.

94. Ind.—See Drew v. State, 124 Ind. 9, 23 N. E. 1098. **Mont.**—State v. Gay, 18 Mont. 51, 81, 44 Pac. 411. **Wyo.**—Nicholson v. State, 18 Wyo. 298, 314, 106 Pac. 929.

95. Crockett v. State, 52 Wis. 211, 8 N. W. 603, 38 Am. Rep. 733. See People v. Bemmerly, 98 Cal. 299, 33 Pac. 263.

96. Riley v. State, 95 Ind. 446, 451. See State v. Dolling, 37 Wis. 396.

97. Daniel v. State, 56 Ga. 653, 655; State v. Dolling, 37 Wis. 396.

98. Intercourse between jurors and other persons, see *infra*, IX, F.

99. Ala.—Harwell v. State, 11 Ala. App. 188, 65 So. 702. **Ill.**—Rafferty v. People, 72 Ill. 37. **Ind.**—Coolman v. State, 163 Ind. 503, 72 N. E. 568; Quinn v. State, 130 Ind. 340, 30 N. E. 300.

[a] A statute making a communication with a jury during their deliber-

ation ground for a new trial, applies to communications between the court and jury. Whitaker v. Browning (Tex. Civ. App.), 155 S. W. 1197.

[b] **Presence of counsel better practice**, but not indispensable. Hurst v. Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

[c] **When the court adjourns**, the judge carries no powers with him to his lodgings, and has no more authority over the jury than any other person. Rafferty v. People, 72 Ill. 37.

[d] **Telephone Conversations.** Where a juror informed the judge by telephone that the jury could not agree and the latter told him that he hoped they would agree and to have the bailiff take them to a good place and allow them to sleep over it, reversible error was not shown. Continental Casualty Co. v. Ogburn, 186 Ala. 398, 64 So. 619. Effect of urging agreement, see generally, *infra*, IX, N.

As to giving instructions, see 13 STANDARD PROC. 975 et seq.

1. Ga.—Central R. & Banking Co. v. Neighbors, 83 Ga. 444, 10 S. E. 115. **Ia.**—Cole v. Swan, 4 G. Gr. 32. **Kan.** State v. Finch, 71 Kan. 793, 81 Pac. 494.

See also *infra*, IX, E, 2, b, (I).

As to function of court in urging an agreement, see *infra*, IX, N.

2. State v. Connelly, 7 Mo. App. 40. **Additional instructions after retirement**, see 13 STANDARD PROC. 966 et seq.

3. Com. v. Heden, 162 Mass. 521, 39 N. E. 181.

to consider in their deliberations, may also be sent to them, without recalling them into court.⁴ But the bailiff should not be directed to make any but the most formal inquiries; nor messages given him for the jury, concerning any but the most general matters of practice.⁵ The jury should not be asked how they stand, numerically, in regard to the verdict.⁶ Nor should the court in the course of its intercourse with the jury intimate any opinion upon the merits of the case,⁷ or as to the weight or credibility of the testimony,⁸ or the period of time they will be kept together for deliberation.⁹ Inquiries by the jurors should be presented to the court through their foreman.¹⁰ The court should not consult with the foreman of the jury except in open court and with all the other jurors present;¹¹ nor should jurors leave the juryroom and converse with the judge,¹² although it has been held not to be improper for the jury by a committee of one or more of their body to communicate with the judge in open court and in the

Sealing verdict, etc., see generally the title "Verdict."

4. *Smith v. Holcomb*, 39 Mass. 552.

Sending papers and articles to juryroom, see *infra*, IX, K.

5. *Coolman v. State*, 163 Ind. 503, 72 N. E. 568; *Lewis v. State*, 109 Miss. 586, 68 So. 785.

[a] Bailiff (1) should not be sent to the juryroom with directions to the jury as to their verdict (*Quinn v. State*, 130 Ind. 340, 30 N. E. 300), (2) or to withdraw erroneous instructions. *Hall v. State*, 8 Ind. 439.

6. **U. S.**—*Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. ed. 482. **Ind.**—*Newell v. Hutchinson*, 54 Ind. 330. **Ind. Ter.**—*McCoy v. United States*, 6 Ind. Ter. 415, 98 S. W. 144. **Kan.**—*Compare State v. Finch*, 71 Kan. 793, 81 Pac. 494. **Minn.**—*McNulty v. Stewart*, 12 Minn. 434. **N. Y.** *People v. Kennedy*, 57 Hun 532, 11 N. Y. Supp. 244, 33 N. Y. St. 108, statement by a juror which is cut short by the court is harmless.

[a] But it is not prejudicial misconduct for the jury to send to the court of their own motion, word as to how they stand and of their inability to agree. *Louisville, N. A. & C. Ry. Co. v. Hendricks*, 123 Ind. 462, 28 N. E. 58.

Function of court in urging an agreement, see *infra*, IX, N.

7. *Lawson v. State* (Tex. Crim.), 32 S. W. 895.

Instructions as to facts or evidence, see 13 STANDARD PROC. 829, et seq.

8. **Ga.**—*Savannah F. & W. R. Co. v. Hardin*, 110 Ga. 433, 35 S. E. 681; *Lellyett v. Markham*, 57 Ga. 13. **Ill.** *Illinois Cent. R. Co. v. Sanders*, 173 Ill. 585, 53 N. E. 408. **Tex.**—*Walling v. State*, 59 Tex. Crim. 279, 128 S. W. 624. **Va.**—*McDowell v. Crawford*, 11 Gratt. (52 Va.) 377. **W. Va.**—*Neill v. Rogers Bros. Produce Co.*, 38 W. Va. 228, 18 S. E. 563.

9. **Ga.**—*O'Bear v. Gray*, 68 Ga. 182. **Miss.**—*Lewis v. State*, 109 Miss. 586, 68 So. 785. **Tex.**—*Hogan v. State* (Tex. Crim.), 28 S. W. 949.

10. **Com. v. Borasky, 214 Mass. 313, 101 N. E. 377.**

11. *Texas M. R. Co. v. Byrd*, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429. *Compare Goldsmith v. Solomons*, 2 Strobb. L. (S. C.) 296, holding a failure to inform counsel of the purport of the communication is not ground for a new trial.

[a] Formal Interchange Is Not Improper.—It is not prejudicial for the court to decipher his own handwriting and explain the meaning of a word to the foreman of the jury who has been sent by the jury to make the inquiry. *Dishmaker v. Heck*, 159 Wis. 572, 150 N. W. 951.

12. **Ala.**—*Continental Casualty Co. v. Ogburn*, 186 Ala. 398, 64 So. 619, telephone conversation of juror with judge held harmless. **Ga.**—*Ruckersville Bank v. Hemphill*, 7 Ga. 396. **Mo.** *Chinn v. Davis*, 21 Mo. App. 363. **Tex.** *Texas Midland Ry. Co. v. Byrd*, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429.

presence of the parties or their attorneys.¹³ The judge should not allow a juror to approach him in the courtroom and speak to him in a whisper.¹⁴

2. Visits by Judge to Juryroom.—a. *In General.*—The courts in some jurisdictions, while fully recognizing the impropriety and irregularity of the conduct,¹⁵ rely on the presumption that prejudice does not follow from a mere irregularity or technical error,¹⁶ and hold that in the absence of a showing of prejudice the verdict will not be set aside in a case because a judge visits the juryroom and there communicates with the jurors;¹⁷ a casual, temporary intrusion into the juryroom does not by these authorities call for a reversal of the judgment.¹⁸ By the weight of authority, however, such conduct on the part of the judge in the absence of counsel and without consent constitutes reversible error,¹⁹ and this, even though the visit was requested by the jury,²⁰ and apart from any question of prejudice resulting from the

13. *Dent v. King*, 1 Ga. 200, 44 Am. Dec. 638.

14. *Chinn v. Davis*, 21 Mo. App. 363.

[a] **Effect.**—While the practice is improper, it is not prejudicial where the judge immediately states publicly the question that was asked him and gives his reply in public. *State v. Rowell*, 75 S. C. 494, 56 S. E. 23.

15. *Miller v. State*, 13 Ga. App. 440, 79 S. E. 232.

16. *Ayrhart v. Wilhelmy*, 135 Iowa 290, 112 N. W. 782; *Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682.

17. **Ala.**—*McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810. **Colo.**—*Moffatt v. People*, 59 Colo. 406, 149 Pac. 104. **Ga.**—*Miller v. State*, 13 Ga. App. 440, 79 S. E. 232. **Ia.**—*State v. Olds*, 106 Iowa 110, 76 N. W. 644. **Kan.**—*State v. Gluck*, 49 Kan. 533, 31 Pac. 690. But see *Stager v. Harrington*, 27 Kan. 414. **La.**—*State v. George*, 8 Rob. 535. **Minn.**—*Helmbrecht v. Helmbrecht*, 31 Minn. 504, 18 N. W. 449, *modifying* *Hoberg v. State*, 3 Minn. 262. **N. C.** *Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928. **Ohio.**—*Wood County v. Shinnew*, 10 Ohio Cir. Ct. (N. S.) 554. **S. C.**—*Goldsmith v. Solomons*, 2 Strobb. L. 296. **Tenn.**—*Cartwright v. State*, 12 Lea 620. **Va.**—*Philips v. Com.*, 19 Gratt. (60 Va.) 485, 533.

[a] **The nature and subject-matter of the communication** must be made to appear before a claim of prejudice can be maintained. *Ayrhart v. Wilhelmy*, 135 Iowa 290, 112 N. W. 782; *Chinn v. Davis*, 21 Mo. App. 363.

18. *Helmbrecht v. Helmbrecht*, 31 Minn. 504, 18 N. W. 449.

19. **Ind.**—*Jones v. Johnson*, 61 Ind. 257; *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976. **Mass.**—*Read v. Cambridge*, 124 Mass. 567, 26 Am. Rep. 690. **Mich.**—*Fox v. Peninsular White Lead & Color Wks.*, 84 Mich. 676, 48 N. W. 203. But see *Galloway v. Corbitt*, 52 Mich. 460, 18 N. W. 218; *Hart v. Lindley*, 50 Mich. 20, 14 N. W. 682. **N. Y.**—*Bunn v. Croul*, 10 Johns. 239; *Seeley v. Bisgrove*, 83 Hun 293, 31 N. Y. Supp. 914, 64 N. Y. St. 650; *Gibbons v. Van Alstyne*, 56 Hun 639, 9 N. Y. Supp. 156; *Valentine v. Kelly*, 54 Hun 78, 7 N. Y. Supp. 184, 17 Civ. Proc. 367, 26 N. Y. St. 481. But see *Kerr v. Hammer*, 61 Hun 619, 15 N. Y. Supp. 605; *People v. Moore*, 50 Hun 356, 3 N. Y. Supp. 159, 18 N. Y. St. 1031, 20 N. Y. St. 1. **N. D.**—*State v. Murphy*, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. (N. S.) 609. **Tex.**—*Texas M. R. Co. v. Byrd*, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429. **Wis.**—*Du Cate v. Town of Brighton*, 133 Wis. 628, 114 N. W. 103.

[a] **Even though the judge takes his stenographer who records all that is said, the error is prejudicial.** *Du Cate v. Town of Brighton*, 133 Wis. 628, 114 N. W. 103.

[b] **Relationship of principal and agent** does not exist between the judge and the officer having the jury in charge. "The officer is the one, and the only one, who has authority to communicate with them, and this excludes the judge." *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976.

Necessity for presence of counsel, see *supra*, IX, E, 1; *infra*, IX, E, 4.

20. **Idaho.**—*State v. Bland*, 9 Idaho

action.²¹ Under these authorities, the judge has no right to communicate with the jury save from the bench,²² unless the parties are, or have an opportunity to be present.²³ The object and motive of the court in making the visit is immaterial;²⁴ as is the fact that the judge

796, 76 Pac. 780. Ill.—Mound City v. Mason, 262 Ill. 392, 104 N. E. 685; Crabtree v. Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694. Ind.—Fish v. Smith, 12 Ind. 563. Ky.—Bentley v. Com., 143 Ky. 503, 136 S. W. 896. Mich.—Snyder v. Wilson, 65 Mich. 336, 32 N. W. 642. Mo.—Berst v. Moxom, 163 Mo. App. 123, 145 S. W. 857. N. Y.—Benson v. Clark, 1 Cow. 258; High v. Chick, 81 Hun 100, 30 N. Y. Supp. 652, 1 N. Y. Ann. Cas. 1; People v. Linzey, 79 Hun 23, 29 N. Y. Supp. 560, 9 N. Y. Crim. 260, 61 N. Y. St. 240; Abbott v. Hockenberger, 31 Misc. 587, 65 N. Y. Supp. 566, 7 N. Y. Ann. Cas. 481; People v. Bowers, 111 N. Y. Supp. 623; Hudson v. Stearns, 75 N. Y. Supp. 735. Ohio.—Kirk v. State, 14 Ohio 511. Okla.—Miller v. State (Okla.), 152 Pac. 409. Tex.—Lester v. Hays, 14 Tex. Civ. App. 643, 38 S. W. 52. Wash.—State v. Wroth, 15 Wash. 621, 47 Pac. 106. Wis.—Hurst v. Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666; Havenor v. State, 125 Wis. 444, 104 N. W. 116.

21. Ill.—Crabtree v. Hagenbaugh, 23 Ill. 349, 76 Am. Dec. 694. Ind.—Danes v. Pearson, 6 Ind. App. 465, 33 N. E. 976. N. Y.—Taylor v. Betsford, 13 Johns. 487; People v. Linzey, 79 Hun 23, 29 N. Y. Supp. 560, 9 N. Y. Crim. 260, 61 N. Y. St. 240; Abbott v. Hockenberger, 31 Misc. 587, 65 N. Y. Supp. 566, 7 N. Y. Ann. Cas. 481; People v. Bowers, 111 N. Y. Supp. 623. Tex.—Texas M. R. Co. v. Byrd, 102 Tex. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429. Wash.—State v. Wroth, 15 Wash. 621, 47 Pac. 106.

[a] "A strict compliance with this practice of having all proceedings in court in the presence of counsel, or on notice to them, unless waived, is better than to countenance violations thereof unless prejudice is shown. . . . To determine in each case whether prejudice resulted would be difficult, if not impossible, and justice will be better subserved by avoiding such communications entirely." State v. Murphy, 17 N. D. 48, 115 N. W. 84, 17 L. R. A. (N. S.) 609.

22. Gibbons v. Van Alstyne, 56 Hun

639, 9 N. Y. Supp. 156. See generally *supra*, IX, E, 1.

[a] **Duty of the Judge.**—"In the discharge of his official duty the place for the judge is on the bench. As to him the law has closed the portals of the juryroom and he may not enter. The appellant was not obliged to follow the judge to the juryroom in order to protect his legal rights, or to see that the jury was not influenced by the presence of the judge." State v. Wroth, 15 Wash. 621, 47 Pac. 106.

23. Mich.—See Snyder v. Wilson, 65 Mich. 336, 32 N. W. 642. Mo.—Bowring v. Wabash Ry. Co., 90 Mo. App. 324. N. J.—Cook v. Green, 6 N. J. L. 109. N. Y.—Rogers v. Moulthrop, 13 Wend. 274. See High v. Chick, 81 Hun 100, 30 N. Y. Supp. 652, 1 N. Y. Ann. Cas. 1.

[a] **Statement of the Rule.**—"In the present case, it cannot fairly be inferred that the plaintiff in error gave his consent, unless from the circumstances that he knew that the justice was going in to the jury, and did not object. But this is not enough. The practice is dangerous and improper, and ought to be guarded against; and the consent ought not to be matter of inference, as it may be liable to great abuse; it ought to appear affirmatively that it was done with the consent of parties." Taylor v. Betsford, 13 Johns. (N. Y.) 486, the leading case.

24. Ind.—Danes v. Pearson, 6 Ind. App. 465, 33 N. E. 976. Mo.—Berst v. Moxom, 163 Mo. App. 123, 145 S. W. 857. N. Y.—Valentine v. Kelly, 54 Hun 78, 7 N. Y. Supp. 184, 17 Civ. Proc. 367, 26 N. Y. St. 481. Ohio.—Kirk v. State, 14 Ohio 511. Wis.—Havenor v. State, 125 Wis. 444, 104 N. W. 116.

[a] **Commendable Object Is No Excuse.**—A verdict was set aside even though the object of the court in visiting the jury "was to ascertain whether anyone was sick and unable to further deliberate, and also to find out whether they had agreed." State v. Murphy, 17 N. D. 48, 115 N. W. 84.

enters the juryroom under a misapprehension of the facts, believing that a verdict has been agreed upon.²⁵

Various principles have led to the adoption of this drastic rule. Public policy demands that juries should be free not only from the exercise of undue influence by the court,²⁶ but even from the suspicion of the existence of any such secret influence;²⁷ the judge by virtue of his position, and the importance attached to his every remark by the jury is, even unconsciously, in a position to unintentionally influence the jury.²⁸ Parties should not be subjected to the burden of an inquiry before the court in regard to the effect of such actions,²⁹ and a resort to the testimony of persons reluctant to testify as to their own wrongdoing, should not be required.³⁰ The necessity that parties have an opportunity to object and except to directions given the jury by the court is also frequently mentioned,³¹ as is the general principle that trials of cases must be conducted publicly and openly,³² and in criminal cases, the right of parties to be present, with counsel, during all stages of the trial.³³

Merely stepping into the doorway of the juryroom is a violation of this rule,³⁴ as is answering a knock on the door of the juryroom and conversing with the jurors in full view of counsel for both parties though beyond their range of hearing.³⁵

b. *Subject-Matter of Communications.* — (I.) *In General.* — A judgment has been reversed even where the judge said nothing at all to the jury during his visit, but merely listened to their request for information and then left them,³⁶ and where he refused to answer the inquiries of the jury and referred them to the instructions given by him.³⁷ Statements regarding the nature of the offense and the punishment³⁸ which

Subject-matter of communication, see *infra*, IX, E, 2, b.

25. *People v. Linzey*, 79 Hun 23, 29 N. Y. Supp. 560, 9 N. Y. Crim. 260, 61 N. Y. St. 240.

26. *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976.

27. *Hudson v. Stearns*, 75 N. Y. Supp. 735; *State v. Murphy*, 17 N. D. 48, 115 N. W. 84.

28. *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976.

29. *State v. Wroth*, 15 Wash. 621, 47 Pac. 106; *Havenor v. State*, 125 Wis. 444, 104 N. W. 116.

30. *Abbott v. Hockenberger*, 31 Misc. 587, 65 N. Y. Supp. 566, 7 N. Y. Ann. Cas. 481.

31. *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694; *Fish v. Smith*, 12 Ind. 563.

[a] **The Rule Stated.** — "All communication to the jury in open court is subject to exception by the parties if deemed improper. If any communication is made to them in the jury-

room in the absence of the parties no opportunity is afforded for objections and exceptions at the time." *State v. Murphy*, 17 N. D. 48, 115 N. W. 84.

32. *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694.

33. *Kirk v. State*, 14 Ohio 511; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106.

Right of accused to be present during trial, see generally the title "Trial."

34. *Hurst v. Webster Mfg. Co.*, 128 Wis. 342, 107 N. W. 666. See *Havenor v. State*, 125 Wis. 444, 104 N. W. 116.

35. *People v. Bowers*, 111 N. Y. Supp. 623.

36. *Benson v. Clark*, 1 Cow. (N. Y.) 258.

37. *Havenor v. State*, 125 Wis. 444, 104 N. W. 116.

38. *State v. Bland*, 9 Idaho 796, 76 Pac. 780; *People v. Linzey*, 79 Hun 23, 29 N. Y. Supp. 560, 9 N. Y. Crim. 260, 61 N. Y. St. 240; *People v. Bowers*, 111 N. Y. Supp. 623.

could be inflicted, as to which party would bear the costs,³⁹ as to what was the testimony in the case,⁴⁰ informing the jury that the sheriff would take them to supper, with a caution as to their conduct at that time,⁴¹ urging the jury to reach an agreement upon a verdict,⁴² or stating the effect of the verdict,⁴³ have all been held to be communications which required the setting aside of the verdict and the granting of a new trial. So also, a reading of the pleadings to the jury upon such a visit has been held improper.⁴⁴

The fact that the inquiry of the jury was answered correctly from a legal point of view does not cure the error.⁴⁵ But inquiries by the court as to the comfort and welfare of the jury,⁴⁶ and a statement of where he could be found if the jury wanted him,⁴⁷ or an inquiry as to whether they had or were likely to be able to reach, an agreement,⁴⁸ or statements as to the form of verdict which might be returned,⁴⁹ or that the jury could not add anything to the plaintiff's demand,⁵⁰ and that he could not communicate with them in their room,⁵¹ are not considered a taking of evidence or a proceeding in the case in the absence of defendant and his counsel.⁵²

39. *Abbott v. Hockenberger*, 31 Misc. 587, 65 N. Y. Supp. 566, 7 N. Y. Ann. Cas. 481; *Hudson v. Stearns*, 75 N. Y. Supp. 735.

40. *N. Y.*—*Bunn v. Croul*, 10 Johns. 239. *Tex.*—*Holliday v. Sampson*, 42 Tex. Civ. App. 364, 95 S. W. 643. *Wis.*—*Hurst v. Webster Mfg. Co.*, 128 Wis. 342, 107 N. W. 666.

[a] **A reading of the testimony of a witness** by the judge from his minutes was held not to be improper in *State v. George*, 8 Rob. (La.) 535.

Instructions as to facts or evidence, see 13 STANDARD PROC. 829, et seq.

41. *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *Du Cate v. Town of Brighton*, 133 Wis. 628, 114 N. W. 103.

42. *Valentine v. Kelly*, 54 Hun 78, 7 N. Y. Supp. 184, 17 Civ. Proc. 367, 26 N. Y. St. 481.

Function of court in urging an agreement, see *infra*, IX, N.

43. *High v. Chick*, 81 Hun 100, 30 N. Y. Supp. 652, 1 N. Y. Ann. Cas. 1.

44. *Seeley v. Bisgrove*, 83 Hun 293, 31 N. Y. Supp. 914, 64 N. Y. St. 650.

45. *Abbott v. Hockenberger*, 31 Misc. 587, 65 N. Y. Supp. 566, 7 N. Y. Ann. Cas. 481.

46. *Philips v. Com.*, 19 Gratt. (60 Va.) 485, 523.

47. *Cartwright v. State*, 12 Lea (Tenn.) 620.

48. *Ga.*—*Miller v. State*, 13 Ga.

App. 440, 79 S. E. 232. *N. Y.*—*People v. Pickert*, 26 Misc. 112, 56 N. Y. Supp. 1090. *N. C.*—*Willeford v. Bailey*, 132 N. C. 402, 43 S. E. 928. *Tex.*—*Priest v. State* (Tex. Crim.), 34 S. W. 611.

Inquiries through bailiff, see *supra*, IX, E, 1.

Function of court in urging an agreement, see *infra*, IX, N.

49. *Colo.*—*Moffitt v. People*, 59 Colo. 406, 149 Pac. 104. *Ga.*—*Miller v. State*, 13 Ga. App. 440, 79 S. E. 232. *Kan.*—*State v. Evans*, 90 Kan. 795, 136 Pac. 270, whether a recommendation to clemency would be received. *Mo.*—*Compton v. Arnold*, 54 Mo. 149. *N. Y.*—*People v. Moore*, 50 Hun 356, 3 N. Y. Supp. 159, 18 N. Y. St. 1031, 20 N. Y. St. 1.

[a] **Telephone conversation** by the judge with the foreman of the jury as to the form of verdict to be used was held not to be prejudicial error though not commended. *Whitney v. Com.*, 190 Mass. 531, 77 N. E. 516.

[b] **Whether it was necessary for all jurors to sign the verdict** is not an improper inquiry. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810.

50. *Thayer v. Van Vleet*, 5 Johns. (N. Y.) 111.

51. *State v. Olds*, 106 Iowa 110, 76 N. W. 644; *State v. Robertson*, 51 La. Ann. 139, 24 So. 817, answer conveyed by bailiff.

52. *Miller v. State*, 13 Ga. App. 440, 79 S. E. 232.

(II.) In Regard to the Instructions. — Any oral communication between the court and the jury in regard to the instructions, such as a construction thereof, is improper.⁵³ The giving of additional instructions in the juryroom is also erroneous.⁵⁴

3. **Written Communications.** — The general rules applicable to visits by the judge to the juryroom⁵⁵ apply to written communications sent by him to the jury: and by the weight of authority it is held improper and prejudicial for the judge to send written answers to inquiries submitted by the jury, irrespective of the character of the inquiry and the answer made to it or its prejudicial nature.⁵⁶ Communications on a great variety of subjects have been condemned by the

53. *Kirk v. State*, 14 Ohio 511.

[a] Even where the court refused the request of the jury to construe the instructions, error was held to inhere in the visit of the judge to the juryroom. *Crabtree v. Hagenbaugh*, 23 Ill. 349, 76 Am. Dec. 694; *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857.

[b] But it is not improper (1) for the judge to enter the juryroom to withdraw an improper instruction (*Martin, Moodie & Co. v. Petty* [Tex. Civ. App.], 79 S. W. 878), (2) or to refer the jury to a dictionary to ascertain the meaning of a word used in an instruction. *Denison v. State*, 49 Tex. Crim. 426, 93 S. W. 731. But see *Corpus Christi St. & Interurban Ry. Co. v. Kjellberg* (Tex. Civ. App.), 185 S. W. 430.

54. Ill.—*Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685. Ind.—*Jones v. Johnson*, 61 Ind. 257; *Fish v. Smith*, 12 Ind. 563. Kan.—*Stager v. Harrington*, 27 Kan. 414. Ky.—*Rouss v. Reid*, 12 Ky. L. Rep. 843. Mass.—*Read v. Cambridge*, 124 Mass. 567, 26 Am. Rep. 690. Mich.—*Fox v. Peninsular White Lead & Color Wks.*, 84 Mich. 676, 48 N. W. 203. Mo.—*Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857. N. Y.—*Hudson v. Stearns*, 75 N. Y. Supp. 735. Additional instructions after retirement generally, see 13 STANDARD PROC. 966, et seq.

55. See *supra*, IX, E, 2.

56. Ala.—*Johnson v. State*, 100 Ala. 55, 14 So. 627. Ind.—*Coolman v. State*, 163 Ind. 503, 72 N. E. 568. See *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242. Ia.—*O'Connor v. Guthrie*, 11 Iowa 80. Ky.—*Goode v. Campbell*, 14 Bush 75. La.—*State v. Frisby*, 19 La. Ann. 143. Me.—*Greely v. Weaver*, 5 Atl. 267. But see *Goodman v. Norton*, 17 Me. 381, where the answer was

written in open court. Mass.—*Lewis v. Lewis*, 220 Mass. 364, 107 N. E. 970, L. R. A. 1915D, 719; *Sargent v. Roberts*, 1 Pick. 337, the leading case. Compare *Com. v. Borasky*, 214 Mass. 313, 321, 101 N. E. 377; *Moseley v. Washburn*, 165 Mass. 417, 43 N. E. 182; *Com. v. Jenkins*, Thacher Cr. Cas. 118. Mich.—*Hopkins v. Bishop*, 91 Mich. 328, 51 N. W. 902, 30 Am. St. Rep. 480. Mo.—*Chouteau v. Jupiter Iron Wks.*, 94 Mo. 388, 7 S. W. 467; *State v. Alexander*, 66 Mo. 148. Compare *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181. N. Y.—*Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558; *Bunn v. Croul*, 10 Johns. 239; *Kehrley v. Shafer*, 92 Hun 196, 36 N. Y. Supp. 510, 3 N. Y. Ann. Cas. 19. Compare *People v. Kelly*, 94 N. Y. 526; *Zust v. Smithier*, 11 N. Y. Supp. 727; *Gillotte v. Jackson*, 9 Jones & S. 308. Pa.—*Sommer v. Huber*, 183 Pa. 162, 38 Atl. 595. S. D.—*State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117. Vt.—*State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200. Wis.—*McBean v. State*, 83 Wis. 206, 53 N. W. 497.

[a] Public policy (1) according to these cases requires that jury trials should be kept free from the suspicions that inevitably attach to secret communications by any person with the jury (*Sargent v. Roberts*, 1 Pick. [Mass.] 337), (2) and parties have a right to have all stages of the trial conducted in public (*Goode v. Campbell*, 14 Bush [Ky.] 75), (3) with full opportunity to object and except to all matters which take place. *O'Connor v. Guthrie*, 11 Iowa 80.

[b] Where the only answer made was that the court had nothing further to say to the jury, it has been held not to constitute a communication on the merits of the case. *Horrman*

courts for this reason.⁵⁷ The sending of additional instructions to the juryroom is also improper.⁵⁸ By other courts, the sending of written inquiries by the jury to the court, and the answering of them by the court is a practice which meets with approval;⁵⁹ and where it appears

v. Neuman, 15 Misc. 449, 37 N. Y. Supp. 199.

57. See the cases cited *infra*, this note.

[a] Thus (1) a report by a foreman that the jury was unable to agree and awaited the directions of the court and the answer that the court was unwilling to discharge them at that time, has been held erroneous. *Sargent v. Roberts*, 1 Pick. (Mass.) 337. (2) So also, furnishing information upon a point of law (*Goode v. Campbell*, 14 Bush [Ky.] 75; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200 [as to degrees of manslaughter]), (3) even by a mere, general reference to instructions already given (*State v. Alexander*, 66 Mo. 148), (4) or by reciting a rule of law given in the charge (*Greely v. Weaver* [Me.], 5 Atl. 267), (5) or a statement of the amount claimed by the plaintiff to be due (*Kehrley v. Shafer*, 92 Hun 196, 36 N. Y. Supp. 510, 3 N. Y. Ann. Cas. 19), (6) or the punishment which could be inflicted upon the defendant (*State v. Beedle* [Mo.], 180 S. W. 888), (7) or a written statement of the testimony of a witness (*Watertown Bank & Loan Co. v. Mix*, 51 N. Y. 558), (8) have all been held to be erroneous, as has an answer to the inquiry whether if the defendant were found guilty, the court would exercise clemency (*State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117; *McBean v. State*, 83 Wis. 206, 53 N. W. 497), (9) and as to the proper construction of instructions already given. *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242.

58. See the following: Ill.—*Chicago & A. R. Co. v. Robbins*, 159 Ill. 598, 43 N. E. 332. Ind.—*Quinn v. State*, 130 Ind. 340, 30 N. E. 300; *Smith v. McMillen*, 19 Ind. 391. Ia.—*O'Connor v. Guthrie*, 11 Iowa 80. La.—*State v. Frisby*, 19 La. Ann. 143. Pa.—*Sommer v. Huber*, 183 Pa. 162, 38 Atl. 595. Tex.—*Taylor v. State*, 42 Tex. 504. Wis.—*Dralle v. Town of Reedsburg*, 155 Wis. 293, 115 N. W. 819.

See also 13 STANDARD PROC. 975, et seq. Compare *infra*, note 59.

Additional instructions after retire-

ment, see generally 13 STANDARD PROC. 966, et seq.

59. See the following: Neb.—*Music v. Adams*, 96 Neb. 298, 147 N. W. 696. Tex.—*Reno v. State*, 56 Tex. Crim. 229, 120 S. W. 429; *Wichita Falls Compress Co. v. W. L. Moody & Co.* (Tex. Civ. App.), 154 S. W. 1032. Va.—*Buntin v. Danville*, 93 Va. 200, 24 S. E. 830.

[a] The answer of the court should not be argumentative and should be directly responsive to the question asked by the jury. See *Reno v. State*, 56 Tex. Crim. 229, 120 S. W. 429.

[b] Informing Counsel.—(1) It is the better practice to apprise counsel of any question asked by the jury that may affect the case before an answer is returned by the court. *Buntin v. Danville*, 93 Va. 200, 24 S. E. 830. (2) But the court may properly refuse to divulge to counsel the purport of a written communication from the jury to which he pays no attention and makes no reply. *People v. Sauerbier*, 173 Mich. 521, 139 N. W. 260.

[c] Communications (1) held proper include answers to inquiries as to the testimony given by witnesses (*Reno v. State*, 56 Tex. Crim. 229, 120 S. W. 429), (2) the kind or amount of the verdict which could properly be returned (*Colo.—Tilley v. Montelius Piano Co.*, 15 Colo. App. 204, 61 Pac. 483 [answer sent orally through the bailiff]. *Kan. State v. Borchert*, 68 Kan. 360, 74 Pac. 1108. Mass.—*Whitney v. Com.*, 190 Mass. 531, 77 N. E. 516 [directions given by judge over the telephone]); (3) answering a request that testimony be read to them with the statement that that could not be done but that the witness could be recalled. *McKinney v. State*, 48 Tex. Crim. 402, 88 S. W. 1012. Rehearing witnesses and testimony, see *infra*, IX, L.

[d] Additional instructions are sometimes given in this way. *Allen, Cummings & Co. v. Aldrich*, 29 N. H. 63; *Bassett v. Salisbury Mfg. Co.*, 28 N. H. 438; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507; *Shapley v. White*, 6 N. H. 172. See also 13 STANDARD PROC. 976, et seq. Compare *supra*, note 57.

that no injury could have followed from the action of the court, a verdict will not be set aside on this ground.⁶⁰

4. Consent of Counsel.—The consent of counsel to written communications between the court and jury,⁶¹ or to visits by the court to the juryroom,⁶² constitutes a waiver of the irregularity, except in a capital case.⁶³ Such consent must be express;⁶⁴ mere knowledge by counsel of the intended action by the judge and failure to object to it is not a consent to it.⁶⁵ But failure to object promptly after knowledge of the irregularity is acquired, is a waiver of the manner of communication between court and jury,⁶⁶ or as to the communication itself.⁶⁷

5. Proof of Misconduct.⁶⁸—Where the question of misconduct by reason of communications between court and jury is raised on appeal, neither the minutes of the clerk of the court,⁶⁹ nor affidavits,⁷⁰ will be allowed to show misconduct of the judge in visiting the juryroom. The facts as certified in the bill of exceptions on statement settled by the court on appeal,⁷¹ or as incorporated by the judge in his return,⁷² must be accepted as true; but if the court refuses to certify the facts as they are claimed to exist, affidavits may then be employed.⁷³

60. **Kan.**—*State v. Borchert*, 68 Kan. 360, 74 Pac. 1108. **Neb.**—*Martin v. Martin*, 76 Neb. 335, 107 N. W. 580, 124 Am. St. Rep. 815, 14 Ann. Cas. 511. **Tex.**—*Whitaker v. Browning* (Tex. Civ. App.), 155 S. W. 1197; *Wichita Falls Compress Co. v. Moody & Co.* (Tex. Civ. App.), 154 S. W. 1032.

61. **Ill.**—*Joliet v. Looney*, 159 Ill. 471, 42 N. E. 854. **Mich.**—*Smoke v. Jones*, 35 Mich. 409. **N. Y.**—*Plunkett v. Appleton*, 51 How. Pr. 469.

62. *Henlow v. Leonard*, 7 Johns. (N. Y.) 200; *Hancock v. Salmon*, 8 Barb. (N. Y.) 564; *Holliday v. Sampson*, 42 Tex. Civ. App. 364, 95 S. W. 643.

[a] **Conveying the request of the jury to the judge was held to be a consent to the visit.** *Whitney v. Crim*, 1 Hill (N. Y.) 61.

63. *Rafferty v. People*, 72 Ill. 37.

64. *Taylor v. Betsford*, 13 Johns. (N. Y.) 487.

65. *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976; *Moody v. Pomeroy*, 4 Denio (N. Y.) 115.

[a] **Where counsel accompanied the justice to the juryroom, but left it on the request of a juror, without objecting, their consent was held to be established.** *Lasher v. Curry*, 68 N. Y. Supp. 845, 9 N. Y. Ann. Cas. 260, *affirmed*, 62 App. Div. 631, 71 N. Y. Supp. 1140.

66. *Silverstone v. Sovereign F. Assur. Co.*, 187 Mich. 333, 153 N. W.

802; *Le Beau v. Telephone & Tele. Const. Co.*, 109 Mich. 302, 67 N. W. 339; *Mahoney v. Decker*, 18 Hun (N. Y.) 365. But see *Danes v. Pearson*, 6 Ind. App. 465, 33 N. E. 976.

[a] **An appropriate exception must be interposed.** *State v. Beedle* (Mo.), 180 S. W. 888.

67. *Com. v. Borasky*, 214 Mass. 313, 101 N. E. 377.

[a] **Objections to questions asked by judge as to prospect of jury reaching an agreement are waived if not made until the entire inquiry is ended.** *State v. Hale*, 91 Iowa 367, 59 N. W. 281.

68. See generally *infra*, IX, H.

69. *State v. Wroth*, 15 Wash. 621, 47 Pac. 106.

70. *State v. Wroth*, 15 Wash. 621, 47 Pac. 106.

71. *Berst v. Moxom*, 163 Mo. App. 123, 145 S. W. 857; *State v. Wroth*, 15 Wash. 621, 47 Pac. 106.

72. *High v. Chick*, 81 Hun 100, 30 N. Y. Supp. 652, 1 N. Y. Ann. Cas. 1; *People v. Linzey*, 79 Hun 23, 29 N. Y. Supp. 560, 9 N. Y. Crim. 260, 61 N. Y. St. 240; *Gibbons v. Van Alstyne*, 56 Hun 639, 9 N. Y. Supp. 156.

[a] **The affidavit of the judge attached to his return may be treated as a part of it.** *People v. Linzey*, 79 Hun 23, 29 N. Y. Supp. 560, 9 N. Y. Crim. 260, 61 N. Y. St. 240.

73. *State v. Olds*, 106 Iowa 110, 76

F. INTERCOURSE BETWEEN JURORS AND OTHER PERSONS.—1. In General—The freedom of the jury from outside influences during the trial of the case and their deliberations thereon is a matter the importance of which is emphasized by all courts.⁷⁴ The mere opportunity for improper communication with the jury where no prejudicial communications are in fact shown, is insufficient to vitiate a verdict, however.⁷⁵ for the fact of misconduct must be clearly established.⁷⁶ Nor does the mere fact that communications passed between persons outside the juryroom and the jury while they were confined constitute prejudicial misconduct.⁷⁷

Jurors should promptly report any attempt to hold improper intercourse with them to the court.⁷⁸ An investigation of the alleged misconduct of other persons and jurors is properly made during the trial.⁷⁹

Failure of counsel to object to misconduct of this nature occurring during the trial and known at the time will be considered as a waiver thereof,⁸⁰ except that, under some authorities, where the misconduct

N. W. 644; *People v. Kelly*, 94 N. Y. 526.

74. See the following: **Conn.**—*Bennett v. Howard*, 3 Day 219. **Ga.**—*Central of Georgia Ry. Co. v. Hammond*, 109 Ga. 383, 34 S. E. 594; *Robinson v. Donahoo*, 97 Ga. 702, 25 S. E. 491. **Kan.**—*Missouri Pac. Ry. Co. v. Bowman*, 68 Kan. 489, 75 Pac. 482. **Mass.**—*Knight v. Freeport*, 13 Mass. 218. **Mich.**—*Churchill v. Alpena Circ. Judge*, 56 Mich. 536, 23 N. W. 211. **Miss.**—*Hare v. State*, 4 How. 187. **Neb.**—*Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344. **N. C.**—*State v. Wiseman*, 68 N. C. 203. **S. D.**—*McGilvery v. Lawrence*, 35 S. D. 443, 152 N. W. 698; *Godfrey v. Dalquist*, 27 S. D. 373, 131 N. W. 299. **Tenn.**—*Turner v. St. John*, 3 Coldw. 376. **Vt.**—*Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739.

[a] A statute regulating the matter is to be rigidly enforced. *Magan v. Com. (Ky.)*, 119 S. W. 734.

Communications between court and jury, see *supra*, IX, E.

Separation of jury, see *supra*, IX, D. 75. *King v. State*, 91 Tenn. 617, 20 S. W. 169.

[a] The fact that doors or windows of the room in which the jury happens to be are open and accessible to outsiders, no actual misconduct appearing to have occurred, does not affect the verdict. *People v. Kelly*, 46 Cal. 355.

76. *Allen, Cummings & Co. v. Aldrich*, 29 N. H. 63; *Goodright v. McCausland*, 1 Yeates (Pa.) 372, 1 Am.

Dec. 306. Compare *Van Loon v. St. Joseph R. L. H. & P. Co.*, 174 Mo. App. 372, 160 S. W. 63.

[a] A mere suspicion by one juror that another juror has been tampered with does not require a new trial. *West Chicago St. R. Co. v. Tuerk*, 193 Ill. 385, 61 N. E. 1087; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *State v. Way*, 38 S. C. 333, 17 S. E. 39.

77. **Cal.**—*People v. Boggs*, 20 Cal. 432. See *People v. Kelly*, 46 Cal. 355. **Miss.**—*Ned v. State*, 33 Miss. 364, message to his family shouted by juror from open window. **N. C.**—*State v. Tilghman*, 33 N. C. 513. **Tex.**—*Latham v. State*, 75 Tex. Crim. 575, 172 S. W. 797, inquiry whether jurors wished to have some watermelons. **Va.**—*Kennedy v. Com.*, 2 Va. Cas. 510.

Compare *Farrer v. State*, 2 Ohio St. 54.

78. **U. S.**—*Callahan v. Chicago, M. & St. P. Ry. Co.*, 158 Fed. 988, 993. **Ala.**—*Louisville & N. R. Co. v. Turney*, 183 Ala. 398, 62 So. 885. **Me.**—*Heffron v. Gallupe*, 55 Me. 565. **Tex.**—*Beazley v. Denson*, 40 Tex. 416; *R. G. Andrews Lumb. Co. v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.)*, 158 S. W. 1194.

79. *West Chicago St. R. Co. v. Luka*, 72 Ill. App. 60. See *State v. Morris*, 58 Ore. 397, 114 Pac. 476; *Mix v. North American Co.*, 209 Pa. 636, 59 Atl. 272; *Com. v. Tilly*, 33 Pa. Super. 35.

80. **U. S.**—*Berry v. De Witt*, 23 Blatch. 544, 27 Fed. 723; *Allen v.*

is that of a party,⁸¹ or consists of irregularities which could not be corrected by the trial court,⁸² it need not be brought to the attention of the court.

2. Between Parties and Jurors.⁸³—It is gross misconduct for a party to the suit to converse with a juror in regard to the case.⁸⁴ Parties should not voluntarily associate with jurors during the trial;

- Blunt, 2 Woodb. & M. 121, 1 Fed. Cas. No. 217. **Ala.**—Cardwell v. State, 1 Ala. App. 1, 56 So. 12. **Conn.**—Appeal of James, 83 Conn. 702, 78 Atl. 420. **Ga.**—Washington v. State, 124 Ga. 423, 52 S. E. 910; Stevens v. State, 93 Ga. 307, 20 S. E. 331; Roberson v. State, 15 Ga. App. 545, 83 S. E. 877. **Ill.**—Chicago Junction Ry. Co. v. McGrath, 203 Ill. 511, 68 N. E. 69. **Ind.**—Trombley v. State, 167 Ind. 231, 78 N. E. 976; Pittsburgh, C. C. & St. L. Ry. Co. v. Welch, 12 Ind. App. 433, 40 N. E. 650. **Ia.**—Crull v. Louisa County, 169 Iowa 199, 151 N. W. 88; Hahn v. Miller, 60 Iowa 96, 14 N. W. 119. **Ky.**—Vanceburg Tel. Co. v. Bevis, 148 Ky. 285, 146 S. W. 420; American Eng. & Const. Co. v. Crawford, 142 Ky. 217, 134 S. W. 448; Louisville Ry. Co. v. Masterson, 96 S. W. 534; Wiedman v. Line, 13 Ky. L. Rep. 590. **La.**—State v. High, 116 La. 79, 40 So. 538; State v. Dorsey, 40 La. Ann. 739, 5 So. 26. **Me.**—Belcher v. Estes, 99 Me. 314, 59 Atl. 439; Fessenden v. Sager, 53 Me. 531. **Mass.**—Hill v. Greenwood, 160 Mass. 256, 35 N. E. 668; Rowe v. Canney, 139 Mass. 41, 29 N. E. 219. **Minn.**—State v. Floyd, 61 Minn. 467, 63 N. W. 1096. **Mo.**—Ern v. Rubinstein, 72 Mo. App. 337; St. Louis, K. C. & C. R. Co. v. North, 31 Mo. App. 351. **Neb.**—Parkins v. Missouri Pac. Ry. Co., 4 Neb. (Unof.) 1, 93 N. W. 197. **Nev.**—Golden v. Murphy, 31 Nev. 395, 103 Pac. 394, 105 Pac. 99; Lee v. McLeod, 15 Nev. 158. **N. H.**—State v. Rand, 33 N. H. 216; Watson v. Walker, 23 N. H. 471. **N. Y.**—Werner v. Interurban St. Ry. Co., 99 App. Div. 592, 91 N. Y. Supp. 111; People v. Flack, 10 N. Y. Supp. 475, 8 N. Y. Crim. 43, 32 N. Y. St. 215; Gade v. New York Cent. & H. R. R. Co., 13 Hun 1. **N. C.**—Lewis v. Fountain, 168 N. C. 277, 84 S. E. 278. **Ore.**—Tucker v. Salem Flouring Mills Co., 13 Ore. 28, 7 Pac. 53. **R. I.**—Patton v. Hughesdale Mfg. Co., 11 R. I. 188. **Tenn.**—Tinkle v. Dunivant, 16 Lea 503. **Tex.**—Clark v. Elmendorff (Tex. Civ. App.), 78 S. W. 538. **Vt.**—Jennett v. Patten, 78 Vt. 69, 62 Atl. 33. **W. Va.**—Dower v. Church, 21 W. Va. 23.
- [a] A party (1) is charged with the knowledge acquired by his counsel (McKinstry v. Collins, 74 Vt. 147, 52 Atl. 438), (2) and lack of knowledge by the party moving for a new trial, and his counsel must be shown (Wynn v. City & Suburban Ry. Co., 91 Ga. 344, 17 S. E. 649), (3) except where public policy demands that there should be a new trial. Rainy v. State, 100 Ga. 82, 27 S. E. 709; McDaniels v. McDaniels, 40 Vt. 363, 94 Am. Dec. 408.
- [b] Objections to irregularities occurring on a view of the premises need not be made at that time; it is sufficient if they are made with reasonable promptness thereafter. Harrington v. Probate Judge, 153 Mich. 660, 117 N. W. 62.
81. Louisville & N. R. Co. v. Turney, 183 Ala. 398, 62 So. 835. And see Craig & Co. v. Pierson, 169 Ala. 548, 53 So. 803.
- Effect of intercourse between jurors and parties, see *infra*, IX, F, 2.
82. Oleson v. Meader, 40 Iowa 662; Peterson v. Siglinger, 3 S. D. 255, 52 N. W. 1062.
83. Statements in hearing of jurors, see *infra*, IX, F, 7.
84. **Cal.**—Wright v. Eastlick, 125 Cal. 517, 58 Pac. 87. **Conn.**—Hamilton v. Pease, 38 Conn. 115. **Ky.**—Ironton Lumb. Co. v. Wagner, 119 S. W. 197. **Me.**—McIntire v. Hussey, 57 Me. 493 (exhibiting real evidence to a juror); Heffron v. Gallupe, 55 Me. 563 (handing juror a document pertaining to the case); Cottle v. Cottle, 6 Greenl. 140, 19 Am. Dec. 200. **N. H.**—Perkins v. Knight, 2 N. H. 474. See Allen, Cummings & Co. v. Aldrich, 29 N. H. 63. **N. J.**—Tomlin v. Cox, 19 N. J. L. 76. **N. Y.**—Turner v. Beardsley, 19 Wend. 348. **Ore.**—Goodeve v. Thompson, 68 Ore. 411, 136 Pac. 670, 137 Pac. 744. **Pa.**—Snyder v. Haas, 18 Pa. Co. Ct. 597. **S. D.**—Godfrey v. Dalquist, 27 S. D. 373, 131 N. W. 299; Peterson v.

any species of intimacy will usually affect the verdict;⁸⁵ but the extending of mere acts of courtesy to a juror, while indiscreet and irregular, is usually harmless.⁸⁶ Mere association, not sought after by a party, but the result of the exigencies of the occasion, is also harmless.⁸⁷ A conversation not connected with the case, and not held surreptitiously, while improper, will not adversely affect the verdict.⁸⁸ So also, a statement made without a realization of the fact

Siglinger, 3 S. D. 255, 52 N. W. 1062. **Tenn.**—Davidson v. Manlove, 2 Coldw. 346. **Tex.**—Palm v. Chernowsky, 28 Tex. Civ. App. 405, 67 S. W. 165; Larson v. Levy (Tex. Civ. App.), 57 S. W. 52; Gulf, C. & S. F. Ry. Co. v. Schroeder (Tex. Civ. App.), 25 S. W. 306. **Wash.**—Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474.

[a] "It must be known that a party may lose, but cannot gain, by a conversation with a juror after he is sworn, unless it be open and by permission of the court." Ritchie v. Holbrooke, 7 Serg. & R. (Pa.) 458.

[b] During a view (1) of the premises a party should not converse with jurors (**Kan.**—Pond v. Barton, 8 Kan. App. 601, 56 Pac. 139. **Mich.**—Harrington v. Probate Judge, 153 Mich. 660, 117 N. W. 62. **Minn.**—Oswald v. Minneapolis & N. W. Ry. Co., 29 Minn. 5, 11 N. W. 112), (2) but a jesting, casual remark does not require a new trial. Catterlin v. Frankfort, 87 Ind. 45.

[c] But a conversation only remotely bearing on the case will not affect it. White v. Wood, 8 Cush. (Mass.) 413, statement that party had been home to get two deeds which were important in the case.

Delivery of papers and documents to jurors by a party, see *infra*, IX, K.

85. **Ala.**—Louisville & N. R. Co. v. Turney, 183 Ala. 398, 62 So. 885. **Cal.**—Wright v. Eastlick, 125 Cal. 517, 58 Pac. 87. **Me.**—Cottle v. Cottle, 6 Greenl. 140, 19 Am. Dec. 200. **Minn.**—State v. Snow, 130 Minn. 206, 153 N. W. 526. **N. J.**—Phillipsburgh Bank v. Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193. **S. D.**—McGilvery v. Lawrence, 35 S. D. 443, 152 N. W. 698; Godfrey v. Dalquist, 27 S. D. 373, 131 N. W. 299, drinking together in a saloon. **Tex.**—First Nat. Bank v. Hix (Tex. Civ. App.), 164 S. W. 1035; Gulf, C. & S. F. Ry. Co. v. Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788.

Wash.—Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474.

Boarding and lodging jurors at the homes of parties, see *supra*, IX, A, 2.

Treating jurors by parties, see *infra*, IX, F, 8.

[a] **Playing cards (1) by jurors and parties** is strongly condemned. Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474. (2) That a party was one of a group of six, including a juror, who played cards, does not require a new trial, however, there being no conversation concerning the case. Ayrhart v. Wilhelmy, 135 Iowa 290, 112 N. W. 782.

[b] **Association with a juror after verdict** does not constitute misconduct. See Montgomery Tr. Co. v. Knabe, 158 Ala. 458, 48 So. 501; Evertson v. McKay, 124 Minn. 260, 144 N. W. 950.

86. **Ala.**—Louisville & N. R. Co. v. Turney, 183 Ala. 398, 62 So. 885. **Ga.**—Ford v. Holmes, 61 Ga. 419, riding to court together under an arrangement made prior to juror's selection. **Ill.**—Bonnet v. Glattfeldt, 120 Ill. 166, 11 N. E. 250, taking juror home at his request. See Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901. **Me.**—Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253, conveying juror home. **Minn.**—Eich v. Taylor, 20 Minn. 378. **N. Y.**—Gale v. New York Cent. & H. R. R. Co., 53 How. Pr. 385.

87. **Ill.**—Beardstown v. Smith, 150 Ill. 169, 37 N. E. 211. **Kan.**—Saint Paul F. & M. Ins. Co. v. Kelly, 43 Kan. 741, 23 Pac. 1046. **Me.**—Hilton v. Southwick, 17 Me. 303, 35 Am. Dec. 253. **Minn.**—Oswald v. Minneapolis & N. W. Ry. Co., 29 Minn. 5, 11 N. W. 112. **Mo.**—McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W. 132. **S. C.**—McCarty v. McCarty, 4 Rich. L. 594.

88. **Ill.**—Beardstown v. Smith, 150 Ill. 169, 37 N. E. 211; Danville Dem. Pub. Co. v. McClure, 86 Ill. App. 432. **Ia.**—Ayrhart v. Wilhelmy, 135 Iowa 290, 112 N. W. 782. **Mo.**—McGraw v. O'Neil, 123 Mo. App. 691, 101 S. W.

that the party addressed was a juror is not ordinarily harmful.⁸⁹

Misconduct affecting the verdict by the party in whose favor the jury finds is dealt with more stringently than is that of any other person or of the jurors.⁹⁰

A party who has conversed with jurors must satisfactorily explain the transaction,⁹¹ though the party complaining has the burden of proving that the conversation concerned the case.⁹²

3. Between Friends and Relatives of the Parties and Jurors. Conversations between friends or relatives of a party and a juror meet with the same disapproval as conversations in which a party participates.⁹³ Even though the communications were held without the party's knowledge or procurement, the verdict will not be allowed to stand if they were in regard to the case on trial and might have influenced the verdict.⁹⁴ Casual conversations, not concerning the

132. **N. Y.**—*Fleischmann v. Samuel*, 18 App. Div. 97, 45 N. Y. Supp. 404. **N. C.**—*Baker v. Brown*, 151 N. C. 12, 65 S. E. 520. **Va.**—*Borland v. Barrett*, 76 Va. 128, 137, 44 Am. Rep. 152. **Wash.**—*Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725.

[a] Conversation in which a party courteously refused request of certain jurors that he lodge them for the night, is harmless. *Southwestern R. Co. v. Mitchell*, 80 Ga. 438, 5 S. E. 490.

89. *Wise v. Bosley*, 32 Iowa 34; *McGraw v. O'Neil*, 123 Mo. App. 691, 101 S. W. 132. See also *infra*, IX, F, 7, note 44.

[a] "Accidental encounters between parties and jurors are matters of common occurrence and are quite unavoidable. A party is not required to be able to recognize each juror wherever he may see him nor when he does recognize one to go out of his way to avoid meeting him." *McGraw v. O'Neil*, 123 Mo. App. 691, 708, 101 S. W. 132.

90. *Hamilton v. Pease*, 38 Conn. 115; *Crocker v. Crocker*, 198 Mass. 401, 84 N. E. 476.

Misconduct of juror, see generally *infra*, IX, G.

91. **Del.**—*Johnson v. Porter*, 2 Harr. 325. **N. Y.**—*Turner v. Beardsley*, 19 Wend. 348. **Tenn.**—*Davidson v. Manlove*, 2 Coldw. 346.

92. *Hamburger v. Rinkel*, 164 Mo. 398, 64 S. W. 104; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

[a] Direct proof of this fact is not essential. *Gulf, C. & S. F. Ry. Co. v. Schroeder* (Tex. Civ. App.), 25 S. W. 306.

93. **Conn.**—*Hamilton v. Pease*, 38 Conn. 115. **Me.**—*Belcher v. Estes*, 99 Me. 314, 59 Atl. 439; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449. **Mass.**—*Knight v. Freeport*, 13 Mass. 218. **Miss.**—*Cook v. State*, 85 Miss. 738, 38 So. 110. **N. C.**—*State v. Daniels*, 134 N. C. 671, 46 S. E. 991. **S. C.**—*Cohen v. Robert*, 2 Strobb. L. 410. **Tenn.**—*Brown v. Pippin*, 12 Heisk. 657. See *Tinkle v. Dunivant*, 16 Lea 503. **Tex.**—*Gulf, C. & S. F. Ry. Co. v. Matthews*, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788. **Vt.**—*McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408.

[a] It is not presumed that a conversation concerned the subject-matter of the action. **Cal.**—*People v. Phelan*, 123 Cal. 551, 56 Pac. 424. **Ky.**—*Louisville & N. R. Co. v. Berry*, 9 Ky. L. Rep. 683. **N. Y.**—*Werner v. Interurban St. Ry. Co.*, 99 App. Div. 592, 91 N. Y. Supp. 111.

Effect of conversations between parties and jurors, see *supra*, IX, F, 2.

94. *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449.

[a] Punishment of a party is not the basis of the rule. "The plaintiff, as he was unaware of these transactions, is not liable to punishment, but it does not follow from this that he can hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful disregard of the familiar rules which are necessary to a decent administration of the law. The court set the verdict aside not as a punishment to anyone but in justice to themselves, as well as to the defendant, that the trial may be conducted fairly so that the verdict, when finally rendered, may be entitled

case, are harmless, however;⁹⁵ and statements made to a juror in ignorance of his connection with the case, and not calculated to influence the jurors, although with a remote bearing upon it, are not ground for a new trial.⁹⁶ Intimate and improper association of such persons with the jurors is also condemned.⁹⁷ But the mere fact that a juror accepted the hospitality of a person interested in the action does not ordinarily require a new trial, no conversation about the case having taken place.⁹⁸

4. Between Counsel and Jurors.⁹⁹—A proper regard for the proprieties of their profession should lead attorneys to abstain, during the trial of cases, from any intercourse with jurors which would tend to bring them into a closer or more intimate relation than is called for by the interchange of the customary social greetings.¹ Such association as is merely conventional does not require the granting of

to the respect of both parties and the confidence of the court as the result of a trial substantially according to law and upon the evidence in court." *McDaniels v. McDaniels*, 40 Vt. 363, 375, 94 Am. Dec. 408.

95. *Louisville & N. R. R. Co. v. Holland*, 173 Ala. 675, 55 So. 1001 (they do not indicate bias or prejudice); *People v. Phelan*, 123 Cal. 551, 56 Pac. 424.

[a] But a conversation not connected with the subject matter of the action, which leaves with the juror the impression that other desirable benefits will be conferred is prejudicial. *Baltimore P. & C. Ry. Co. v. Phelps*, 8 Ohio Dec. (Reprint) 11, 5 Wkly. L. Bul. 28.

96. *Hairgrove v. Curtiss*, 67 Ill. App. 448; *Meriwether v. Publishers: Geo. Knapp & Co.*, 120 Mo. App. 354, 97 S. W. 257.

97. **U. S.**—*Callahan v. Chicago, M. & St. P. Ry. Co.*, 158 Fed. 988. **Ga.** *Central of Georgia Ry. Co. v. Hammond*, 109 Ga. 383, 34 S. E. 594. **S. C.** *McGill Bros. v. Seaboard Air Line Ry. Co.*, 75 S. C. 177, 55 S. E. 216, railroad claim agent.

[a] Entertainment at saloons and poolhalls was strongly criticized in *Callahan v. Chicago, M. & St. P. Ry. Co.*, 158 Fed. 988, 993, though "no word was spoken between them with reference to the case. But the very absence of such words in view of their relations and the kindly treatment of the juror may have exerted a far more insidious, and therefore dangerous influence than any words that could have been spoken."

98. *Brookhaven Lumb. Mfg. Co. v.*

Illinois Cent. R. Co., 68 Miss. 432, 10 So. 66; *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487, juror lodged at home of a person who was also suing defendant for damages suffered in the same accident.

99. **Statements in hearing of jurors**, see *infra*, IX, F, 7.

1. **Cal.**—*People v. Lyle*, 66 Cal. xviii, 4 Pac. 977. **Ga.**—*Rainy v. State*, 100 Ga. 82, 27 S. E. 709; *Springer v. State*, 34 Ga. 379. **Ill.**—*Mobile & O. R. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850. **Ia.**—*Stafford v. City of Oskaloosa*, 57 Iowa 748, 11 N. W. 668. **Mich.**—*In re Quinn's Est.*, 180 Mich. 502, 147 N. W. 566; *Solomon v. Loud*, 173 Mich. 233, 140 N. W. 651, 48 L. R. A. (N. S.) 540; *People v. Montague*, 71 Mich. 447, 39 N. W. 585. **Ore.**—*Sandstrom v. Oregon-Washington R. & N. Co.*, 69 Ore. 194, 136 Pac. 878, 45 L. R. A. (N. S.) 889. **Vt.**—*Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739.

[a] Counsel should not board or lodge with jurors. *Albers v. San Antonio & A. P. Ry. Co.*, 36 Tex. Civ. App. 186, 81 S. W. 828.

[b] Entertainment at Thanksgiving dinner of a social organization of which a juror was a member, by the attorney, the juror being present, requires a new trial. *In re Quinn's Est.*, 180 Mich. 502, 147 N. W. 566.

[c] Loaning jurors his horse and buggy to enable them to visit their homes and at their request requires a new trial. *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344.

[d] Caring for horses of the jurors, over night, by counsel, requires a new trial. *Springer v. State*, 34 Ga. 379.

a new trial;² and the rendition of minor services to a juror, which fall within the category of common civilities is not frowned upon by the courts.³ Indulging in joking with or playing tricks upon a juror,⁴ playing cards with them,⁵ or allowing the use of his room for such purpose,⁶ or participation in their entertainment and recreation,⁷ are all highly improper acts. A conversation with a juror, in connection with the case frequently calls for a new trial,⁸ unless it was in relation to formal, immaterial features of the case;⁹ but where the conversation is public, fully explained, and in no way affected or concerned the case on trial, a new trial is not required.¹⁰ Counsel may

[e] Offer to carry message to juror's family improper. *Hutchins v. State*, 140 Ind. 78, 39 N. E. 243.

[f] While a view is being taken, counsel should not mingle with jurors. *Keller v. Bley*, 15 Ore. 429, 15 Pac. 705.

[g] Hiring a juror who had been excused from the case, to watch the jurors who were selected, is ground for a new trial, although he did nothing to influence such jurors: "The indictment is that an officer of the court charged equally with the court with the duty of administering the law is guilty of establishing commercial relations with a juror with respect to proceedings in court, knowledge of which relations must inevitably bring the court into disrepute and cause the integrity of its proceedings to be suspected." *Solomon v. Loud*, 173 Mich. 233, 140 N. W. 651, 48 L. R. A. (N. S.) 540.

2. Ga.—*Martin v. Mitchell*, 28 Ga. 382, sleeping in same room—no other accommodation being available. Ia.—*Koester v. Ottumwa*, 34 Iowa 41. Minn.—*Township of Alpena v. Mainville*, 153 Mich. 732, 117 N. W. 338, walking to the courthouse with a juror. Nev.—*Knock v. Tonopah & G. R. Co.*, 38 Nev. 143, 145 Pac. 939, dining at the same table.

Treating of jurors by counsel, see *infra*, IX, F, 8.

3. Cal.—*People v. Lyle*, 66 Cal. xviii, 4 Pac. 977. Ga.—*Barker v. Stewart*, 110 Ga. 854, 856, 36 S. E. 238. Nev.—*Carnaghan v. Ward*, 8 Nev. 30, sending for a bottle of liniment at the request of a juror. N. C.—*Mitchell v. Corpening*, 124 N. C. 472, 32 S. E. 798, handing juror a glass of water.

[a] "There is a marked distinction between the performance of a mere act

of humanity or duty for a juror, as in this case, and the voluntary offer of civilities which neither duty, charity, nor the conventionalities of society require of a man." *Carnaghan v. Ward*, 8 Nev. 30.

4. *Trombley v. State*, 167 Ind. 231, 78 N. E. 976.

5. Ga.—*Robbins v. Brannon*, 145 Ga. 262, 88 S. E. 971; not prejudicial. Mich.—*Webber v. Hayes*, 117 Mich. 256, 75 N. W. 622. Mo.—*Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452, does not require reversal. Vt.—*Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739.

6. *Pool v. Chicago B. & Q. R. R. Co.*, 6 Fed. 844.

7. Ark.—*Collier v. State*, 20 Ark. 36, joining them in singing songs. Ia.—*Stafford v. City of Oskaloosa*, 57 Iowa 748, 11 N. W. 668, celebrating a juror's birthday while visiting his family. Ky.—*Louisville Ry. Co. v. Masterson*, 96 S. W. 534, taking drink with jurymen at their request.

8. Ia.—*Oleson v. Meader*, 40 Iowa 662, conversation concerning the law of the case. Ky.—*Liverpool & London & Globe Ins. Co. v. Wright*, 166 Ky. 159, 179 S. W. 49; *Ironton Lumb. Co. v. Wagner*, 119 S. W. 197. Neb.—*Edney v. Baum*, 44 Neb. 294, 62 N. W. 461. N. C.—*Love v. Moody*, 68 N. C. 200.

[a] Unexplained conversation requires a new trial. *Com. v. Martin*, 16 Pa. Co. Ct. 140.

9. *Ern v. Rubinstein*, 72 Mo. App. 337 (inquiry by juror as to when trial would end); *Lee v. McLeod*, 15 Nev. 158.

[a] Merely inquiring whether a verdict had been reached is harmless. *Carnaghan v. Ward*, 8 Nev. 30.

10. Del.—*Pritchard v. Henderson*, 3 Penne. 128, 50 Atl. 217. Ia.—See Bur-

properly be permitted by order of court, to converse with a juror during a recess of court in order to ascertain what personal knowledge the juror has of the case;¹¹ but they should not communicate with jurors after a sealed verdict has been delivered to the clerk but before it is returned in open court.¹²

5. Between Witnesses and Jurors.—Jurors should not associate during the trial with witnesses in the case,¹³ though such association is not of itself usually a sufficient ground for setting aside the verdict.¹⁴ There should be no communication between the jurors and witnesses concerning the case.¹⁵ Improper communications are, however, usually held to be harmless, unless injury is shown to have followed from them,¹⁶ especially where they are of little direct bearing

dieck v. Chicago, M. & St. P. Ry. Co., 87 Iowa 384, 54 N. W. 439. **La.**—See *State v. Fruge*, 28 La. Ann. 657, whispered conversation in open court harmless. **Neb.**—*Lindsay v. State*, 46 Neb. 177, 64 N. W. 716. **Wash.**—*Deighton v. Hover*, 58 Wash. 12, 107 Pac. 853. **Wis.**—*DeLaney v. Hartwig*, 91 Wis. 412, 64 N. W. 1035.

11. *McDowell v. Sutlive*, 78 Ga. 142, 2 S. E. 937, the same permission should be given to both counsel.

12. *Martin v. Morelock*, 32 Ill. 485. See *Carlyle Canning Co. v. B. & O. S. W. Ry. Co.*, 77 Ill. App. 396.

13. *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698; *Albers v. San Antonio & A. P. Ry. Co.*, 36 Tex. Civ. App. 186, 81 S. W. 828, verdict set aside where juror lodged with an important witness.

[a] **The association of a prosecuting witness** (1) with a juror, in a criminal case, is subject to particular condemnation. *McElrath v. State*, 2 Swan (Tenn.) 378; *Mann v. State*, 47 Tex. Crim. 250, 83 S. W. 195, where the witness journeyed to the juror's home, took dinner with him and stayed a considerable time. (2) But the fact that a prosecuting witness during the trial shook hands "eagerly, excitedly and warmly" with jurors, and spoke to them it not being shown however that he spoke about the case, does not require a reversal. *Bryan v. Com.*, 17 Ky. L. Rep. 965, 33 S. W. 95.

[b] **Association of jurors with a witness for the defense** having become notorious, and the jurors having been reprimanded by the court, a conviction of the defendant was held to have been coerced. *People v. Mitchell*, 100 Cal. 328, 34 Pac. 698.

14. *Hilton v. McDonald*, 173 Mass. 124, 53 N. E. 208; *De Van Rose v. Tholborn*, 153 Mo. App. 408, 134 S. W. 1093.

[a] **The fact that a juror rode to the courthouse with a witness** and that they boarded at the same place is immaterial. *United States v. Daubner*, 17 Fed. 793. And see *Hilton v. McDonald*, 173 Mass. 124, 53 N. E. 208.

15. **Conn.**—*Hamilton v. Pease*, 33 Conn. 115. **Ga.**—*Wynn v. City & Suburban Ry. Co.*, 91 Ga. 344, 17 S. E. 649. **Ill.**—*Woolsey v. Wright*, 7 Ill. App. 277. **Pa.**—*Mawson v. Goldstone*, 9 Phila. 30; *Mench v. Bolbach*, 4 Phila. 68. **Tex.**—*R. G. Andrews Lumb. Co. v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 158 S. W. 1194. **W. Va.**—*Vanmeter v. Kitzmiller*, 5 W. Va. 380, conversation concerning the testimony given by the witness.

[a] **An attempted intimidation of a juror by a witness** will require the setting aside of the verdict. *State v. Riggs*, 110 La. 509, 34 So. 655.

[b] **While a view of premises is being conducted**, witnesses must not point out objects or state facts in connection with the case. *People v. Gallo*, 149 N. Y. 106, 43 N. E. 529.

16. **Conn.**—*Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88. **Ill.**—*Chicago Junction Ry. Co. v. McGrath*, 203 Ill. 511, 68 N. E. 69, some of the jurors were amused and some resented his action. **Ia.**—*State v. Allen*, 89 Iowa 49, 56 N. W. 261. **Me.**—*Bishop v. Williamson*, 11 Me. 495. **Mass.**—*Johnson v. Witt*, 138 Mass. 79. **N. C.**—*State v. Crane*, 110 N. C. 530, 15 S. E. 231. **S. C.**—*State v. Way*, 38 S. C. 333, 17 S. E. 39.

[a] **The fact that the juror did not encourage or induce the conversation**

on the merits of the case.¹⁷ Conversations not pertaining to the case are harmless.¹⁸ The exchange of customary greetings or civilities is not prohibited.¹⁹

6. Between Strangers to the Action and Jurors.—a. *In General.* Not only should the parties to the suit,²⁰ their friends and relatives,²¹ and their counsel,²² and the witnesses in the suit,²³ refrain from discussing the merits of the case on trial with the jurors in the suit; but conversations and discussions of such nature with other persons sometimes require a new trial.²⁴ Each case of alleged improper intercourse between jurors and strangers to the action must be judged on its particular and peculiar facts, however;²⁵ and the prevailing view is to hold such improper intercourse to be harmless in the absence of a showing that prejudice has actually followed from the actions

is to be considered. *State v. Allen*, 89 Iowa 49, 56 N. W. 261.

17. *Mellvaine v. Wilkins*, 12 N. H. 474; *Tiernan v. Trewick*, 2 Utah 393.

18. *Conn.*—*Burns v. State*, 84 Conn. 518, 80 Atl. 712, where the juror merely complimented the prosecuting witness on her good appearance. *Ill.*—*Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056. *Ia.*—*State v. Gulliver*, 163 Iowa 123, 142 N. W. 948. *Neb.*—*Omaha Fair & Exp. Assn. v. Missouri Pac. R. Co.*, 42 Neb. 105, 60 N. W. 330.

19. *People v. Lee*, 17 Cal. 76.

20. See *supra*, IX, F, 2.

21. See *supra*, IX, F, 3.

22. See *supra*, IX, F, 4.

23. See *supra*, IX, F, 5.

24. See the following: *Conn.*—*Tomlinson v. Town of Derby*, 41 Conn. 268; *Hamilton v. Pease*, 38 Conn. 115; *State v. Andrews*, 29 Conn. 100, 76 Am. Dec. 593. *Ia.*—*Welch v. Taverner*, 37 Iowa 207, 42 N. W. 650, statements reflecting on character of the parties. *La.*—*State v. Robertson*, 133 La. 806, 63 So. 363. *Minn.*—*Chalmers v. Whittemore*, 22 Minn. 305. *N. Y.*—*Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. Pr. 141.

[a] **Direct attempts (1) by persons who are unknown to the jurors to influence their verdict**, if persistently made and of apparent consequence, call for the granting of a new trial. *Mix v. North American Co.*, 209 Pa. 636, 59 Atl. 272. (2) Posting of a placard in the juryroom which charged that one of the jurors, naming him, was guilty of a crime similar to that for which defendant was being tried and had used unfair means to get himself upon the jury, which was read by all the jurors, did not of itself require a new trial, after a verdict of guilty. *Hall*

v. Com., 6 Leigh (33 Va.) 615, 29 Am. Dec. 236.

[b] **Statement as to Correctness of Testimony.**—A statement made by a person in answer to a question by a juror, to the effect that the testimony given by a witness was correct, will require a new trial. *Dempsey v. People*, 47 Ill. 323.

[c] **Conversation With Incompetent.** Statements by a person whose faculties were well known to be impaired by age are harmless. *Cowles v. Merchants*, 140 Mass. 377, 5 N. E. 288.

Misconduct of jurors in discussing the case with other persons, see *infra*, IX, G, 9.

25. *McGill Bros. v. Seaboard Air Line Ry. Co.*, 75 S. C. 177, 55 S. E. 216; *State v. Rowell*, 75 S. C. 494, 56 S. E. 23.

[a] **Where Juror's Connection With Case Not Known.**—(1) The fact that the person speaking with the juror did not know of his connection with the case is a circumstance tending to establish the harmless character of the misconduct. *Cowles v. Merchants*, 140 Mass. 377, 5 N. E. 288. (2) Conversely the fact that the juror did not know of the interest in the case of the person with whom he conversed or associated is a matter tending strongly to establish a want of prejudice. *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487.

[b] **Want of Misconduct on Part of Juror.**—The fact that a conversation was not invited by the juror who was guilty of no misconduct on his part, is to be considered. *Caswell v. Pitcher (Me.)*, 10 Atl. 453; *Cowles v. Merchants*, 140 Mass. 377, 5 N. E. 288. See also *infra*, IX, F, 7.

of which complaint is made,²⁶ unless the misconduct was of such a nature that it is reasonably probable that the jury was influenced thereby,²⁷ or the surrounding circumstances were of such character as of themselves to raise a presumption that the misconduct operated to the prejudice of the defeated party.²⁸ Occasionally aggravated instances of misconduct are held to be intrinsically prejudicial.²⁹

[c] Where the misconduct is all on the part of the juror, the court will endeavor to uphold the verdict. *Yancey v. Downer*, 5 Litt. (Ky.) 8, 15 Am. Dec. 35, holding that a party should not be punished for a juror's misconduct.

[d] Participation in the misconduct by the complaining party will justify a refusal of relief. *United States v. Salentine*, 8 Biss. 404, 27 Fed. Cas. No. 16,213; *State v. Wilson*, 42 Wash. 56, 84 Pac. 409.

26. *Ariz.*—*Rain v. State*, 15 *Ariz.* 125, 137 *Pac.* 550. *Ark.*—*Collier v. State*, 20 *Ark.* 36. *Cal.*—*People v. McCurdy*, 68 *Cal.* 576, 10 *Pac.* 207; *People v. Quimby*, 6 *Cal. App.* 482, 92 *Pac.* 493. *Ga.*—*Cohron v. State*, 20 *Ga.* 752. *Ill.*—*People v. Duncan*, 261 *Ill.* 339, 103 *N. E.* 1043; *Chicago Junction Ry. Co. v. McGrath*, 203 *Ill.* 511, 68 *N. E.* 69. *Ind.*—*Trombly v. State*, 167 *Ind.* 231, 78 *N. E.* 976; *Medler v. State*, 26 *Ind.* 171. *Ia.*—*State v. Allen*, 89 *Iowa* 49, 56 *N. W.* 261; *Stockwell v. Chicago, etc. Ry. Co.*, 43 *Iowa* 470. *Me.*—*Shepard v. Lewiston*, B. & B. *St. Ry.*, 101 *Me.* 591, 65 *Atl.* 20. *Minn.*—*Oswald v. Minneapolis & N. W. Ry. Co.*, 29 *Minn.* 5, 11 *N. W.* 112; *Chalmers v. Whittemore*, 22 *Minn.* 305; *Koehler v. Cleary*, 23 *Minn.* 325. *Miss.*—*Easterling Lumber Co. v. Pierce*, 106 *Miss.* 672, 64 *So.* 461. *Pa.*—*Com. v. Lombardi*, 221 *Pa.* 31, 70 *Atl.* 122; *Com. v. Cummings*, 45 *Pa. Super.* 211. *Tenn.*—*King v. State*, 91 *Tenn.* 617, 20 *S. W.* 169. *W. Va.*—*State v. Belknap*, 39 *W. Va.* 427, 19 *S. E.* 507. *Wis.*—*Oborn v. State*, 143 *Wis.* 249, 126 *N. W.* 737, 31 *L. R. A.* (N. S.) 966.

[a] The burden of proving that a conversation pertained to the case, is upon the party who claims the irregularity to exist. *Williams v. Williams*, 112 *Ark.* 507, 166 *S. W.* 552.

27. *U. S.*—*Callahan v. Chicago, M. & St. P. Ry. Co.*, 158 *Fed.* 988; *Johnson v. Root*, 2 *Cliff.* 108, 13 *Fed. Cas.* No. 7,409. *Ala.*—*Clay v. Montgomery*, 102 *Ala.* 297, 14 *So.* 646. *Ark.*—*Collier v. State*, 20 *Ark.* 36. *Conn.*—*Pettibone*

v. Phelps, 13 *Conn.* 445, 35 *Am. Dec.* 88. *Ind.*—*Whelchell v. State*, 23 *Ind.* 89; *Pittsburgh, C. C. & St. L. Ry. Co. v. Welch*, 12 *Ind. App.* 433, 40 *N. E.* 650. *Ia.*—*State v. Kirk*, 168 *Iowa* 244, 150 *N. W.* 91; *Welch v. Taverner*, 73 *Iowa* 207, 42 *N. W.* 650. *La.*—*State v. Fruge*, 28 *La. Ann.* 657. *Minn.*—*Akin v. Lake Superior Consol. Iron Mines*, 103 *Minn.* 204, 114 *N. W.* 654, 837. *Miss.*—*Caleb v. State*, 39 *Miss.* 721. *S. C.*—*Cohen v. Robert*, 2 *Strob. L.* 410. *Tex.*—*Rigsby v. State*, 64 *Tex. Crim.* 504, 142 *S. W.* 901 (the burden of proof is on the offending party); *Shaw v. State*, 32 *Tex. Crim.* 155, 22 *S. W.* 588; *Houston & T. C. R. Co. v. Gray* (*Tex. Civ. App.*), 137 *S. W.* 729; *Nance v. State*, 21 *Tex. App.* 457, 1 *S. W.* 448. But see *Larson v. Levy* (*Tex. Civ. App.*), 57 *S. W.* 52.

28. *Conn.*—*Tomlinson v. Town of Derby*, 41 *Conn.* 268. *Ga.*—*Robinson v. Donahoo*, 97 *Ga.* 702, 25 *S. E.* 491; *Shaw v. State*, 83 *Ga.* 92, 9 *S. E.* 768; *Downer v. State*, 10 *Ga. App.* 827, 74 *S. E.* 301. *Mass.*—*Knight v. Freeport*, 13 *Mass.* 218. *Miss.*—*Boles v. State*, 13 *Smed. & M.* 398; *McCann v. State*, 9 *Smed. & M.* 465. *Neb.*—*Veneman v. McCurtain*, 33 *Neb.* 643, 50 *N. W.* 955. *Tenn.*—*King v. State*, 91 *Tenn.* 617, 20 *S. W.* 169.

[a] Where there has been an opportunity (1) for improper intercourse between the jury and third persons, but there is only a suspicion that something improper occurred, the court has it in its discretion to grant a new trial (*Baker v. Brown*, 151 *N. C.* 12, 65 *S. E.* 520; *State v. Boggan*, 133 *N. C.* 761, 46 *S. E.* 111; *State v. Crane*, 110 *N. C.* 530, 15 *S. E.* 231; *State v. Gould*, 90 *N. C.* 658; *State v. Tilghman*, 33 *N. C.* 513), (2) but where the fact appears that such intercourse took place, a new trial will be granted. *State v. Boggan*, 133 *N. C.* 761, 46 *S. E.* 111; *State v. Perry*, 121 *N. C.* 533, 27 *S. E.* 997, 61 *Am. St. Rep.* 683.

29. *Ga.*—*Central of Georgia Ry. Co. v. Hammond*, 109 *Ga.* 383, 34 *S. E.*

Casual remarks concerning the case,³⁰ or remarks foreign to the subject-matter of the action,³¹ will not affect the verdict, however. So conversations with other persons pertaining to their personal affairs, while irregular, are harmless.³² The fact that the misconduct was not induced or participated in by the successful party³³ is sometimes

594; *Shaw v. State*, 83 Ga. 92, 9 S. E. 768. **Mich.**—*Churchill v. Alpena Circ. Judge*, 56 Mich. 536, 23 N. W. 211. **Vt.** *Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739; *McDaniels v. McDaniels*, 40 Vt. 363, 374, 94 Am. Dec. 408.

30. **U. S.**—*United States v. Daubner*, 17 Fed. 793. **Conn.**—*Pettibone v. Phelps*, 13 Conn. 445, 35 Am. Dec. 88. **Ia.**—*State v. Hasty*, 121 Iowa 507, 96 N. W. 1115; *McCash v. Burlington*, 72 Iowa 26, 28, 33 N. W. 346. **La.**—*State v. Goodson*, 116 La. 388, 40 So. 771. See *State v. Dorsey*, 40 La. Ann. 739, 5 So. 26. **Mo.**—*Stewart v. Small*, 5 Mo. 525. **Tex.**—*Ellis v. Ponton*, 32 Tex. 434; *Murphy v. State* (Tex. Crim.), 40 S. W. 978 (statement: "Boy's don't give him more than ten years," was held not to require a new trial); *Nance v. State*, 21 Tex. App. 457, 1 S. W. 448.

[a] **Tests To Be Applied.**—To affect the verdict it must be "a conversation calculated to impress the case under consideration upon the mind of the juror in a different aspect from the one made upon the mind from hearing the evidence in the courtroom, or of such a nature as calculated to result in harm to the party on trial." *March v. State*, 44 Tex. 64, 82.

[b] **Sermons.**—The fact that a minister at whose church the jury were in attendance, directed general remarks to them with reference to their duty does not require a new trial. *State v. Kincauls*, 126 N. C. 1095, 36 S. E. 31.

31. **Ala.**—*Dill v. State*, 5 Ala. App. 162, 59 So. 307. **Cal.**—*People v. Branigan*, 21 Cal. 337; *People v. Boggs*, 20 Cal. 432. **Colo.**—*Liutz v. Denver Tramway Co.*, 54 Colo. 371, 131 Pac. 258. **Conn.**—*Hickox v. Parmalee*, 21 Conn. 86, 101. **Ga.**—*Flanagan v. State*, 64 Ga. 52; *Epps v. State*, 19 Ga. 102; *Burtine v. State*, 18 Ga. 534. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Barlow v. State*, 2 Blackf. 114. **Ky.** *Fowler v. Com.*, 7 Ky. L. Rep. 529. **La.** *State v. Robertson*, 133 La. 806, 63 So. 363. **Mo.**—*State v. Igo*, 21 Mo. 459. **Pa.**—*Com. v. Lombardi*, 221 Pa. 31, 70

Atl. 122. **Tex.**—*Shaw v. State*, 32 Tex. Crim. 155, 22 S. W. 588 (inquiry as to whether the juror's wife should be informed as to his selection as a juror); *Pickens v. State*, 31 Tex. Crim. 554, 21 S. W. 362. **W. Va.**—*State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

[a] **A whisper by a venireman who had just been excused, to a juror who had been accepted concerning a matter foreign to the case, is harmless.** *Taylor v. State* (Miss.), 30 So. 657; And see *Stiles v. State* (Tex. Crim.), 75 S. W. 511.

32. **Ga.**—*Suple v. State*, 133 Ga. 601, 66 S. E. 919. **Ill.**—*Martin v. People*, 54 Ill. 225. **S. D.**—*State v. Church*, 6 S. D. 89, 60 N. W. 143. **Tenn.**—*King v. State*, 91 Tenn. 617, 20 S. W. 169; *Rowe v. State*, 11 Humph. 491; *Riley v. State*, 9 Humph. 646; *Stone v. State*, 4 Humph. 27. **W. Va.**—*State v. Cotts*, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176; *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224.

33. **U. S.**—*Fuller v. Fletcher*, 44 Fed. 34. **Ia.**—*State v. Allen*, 89 Iowa 49, 56 N. W. 261. **Mo.**—*Stewart v. Swall*, 5 Mo. 525. **Nev.**—*Lee v. McLeod*, 15 Nev. 158. **N. H.**—*Phoenix Ins. Co. v. Clark*, 59 N. H. 345. **N. J.** *Eakin v. Morris, C. & B. Co.*, 24 N. J. L. 538. **Ohio.**—*Armleder & Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530. **Vt.**—*Dennison v. Powers*, 35 Vt. 39.

[a] "A contrary rule would, in many cases, operate most unjustly. It would punish an innocent person for the offence of another. If a juror conducts improperly, and violates his duty and his oath, he ought to be answerable for it and not a party in the cause who was in no manner accessory to the misconduct. To deprive a party of a verdict, which he may have honestly obtained, after a protracted and expensive litigation, merely because a juror may have improperly spoken of the cause, when he could have received no benefit from that act of the juror, and his opponent no injury, would seem

considered, but does not always require a holding that the intercourse was harmless.³⁴

An order granting or refusing a new trial for misconduct affecting the jury will not ordinarily be interfered with on appeal.³⁵

b. *Misconduct in the Courtroom.*—Statements by bystanders, in the courtroom and during the trial in interruption of the proceedings, do not ordinarily require a new trial.³⁶

hardly compatible with a due administration of justice." *Pettibone v. Phelps*, 13 Conn. 445, 451, 35 Am. Dec. 88.

[b] "Where the misconduct is without the knowledge or participation of the successful party, much liberality is indulged in sustaining the verdict, notwithstanding such misconduct. . . . And, if it does not appear that the misconduct was occasioned by the prevailing party or by some one in his behalf, the verdict will not ordinarily be set aside, unless there is reasonable cause to believe that the misconduct was prejudicial to the moving party." *State v. Snow*, 130 Minn. 206, 153 N. W. 526.

34. **U. S.**—*Callahan v. Chicago*, M. & St. P. Ry. Co., 158 Fed. 988, 994; *Pool v. Chicago*, B. & Q. R. R. Co., 6 Fed. 844; *Johnson v. Root*, 2 Cliff. 108, 13 Fed. Cas. No. 7,409. **Ala.**—*Louisville & N. R. Co. v. Turney*, 183 Ala. 398, 62 So. 885. **Me.**—*Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449. **N. H.**—See *Mellvaine v. Wilkins*, 12 N. H. 474. **Vt.**—*McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408.

35. **Ark.**—*McKenzie v. State*, 26 Ark. 334. **Colo.**—*Lintz v. Denver Tramway Co.*, 54 Colo. 371, 131 Pac. 258. **Conn.**—*Burns v. State*, 84 Conn. 518, 80 Atl. 712. **Ga.**—*Smith v. Willingham*, 44 Ga. 200. **Ind.**—*Trombley v. State*, 167 Ind. 231, 78 N. E. 976; *Shular v. State*, 160 Ind. 300, 66 N. E. 746. **Ia.**—*State v. Thomas*, 135 Iowa 717, 109 N. W. 900; *State v. Allen*, 89 Iowa 49, 56 N. W. 261. **Kan.**—*Missouri Pac. Ry. Co. v. Bowman*, 68 Kan. 489, 75 Pac. 482, on the issue of whether the misconduct actually took place. **Minn.**—*Evertson v. McKay*, 124 Minn. 260, 144 N. W. 950; *Svenson v. Chicago G. W. R. Co.*, 68 Minn. 14, 70 N. W. 795; *State v. Floyd*, 61 Minn. 467, 63 N. W. 1096. **Mo.**—*Van Loon v. St. Joseph R. L. H. & P. Co.*, 174 Mo. App. 372, 160 S. W. 63; *Third Nat. Bank v. Fufts*, 115 Mo. App. 42, 90 S. W. 755. **Neb.**—*Omaha Fair & Exp. Assn. v. Missouri*

P. R. Co., 42 Neb. 105, 60 N. W. 330; *Republican V. R. Co. v. Boyse*, 14 Neb. 130, 15 N. W. 364. **N. C.**—*Lewis v. Fountain*, 168 N. C. 277, 84 S. E. 278; *State v. Crane*, 110 N. C. 530, 15 S. E. 231. **Ore.**—*Goodeve v. Thompson*, 68 Ore. 411, 136 Pac. 670, 137 Pac. 744 (holding that an abuse of discretion was shown); *State v. Morris*, 58 Ore. 397, 114 Pac. 476; *Tucker v. Salem Flouring Mills Co.*, 13 Ore. 28, 7 Pac. 53. **Pa.**—*Mix v. North American Co.*, 209 Pa. 636, 59 Atl. 272. **S. C.**—*Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487. **S. D.**—*State v. McDonald*, 16 S. D. 78, 91 N. W. 447. **Tenn.**—*Turner v. St. John*, 3 Coldw. 376. **Tex.**—*Virginia Fire & M. Ins. Co. v. St. Louis & S. W. Ry. Co. (Tex. Civ. App.)*, 173 S. W. 487; *St. Louis S. W. Ry. Co. v. Waits (Tex. Civ. App.)*, 164 S. W. 870. But see *R. G. Andrews Lumb. Co. v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.)*, 158 S. W. 1194. **Va.**—*Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152.

[a] "The reasons for refusing to interfere with the discretion of a Circuit Judge in matters involving the purity of the jurybox and the integrity of verdicts are peculiarly strong. He is in the atmosphere of the trial and has opportunity to estimate the character and intelligence of the jurors, as well as of the person charged with improper conversation or corrupt dealings with them. He has opportunity also to consider the verdict in the light of the evidence and the sources from which the evidence comes and determine whether the verdict has so little support as to indicate corrupt or improper influence. These and perhaps other things afford the trial judge such superior means of coming to a just conclusion, that before disturbing his order on such a subject an appellate court should require very clear evidence of abuse of discretion." *McGill Bros. v. Seaboard Air Line Ry.*, 75 S. C. 177, 55 S. E. 216.

36. **Ga.**—*Stevens v. State*, 93 Ga. 307, 20 S. E. 331. **Neb.**—*Lindsay v.*

c. *Officers of the Court*.—This subject is fully treated elsewhere in this title.³⁷

d. *Families*.—Communications between jurors and members of their family on personal matters, while improper, except under supervision of the court, are not generally regarded as prejudicial.³⁸

7. Statements Concerning Case Made in Hearing of Jurors.³⁹ The fact that a case is commented on in the presence or hearing of a juror is frequently held to call for a reversal of the judgment.⁴⁰ But where it is not shown that the discussions were overheard by the jury, the verdict will not be affected.⁴¹ Even when the jury overheard the remarks, if it had already agreed upon a verdict, no prejudice results.⁴² So also, the verdict will be allowed to stand in such cases, unless from all the facts of the case, it appears to be reasonably probable that what was said and overheard actually affected the verdict.⁴³

State, 46 Neb. 177, 64 N. W. 716, statement by mother of a deceased addressed to prisoner: "You have killed my boy!" **N. C.**—State v. Jackson, 112 N. C. 851, 17 S. E. 149, prior to empanelling of jury. **Tex.**—Holt v. State, 51 Tex. Crim. 15, 100 S. W. 156, correcting counsel as to place where a person was injured.

As to misconduct of bystanders during course of trial, see generally the title "Trial."

37. See *supra*, IX, B, 4, c.

38. **Ark.**—Coats v. State, 101 Ark. 51, 141 S. W. 197. **Ga.**—Hill v. State, 64 Ga. 453. **Ill.**—People v. Duncan, 261 Ill. 339, 103 N. E. 1043; Sanitary Dist. of Chicago v. Cullerton, 147 Ill. 385, 35 N. E. 723. **Ky.**—Mansfield v. Com., 163 Ky. 488, 174 S. W. 16. **Tenn.** King v. State, 91 Tenn. 617, 20 S. W. 169. **Wis.**—Oborn v. State, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

39. *Demonstrations in the courtroom and their effect*, see the title "Trial."

40. **Ark.**—Vaughan v. State, 57 Ark. 1, 20 S. W. 588; Maclin v. State, 44 Ark. 115. **Ga.**—Smith v. Willingham, 44 Ga. 200; Downer v. State, 10 Ga. App. 827, 74 S. E. 301. **La.**—State v. Dallas, 35 La. Ann. 899, by officers having charge of the jury. **Me.** Belcher v. Estes, 99 Me. 314, 59 Atl. 439; Campbell v. Chase Granite Co., 92 Me. 90, 42 Atl. 228. **Mont.**—State v. Landry, 29 Mont. 218, 74 Pac. 418, while taking a view. **N. Y.**—Reynolds v. Champlain Transp. Co., 9 How. Pr. 7. **Ore.**—Tucker v. Salem Flouring Mills Co., 13 Ore. 28, 7 Pac. 53.

[a] *Heated arguments between hostile witnesses in reference to the case, and in the courtroom or near it con-*

stitute acts of impropriety. Noel Co. v. Newcomb, 188 Mich. 53, 154 N. W. 58.

[b] *Expressions of opinion* are less harmful than statements of alleged facts. Caswell v. Pitcher (Me.), 10 Atl. 453.

Statements by bystanders in jury-room, see *supra*, IX, F, 6, b.

41. **Ky.**—Alderson v. Com., 25 Ky. L. Rep. 32, 74 S. W. 679. **La.**—State v. Robertson, 133 La. 806, 63 So. 363. **Mich.**—Noel Co. v. Newcomb, 188 Mich. 53, 154 N. W. 58. **Mo.**—State v. Gray, 172 Mo. 430, 72 S. W. 698. **N. H.** Smith v. Powers, 15 N. H. 546. **N. J.** Jones v. Vail, 30 N. J. L. 135. **Ore.** See State v. Rea, 46 Ore. 620, 81 Pac. 822. **W. Va.**—State v. Smith, 24 W. Va. 814.

42. State v. Robertson, 133 La. 806, 63 So. 363.

43. **Ark.**—Reed v. State, 102 Ark. 525, 145 S. W. 206. **Conn.**—State v. Andrews, 29 Conn. 100, 76 Am. Dec. 593. **Ga.**—McTyier v. State, 91 Ga. 254, 18 S. E. 140; Jackson v. Jackson, 32 Ga. 325; Waller v. State, 2 Ga. App. 636, 58 S. E. 1106. **Ia.**—State v. Gulliver, 163 Iowa 123, 142 N. W. 948; Montgomery v. Hanson, 122 Iowa 222, 97 N. W. 1081; Thrift v. Redman, 13 Iowa 25, by witness. **Kan.**—Wheeler & Wilson Mfg. Co. v. Morgan, 29 Kan. 519. **Ky.**—Louisville & N. R. Co. v. Davis, 115 Ky. 270, 71 S. W. 658. **Mass.**—Shea v. Lawrence, 1 Allen 167. **Minn.**—Goss v. Goss, 192 Minn. 346, 113 N. W. 690. **Mo.**—State v. Bird, 1 Mo. 585; Third Nat. Bank v. Fuels, 115 Mo. App. 42, 90 S. W. 755; Fendler v. De-wald, 14 Mo. App. 60, by witnesses. **N. H.**—State v. Ayer, 23 N. H. 301. **N. J.**—State v. Cucuel, 31 N. J. L. 249;

Where the statements are made by a party to the suit, it is presumed that he intended that they would influence the jury and a new trial will be granted though it is not shown that the verdict was in fact influenced thereby.⁴⁴ Such remarks by counsel in the case are subject to especially strong criticism.⁴⁵

8. Benefits Received by Jurors.—The bribery of a juror, by a party, or in his behalf, is such misconduct as calls for the setting aside of the verdict.⁴⁶ Unsuccessful attempts at bribery of a juror are not always considered to be prejudicial, however,⁴⁷ especially where knowledge of the improper act is kept from the other jurors.⁴⁸ The patronizing by a party, of a place of business kept by a juror is condemned.⁴⁹ The treating of jurors by parties,⁵⁰ their relatives, or

Jones v. Vail, 30 N. J. L. 135. **S. C.** State v. Rowell, 75 S. C. 494, 56 S. E. 23. **Tenn.**—Turner v. State, 89 Tenn. 547, 15 S. W. 838; Turner v. St. John, 3 Coldw. 376. **Tex.**—Murphy v. State (Tex. Crim.), 40 S. W. 978. **W. Va.** State v. Clifford, 58 W. Va. 681, 52 S. E. 864; State v. Miller, 24 W. Va. 802. See Dower v. Church, 21 W. Va. 23.

[a] **Proof must be made of at least what was overheard by the juror before prejudice will be held to have followed.** Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

[b] **A shout made by a man eighty or ninety feet from the jury while they were taking a walk: "Hang him! Hang him! Hang him!"** was not sufficient to require the reversal of the judgment. State v. High, 116 La. 79, 40 So. 538. And see State v. Renard, 50 La. Ann. 662, 23 So. 894.

44. Ky.—Campbell v. Bannister, 79 Ky. 205. **N. J.**—Sloan v. Harrison, 1 N. J. L. 123. **Vt.**—Grand Trunk Ry. Co. v. Davis, 76 Vt. 187, 56 Atl. 982. *Contra*, Third Nat. Bank v. Fufts, 115 Mo. App. 42, 90 S. W. 755.

[a] **Where it does not appear that a party directly or indirectly participated in the conversation or instigated it, ordinarily no prejudice follows.** Jones v. Vail, 30 N. J. L. 135.

[b] **Where it appears (1) that the party did not know of the presence of the juror a more liberal rule is sometimes (Shea v. Lawrence, 1 Allen [Mass.] 167), (2) but not always, applied. Cilley v. Bartlett, 19 N. H. 312. Compare supra, IX, F, 2, note 89.**

Effect of intercourse between parties and jurors, see supra, IX, F, 2.

45. Turner v. St. John, 3 Coldw. (Tenn.) 376, 378.

Effect of intercourse between counsel and jurors, see supra, IX, F, 4.

46. Ill.—West Chicago St. R. Co. v. Luka, 72 Ill. App. 60. **La.**—Hawkins v. New Orleans Print. & Pub. Co., 29 La. Ann. 134. **Mass.**—Crocker v. Crocker, 198 Mass. 401, 84 N. E. 476.

[a] **Payment of an additional per diem fee to the jury by a party is prejudicial.** *In re Vanderbilt*, 127 App. Div. 408, 111 N. Y. Supp. 558.

[b] **Juror, who is also a witness, should not receive witness fees; but no prejudice follows where neither the party nor the juror knew of the error.** *Handly v. Call*, 30 Me. 9.

47. Clay v. Montgomery, 102 Ala. 297, 14 So. 646.

48. State v. Morris, 58 Ore. 397, 114 Pac. 476 (the juror being admonished not to allow himself to be influenced); *State v. Wilson*, 42 Wash. 56, 84 Pac. 409.

49. Pittsburgh, C. C. & St. L. Ry. Co. v. Welch, 12 Ind. App. 433, 40 N. E. 650 (boarding a large number of witnesses at a juror's restaurant); *Akin v. Lake Superior Consol. Iron Mines*, 103 Minn. 204, 114 N. W. 654, ordering new overcoat from a tailor who was a juror.

[a] **Hiring carriages from a juror who maintained a livery stable, to take the jury to view the premises, is not improper.** *Missouri Pac. Ry. Co. v. Bowman*, 68 Kan. 489, 75 Pac. 482.

50. U. S.—Johnson v. Hobart, 45 Fed. 542; *Harrison v. Rowan*, 4 Wash. C. C. 32, 11 Fed. Cas. No. 6,142. **Ala.** *Craig v. Pierson Lumb. Co.*, 169 Ala.

representatives,⁵¹ counsel,⁵² witnesses,⁵³ or the officer having them in charge,⁵⁴ is gross misconduct.⁵⁵ Thus, intoxicating liquors, and re-

- 548, 53 So. 803. **Ark.**—Pelham v. Page, 6 Ark. 535. **Cal.**—Wright v. Eastlick, 125 Cal. 517, 58 Pac. 87. **Colo.**—Scott v. Tubbs, 43 Colo. 221, 95 Pac. 540, 19 L. R. A. (N. S.) 733. **Ga.**—Grace v. Martin, 83 Ga. 245, 9 S. E. 841; Walker v. Walker, 11 Ga. 203. **Idaho.**—Burke v. McDonald, 3 Idaho 296, 29 Pac. 98. **Ill.**—Vane v. City of Evanston, 150 Ill. 616, 37 N. E. 901; Lyons v. Lawrence, 12 Ill. App. 531. **Ind.**—Huston v. Vail, 51 Ind. 299. **Kan.**—Perry v. Bailey, 12 Kan. 539. **La.**—State v. Reid, 120 La. 200, 45 So. 103. **Me.**—Studley v. Hall, 22 Me. 198; Cottle v. Cottle, 6 Greenl. 140, 19 Am. Dec. 200. **Mich.**—Harrington v. Probate Judge, 153 Mich. 660, 117 N. W. 62. **Minn.**—State v. Snow, 130 Minn. 206, 153 N. W. 526. **Neb.**—Vose v. Muller, 23 Neb. 171, 36 N. W. 583. **Nev.**—Sacramento & M. Min. Co. v. Showers, 6 Nev. 291. **N. J.**—Phillipsburgh Bank v. Fulmer, 31 N. J. L. 52, 86 Am. Dec. 193; Drake v. Newton, 23 N. J. L. 111. **Ohio.**—See Pittsburgh, C. & St. L. Ry. Co. v. Porter, 32 Ohio St. 328; Bender v. Buehrer, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507. **Okla.**—Garvin v. Harrell, 27 Okla. 373, 113 Pac. 186, Ann. Cas. 1912B, 744, 35 L. R. A. (N. S.) 862. **Pa.**—Goodright v. McCausland, 1 Yeates 372, 1 Am. Dec. 306; Harvester Co. v. Hodge, 6 Pa. Dist. 378; Redmond v. Royal Ins. Co., 7 Phila. 167; Keegan v. McCandless, 7 Phila. 248. **R. I.**—Patton v. Hughesdale Mfg. Co., 11 R. I. 188. **S. D.**—McGilvery v. Lawrence, 35 S. D. 443, 152 N. W. 698. **Tenn.**—Mynatt v. Hubbs, 6 Heisk. 323; Sexton v. Lelievre, 4 Coldw. 11. But see Vaughn v. Dotson, 2 Swan 348. **Tex.**—Beazley v. Denson, 40 Tex. 416; First Nat. Bank v. Hix (Tex. Civ. App.), 164 S. W. 1035; Palm v. Chernowsky, 28 Tex. Civ. App. 405, 67 S. W. 165; Marshall v. Watson, 16 Tex. Civ. App. 127, 40 S. W. 352. **Va.**—Coleman v. Moody, 4 Hen. & M. (14 Va.) 1. **Wash.**—Vollrath v. Crowe, 9 Wash. 374, 37 Pac. 474. **W. Va.**—Pickens v. Coal River Boom & Timber Co., 58 W. Va. 11, 50 S. E. 872, 6 Am. & Eng. Ann. Cas. 285.
- [a] Offer to take juror to dinner, refused by the latter, whereupon the party added "come some time again, then," requires a new trial. *Boreland v. St. Clair*, 4 Pa. Co. Ct. 541.
51. **U. S.**—Callahan v. Chicago, M. & St. P. Ry. Co., 158 Fed. 988. **Ga.**—Central of Georgia Ry. Co. v. Hammond, 109 Ga. 383, 34 S. E. 594. **Miss.**—Brookhaven Lumb. & Mfg. Co. v. Illinois Cent. R. Co., 68 Miss. 432, 10 So. 666. **Neb.**—Veneman v. McCurtain, 33 Neb. 643, 50 N. W. 955. **N. J.**—Eakin v. Morris C. & B. Co., 24 N. J. L. 538. **S. C.**—McGill Bros. v. Seaboard Air Line Ry. Co., 75 S. C. 177, 55 S. E. 216. **Tex.**—Gulf, C. & S. F. Ry. Co. v. Matthews, 28 Tex. Civ. App. 92, 66 S. W. 588, 67 S. W. 788, where plaintiff's brother who was looking after her case took a juror to dinner and paid for drinks and cigars. **Vt.**—Shattuck v. Wrought Iron Range Co., 69 Vt. 468, 38 Atl. 72. **Wyo.**—Stockgrowers Bank v. Gray (Wyo.), 154 Pac. 593, where the plaintiff's wife handed a cigar to a juror.
52. **Del.**—Pritchard v. Henderson, 3 Penne. 128, 50 Atl. 217. **Ga.**—Central of Ga. Ry. Co. v. Hammond, 109 Ga. 383, 34 S. E. 594; *Rainy v. State*, 100 Ga. 82, 27 S. E. 709; *Springer v. State*, 34 Ga. 379; *Walker v. Hunter*, 17 Ga. 364. **Ill.**—Mobile & O. R. R. Co. v. Davis, 130 Ill. 146, 22 N. E. 850. **Ia.**—Stafford v. Oskaloosa, 57 Iowa 748, 11 N. W. 668; *Koester v. Ottumwa*, 34 Iowa 41, verdict not vitiated because no improper influence alleged or shown. **Ky.**—Liverpool & London & Globe Ins. Co. v. Wright, 166 Ky. 159, 179 S. W. 49. See *Napier v. Com.*, 33 Ky. L. Rep. 635, 110 S. W. 842. **Mich.**—*In re Quinn's Estate*, 180 Mich. 502, 147 N. W. 566; *People v. Montague*, 71 Mich. 447, 39 N. W. 585. **N. Y.**—*Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118. **Ore.**—*Sandstrom v. Oregon-Washington R. & N. Co.*, 69 Ore. 194, 136 Pac. 878, 45 L. R. A. (N. S.) 889.
53. **Ia.**—*State v. Minor*, 106 Iowa 642, 77 N. W. 330. **N. J.**—*Eakin v. Morris C. & B. Co.*, 24 N. J. L. 538. **Va.**—*Thompson v. Com.*, 8 Gratt. (49 Va.) 637.
54. *People v. Myers*, 70 Cal. 582, 12 Pac. 719. Compare *State v. Degonia*, 69 Mo. 485.
55. *People v. Montague*, 71 Mich. 447, 39 N. W. 585; *Sacramento & M. Min. Co. v. Showers*, 6 Nev. 291.

freshments of other kinds, should not be given to jurors;⁵⁶ nor should they be given cigars,⁵⁷ even though they are not informed as to the source of the gift,⁵⁸ though this fact should be considered in determining whether the irregularity was harmful in its effect.⁵⁹ But the mere treating of jurors, especially where participated in equally by both parties,⁶⁰ does not necessarily affect the verdict.⁶¹ If done after verdict, the action while criticized, will not require the granting of a new trial,⁶² unless the conduct is such as to raise the suspicion that

[a] "The act of treating the jury gives rise to a suspicion of attempted improper influence." *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118.

[b] **No Qualifications of the Rule Exist.**—"We prefer to follow the plain, simple rule of the common law. The rule, it is said, was adopted 'to prevent the jury from being tempted to find a verdict against their unbiased sense of the right of the case, by motives of gratitude or feeling for favors, however slight, conferred by either of the parties (4 Wash. C. C. 34), and therefore the rule applies to any treating, of any of the jury at any time after they are sworn, and before they agree upon their verdict; whether once or several times; by design or inadvertently, in the presence of the officer or in his absence; and whether we might deem it called or uncalled for by the proprieties of life.'" *Sacramento & Meredith Min. Co. v. Showers*, 6 Nev. 291, 302.

56. See generally the cases cited in preceding notes.

Use of intoxicating liquors by jurors, see *infra*, IX, G, 5.

57. **Ill.**—*Doud v. Guthrie*, 13 Ill. App. 653. **Mich.**—*Detroit & T. Shore Line R. Co. v. Campbell*, 140 Mich. 384, 103 N. W. 856 (at a view); *People v. Montague*, 71 Mich. 447, 39 N. W. 585. **N. Y.**—*Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118, by counsel. **Ohio.**—*Bender v. Buehrer*, 8 Ohio Cir. Ct. 244, 4 Ohio Cir. Dec. 507. **Vt.** *Shattuck v. Wrought Iron Range Co.*, 69 Vt. 468, 38 Atl. 72; *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588.

[a] **Reason of Rule.**—"There is no probable danger of the use of cigars affecting the minds of the jurymen in such way as to affect their verdict. The danger is not in the use of the gift, the cigars in this case, but it lies in the probability that the attorney may have won the favor of the jury or cre-

ated the impression that a measure of obligation existed because of the gift of the cigars, which may have created in their minds a feeling that they had received a favor and a desire to reciprocate." *Steenburgh v. McRorie*, 60 Misc. 510, 113 N. Y. Supp. 1118.

58. *Wichita & W. R. Co. v. Fecheimer*, 49 Kan. 643, 31 Pac. 127 (verdict was allowed to stand); *State v. Reid*, 120 La. 200, 45 So. 103.

59. *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901.

60. *Drainage Comrs. v. Knox*, 237 Ill. 148, 86 N. E. 636; *McLaughlin v. Hinds*, 151 Ill. 403, 38 N. E. 136. See *Dennison v. Collins*, 1 Cow. (N. Y.) 111.

[a] Where the plaintiff treated the bailiff and the defendant as well as the jurors, no prejudice followed. *Bradshaw v. Degenhart*, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677.

61. **Del.**—*Pritchard v. Henderson*, 3 Penne. 128, 50 Atl. 217. **Ill.**—*Drainage Comrs. v. Knox*, 237 Ill. 148, 86 N. E. 636. **Kan.**—*Wichita & W. R. Co. v. Fecheimer*, 49 Kan. 643, 31 Pac. 127. **Mont.**—*Bradshaw v. Degenhart*, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677, burden of proving want of prejudice is on the party treating. **Ohio.** *Pittsburg, C. & St. L. R. Co. v. Porter*, 32 Ohio St. 328. **Ore.**—But see *Sandstrom v. Oregon-Washington R. & N. Co.*, 69 Ore. 194, 136 Pac. 878, 45 L. R. A. (N. S.) 889.

62. **U. S.**—*Beach Front Hotel Co. v. Sooy*, 197 Fed. 881, 118 C. C. A. 579. **Colo.**—*Liutz v. Denver City Tramway Co.*, 54 Colo. 371, 131 Pac. 258. **Ga.** *Pinkston v. Mercer*, 112 Ga. 365, 37 S. E. 365; *Grace v. Martin*, 83 Ga. 245, 9 S. E. 841, after the jurors have been discharged for the term. **Minn.**—*Evertson v. McKay*, 124 Minn. 260, 144 N. W. 950. **S. C.**—*Todd v. Gray*, 16 S. C. 635. **Tex.**—*Larson v. Levy* (Tex. Civ. App.), 57 S. W. 52; *Western Union Tel. Co. v. Pells*, 2 Wills. Civ. Cas. §41. **Va.**

something other than the law and the evidence adduced, influenced the jury,⁶³ or the misconduct was so gross as to require punishment to prevent other cases from being affected.⁶⁴

Statutes in some states prohibit the "treating" of jurors by parties, either during the trial or after the verdict has been returned.⁶⁵

9. Presence of Outsiders in the Juryroom.—Outsiders have no right to be in the juryroom during the deliberations of the jury,⁶⁶ and their presence there,⁶⁷ especially in criminal cases,⁶⁸ may be a sufficient excuse for granting a new trial. But the mere temporary presence of outsiders has, in many cases, been held to have no adverse effect upon the verdict, where no prejudice resulted from the intrusion and it was apparent that it was the result⁶⁹ of an inadvertent

Thompson v. Com., 8 Gratt. (49 Va.) 637.

But see *Harvester Co. v. Hodge*, 6 Pa. Dist. 378.

[a] **Reason for Rule.**—Under such circumstances the juror could not recede from the findings expressed in the verdict. *Pinkston v. Mercer*, 112 Ga. 365, 37 S. E. 365.

63. *Merritt v. Bunting*, 107 Va. 174, 57 S. E. 567.

64. *McGill Bros. v. Seaboard Air L. Ry. Co.*, 75 S. C. 177, 55 S. E. 216, where another similar case was to be immediately tried.

65. See generally the statutes, and the following: *Shepard v. Lewiston, B. & B. St. Ry.*, 101 Me. 591, 596, 65 Atl. 20; *Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739; *State v. Costa*, 78 Vt. 198, 62 Atl. 38 (statute is inapplicable to criminal cases); *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588.

[a] **Treating to cigars is within a statutory provision** relating to "any victuals or drink." *Austin v. Langlois*, 81 Vt. 223, 69 Atl. 739; *Baker v. Jacobs*, 64 Vt. 197, 23 Atl. 588.

[b] **Acts of common hospitality are not forbidden** by such a statute. *Carlisle v. Sheldon*, 38 Vt. 440.

66. *Hare v. State*, 4 How. (Miss.) 187 (an unsworn officer); *Peterson v. Siglinger*, 3 S. D. 255, 52 N. W. 1062.

[a] "The probability that a party who intermeddles with the jury while they are deliberating upon their verdict, does so for an improper purpose is so great that courts will look with suspicion upon the evidence given in explanation of the act." *Peterson v. Siglinger*, 3 S. D. 255, 52 N. W. 1062.

[b] **Equivalent to Separation.**—See *Hare v. State*, 4 How. (Miss.) 187. As

to effect of separation, see *supra*, IX, D.

[c] **Amanuensis.**—The court should not, even at the request of the jury allow an officer of the court to go to the juryroom and serve as their amanuensis. "The law does not contemplate that any one shall be with the jurors while they are deliberating upon their verdict, and such conduct is contrary to the spirit of the law in the trial of causes by jury." *Kilgore v. Moore*, 14 Tex. Civ. App. 20, 36 S. W. 317.

67. *Starling v. Thorne*, 87 Ga. 513, 13 S. E. 552.

68. *Tarkington v. State*, 72 Miss. 731, 17 So. 768 (even though no conversation took place); *Heskeu v. State*, 17 Tex. App. 161.

[a] **Where a material witness was taken to the juryroom**, at their request, and there amused them by his "fiddling," a new trial was granted. *State v. Cartright*, 20 W. Va. 32, 44.

Right of custodian of jury to enter juryroom, see *supra*, IX, B, 4, d.

69. *Ga.*—*Southern R. R. Co. v. Brown*, 126 Ga. 1, 54 S. E. 911; *Doyal v. State*, 70 Ga. 134. *Mass.*—*Com. v. Roby*, 12 Pick. 496. *Miss.*—*Ned v. State*, 33 Miss. 364; *Graves v. Monet*, 7 Smed. & M. 45. *Mo.*—*State v. De-gonia*, 69 Mo. 485. See *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55. *N. C.*—*State v. Gould*, 90 N. C. 658; *State v. Tilghman*, 33 N. C. 513. *Tenn.*—*Luster v. State*, 11 Humph. 169. *Tex.*—*Johns v. State*, 47 Tex. Crim. 161, 83 S. W. 198. *W. Va.*—*State v. Cartright*, 20 W. Va. 32.

[a] **Where the clerk of court was called in by jury** which had agreed to find a verdict for one of the parties,

and innocent act, or was unknown to the jury;⁷⁰ there is no presumption of misconduct in such cases.⁷¹

10. Letters Received or Sent by Jurors.—Written communications to jurors on necessary and personal matters, after being inspected by the court, may be given to them;⁷² but the receipt of uninspected letters is seldom held to be prejudicial.⁷³ In capital cases, however, the tendency is to limit the practice,⁷⁴ and the receipt of sealed letters, which are not inspected by the court, may constitute prejudicial misconduct.⁷⁵ The writing of letters by jurors to their families will not ordinarily be prejudicial.⁷⁶

11. Telephone Conversations.—Conversations by jurors with other persons over the telephone are peculiarly subject to suspicion and abuse;⁷⁷ they should be allowed to take place only in the presence of all the jurors and the officer in charge of them,⁷⁸ and should, of course,

and asked as to the proper method of computing the amount, a new trial was nevertheless refused. *Dennison v. Powers*, 35 Vt. 39.

[b] Entry of janitor to replenish ice water, not prejudicial, although he conversed with the jurors. *Rain v. State*, 15 Ariz. 125, 137 Pac. 550. And see *State v. Trull*, 169 N. C. 363, 85 S. E. 133.

[c] Playing cards with a boy was held a harmless indiscretion. *State v. Harrigan*, 9 Houst. (Del.) 369, 31 Atl. 1652.

70. *People v. Flack*, 57 Hun 83, 10 N. Y. Supp. 475, 8 N. Y. Crim. 43, 32 N. Y. St. 215.

71. *State v. Oteri*, 128 La. 939, 55 So. 582, Ann. Cas. 1912C, 878.

72. *Idaho*.—*State v. Sly*, 11 Idaho 110, 80 Pac. 1125. *Tenn.*—*King v. State*, 91 Tenn. 617, 20 S. W. 169. *W. Va.* *State v. Robinson*, 20 W. Va. 713, 762, 43 Am. Rep. 799. *Wis.*—*Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

[a] Jurors should not be taken to the post-office and allowed to receive mail there. *Chesnut v. People*, 21 Colo. 512, 42 Pac. 656.

73. *State v. Magee*, 48 La. Ann. 901, 19 So. 933, not ground for a new trial.

[a] The bare possibility that improper matter was contained in the letter, is not sufficient to affect the verdict. *State v. Pepoon*, 62 Wash. 635, 114 Pac. 449, *criticizing State v. McCormick*, 20 Wash. 94, 54 Pac. 764.

74. *State v. McCormick*, 20 Wash. 94, 54 Pac. 764 (*criticized in State v. Pepoon*, 62 Wash. 635, 114 Pac. 449); *Oborn v. State*, 143 Wis. 249, 126 N. W. 737, 31 L. R. A. (N. S.) 966.

75. *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

[a] "If an improper separation of the jury is a just ground for setting aside a verdict in a criminal case, it seems to us for a much stronger reason, is the reception of uninspected and sealed letters. There is much better opportunity to detect any improper influence exerted upon a juror who leaves his fellows and goes into the street and among the people, than to detect the same or a worse influence exerted upon him by a sealed letter sent to the same juror through the postoffice or otherwise. We may guard against the former, but it seems impossible to guard against the latter. The reception of sealed letters by jurors during the trial of a prisoner, especially a capital case, renders the verdict vicious, and it should be set aside and a new trial granted the prisoner who has been convicted, although the jurors, in the absence of the letters swear that none of such letters so received in any manner related to the case on trial." *State v. Robinson*, 20 W. Va. 713, 761.

76. *Eich v. Taylor*, 20 Minn. 378 (it does not show bias); *King v. State*, 91 Tenn. 617, 20 S. W. 169.

77. *Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169.

Communications between strangers to the action and jurors generally, see *supra*, IX, F, 6.

78. *Ark.*—*Coats v. State*, 101 Ark. 51, 141 S. W. 197. *Cal.*—*Saltzman v. Sunset Tel. & Tel. Co.*, 125 Cal. 501, 58 Pac. 169, only after order of court has been obtained. *Ga.*—*Potter v. State*, 12 Ga. App. 315, 77 S. E. 186.

not refer to the case under consideration.⁷⁹ Where an improper conversation takes place, the burden is upon the successful party to show the harmlessness of the action and its lack of prejudice to the defeated party.⁸⁰

12. Admonition by Court.⁸¹—The court should instruct the jury not to communicate with other persons while they are serving on the case;⁸² but failure to do so, no misconduct of the jurors being shown, is not ground for a new trial.⁸³ The court may properly call attention to reports of misconduct which have reached him and emphatically admonish them as to their duty.⁸⁴

G. CONDUCT OF JURORS. — 1. In General.—Misconduct of a single juror is sufficient to affect the verdict.⁸⁵ Deliberations of the jury continue in the eyes of the law until their verdict is returned in open court and until after they have been polled, if a poll be demanded, and misconduct may be predicated upon their conduct until that time.⁸⁶

Wagering on the nature of the verdict which will be returned is strongly condemned.⁸⁷ Playing cards among themselves,⁸⁸ or with

Ky.—*Magan v. Com.*, 119 S. W. 734.
N. J.—*Baizley v. Welsh*, 71 N. J. L. 471, 60 Atl. 59. **Pa.**—*Mix v. North American Co.*, 209 Pa. 636, 59 Atl. 272. See *Com. v. Fisher*, 226 Pa. 189, 75 Atl. 204. **Tex.**—See *Tores v. State*, 74 Tex. Crim. 37, 166 S. W. 523.

But see *West Chicago St. R. Co. v. Lundahl*, 183 Ill. 284, 55 N. E. 667.

79. See generally the cases cited in the preceding notes.

80. *Early v. State*, 51 Tex. Crim. 382, 103 S. W. 868, examination of those with whom conversation was had essential.

81. **Admonitory instructions generally**, see 13 STANDARD PROC. 948, et seq.

Upon separation of jury, see *supra*, IX, D, 1, g.

82. *People v. Taylor*, 93 Mich. 638, 53 N. W. 777; *Com. v. Lombardi*, 221 Pa. 31, 70 Atl. 122.

83. *Thompson v. State*, 26 Ark. 323.

84. *Crull v. Louisa County*, 169 Iowa 199, 151 N. W. 88; *State v. Floyd*, 61 Minn. 467, 63 N. W. 1096.

85. **U. S.**—*United States v. Chaffee*, 2 Bond 147, 25 Fed. Cas. No. 14,773. **Mich.**—*Churchill v. Alpena Circ. Judge*, 56 Mich. 536, 23 N. W. 211. **Ohio.** *State v. Carter*, 11 Ohio Dec. (Reprint) 123.

[a] "The jury being composed of twelve individuals, the misconduct of any juror, actual or implied, 'by which a fair and due consideration of the case may have been prevented' is mis-

conduct of the jury because the jury can only act as a unit and the misconduct of one of the members cannot be eliminated, and therefore in such cases the action of the jury as a whole is invalid." *State v. Morgan*, 23 Utah 212, 226, 64 Pac. 356.

86. *State v. Applegate*, 28 N. D. 395, 149 N. W. 356, L. R. A. 1915C, 315.

87. *Butts v. Union R. Co.*, 21 R. I. 505, 44 Atl. 933.

[a] **Wager of a cigar** with an employe of defendant, as to what the verdict would be, is not prejudicial, the verdict being clearly supported by the evidence. *Butts v. Union R. Co.*, 21 R. I. 505, 44 Atl. 933.

[b] **Wager between jurors made in jest** is harmless. *Walker v. Dailey*, 87 Iowa 375, 54 N. W. 344.

[c] **Wager made prior to selection of the juror** does not require new trial where the defeated party was lax in inquiring into juror's qualifications. *Booby v. State*, 4 Yerg. (Tenn.) 111.

[d] **Wagering on both sides**, does not require a new trial. *McCausland's Lessee v. McCausland*, 1 Yeates (Pa.) 372.

88. *State v. Taylor*, 134 Mo. 109, 35 S. W. 92.

[a] "Where a jury is locked up for the night, as in this case, we can see no harm in their whiling away a part of the time in an innocent game of cards." *State v. Campbell*, 134 La. 828, 64 So. 765.

the officer in charge of them,⁸⁹ prior to the final submission of the case is harmless; but after final submission, such is highly improper.⁹⁰ Persistence in rendering an improper verdict may be punished by the court.⁹¹ Conduct by jurors during the trial evincing an opinion favorable to one of the parties is not necessarily ground for a new trial.⁹²

2. Attention to Trial Proceedings.—It constitutes misconduct for a juror to sleep in the jurybox,⁹³ and may be ground for a new trial,⁹⁴ though it is usually held to be a harmless irregularity.⁹⁵ Jurors should listen attentively to the argument of counsel.⁹⁶

3. Maintaining Open and Impartial Mind.—It is misconduct for a juror to make up his mind on a case before the evidence is all in

89. *State v. Bullock*, 136 La. 167, 66 So. 767.

Acts and conduct of officer in charge of jury, see *supra*, IX, B, 4.

90. *Mix v. North American Co.*, 209 Pa. 636, 59 Atl. 272.

91. *Houston v. Potts*, 65 N. C. 41.

[a] In a criminal case it is misconduct for the jury to disregard the instructions of the court and find the law different from that given them by the court. *Brewer v. State*, 160 Ala. 66, 49 So. 336. But see 13 STANDARD PROC. 983, et seq.

92. *Berry v. De Witt*, 27 Fed. 723, 23 Blatchf. 544, "when there is no adequate reason to suppose that any jurymen was not impartial when the trial commenced, and when no improper means were taken by the plaintiff to cause a too hasty or a prejudicial decision."

Maintaining open and impartial mind, see *infra*, IX, G, 3.

93. *Pelham v. Page*, 6 Ark. 535.

[a] **Proof of the Fact.**—Where the juror testifies that he has a habit of closing his eyes and was not asleep, the jury need not be discharged. *Continental Casualty Co. v. Semple (Ky.)*, 112 S. W. 1122.

[b] **Statement in an affidavit** that the juror "had his eyes closed and appeared to be asleep" is insufficient. *McClary v. State*, 75 Ind. 260.

[c] **An Objection Must Be Made at the Time.**—*United States v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632; *Scott v. Waldeck*, 12 Neb. 5, 10 N. W. 413.

94. *Alderman v. Cobb*, 94 Ind. 602, under a statute.

95. *Carey v. Gunnison (Iowa)*, 17 N. W. 881 (objection cannot be made for the first time after verdict); *Stone v. State*, 4 Humph. (Tenn.) 27.

[a] "The mere falling asleep for a

short time by a juror during the argument of counsel for the defendant in a criminal cause, does not of itself constitute a sufficient cause for a new trial." *McClary v. State*, 75 Ind. 260.

[b] **Action of Trial Court Conclusively.**—"The learned judge stated when this motion was before him that he had given particular attention to this juryman during the trial because of his age, and was able to say upon his own knowledge that he was awake and attentive except for a single instant, and that he lost nothing of the trial. It was idle to call witnesses to prove what the learned judge knew to be untrue." *Com. v. Jongrass*, 181 Pa. 172, 37 Atl. 207.

96. *McAllister v. Sibley*, 25 Me. 474.

[a] A statement by a juror to the effect that he had made up his mind and that what counsel said would make no difference while improper, is not prejudicial misconduct. "It is the duty of jurors to listen to the arguments of counsel touching the facts in issue. They are not supposed to have viewed the evidence in all the aspects, in which counsel may present it. The same facts often make a different impression upon the mind, after they have been placed in certain relations to each other, from that which was previously produced. But it would be strange if there were not many cases, wherein the minds of the jury were fully convinced before anything was said in argument; but it does not therefore follow, that they had resolved to turn a deaf ear to the remarks of counsel." *McAllister v. Sibley*, 25 Me. 474, 488.

[b] **Inattentiveness** to the arguments of counsel is not ground for a new trial. *Lee v. McLeod*, 15 Nev. 158.

and the case submitted to the jury.⁹⁷ and expressions of opinion before the submission of the case constitute misconduct.⁹⁸

4. **Taking Notes.**—Jurors may, with the consent of the court, make notes of the testimony given by the witnesses,⁹⁹ although the practice is not a favored one in all courts,¹ and the proceedings should not be delayed for that purpose.² Nor should the taking of notes be persisted in after the court has prohibited it.³

5. **Statements, Questions, Discussions and Expressions of Opinion.**—a. *Generally.*—A juror may properly, with the permission of the court, interrogate a witness,⁴ or examine his body for evidence

97. *Ewer's Admr. v. National Imp. Co.*, 63 Fed. 562.

As to admonition to jury, see *supra*, IX, D, 1, g.

98. See *infra*, IX, G, 5.

99. *Ga.*—*Thomas v. State*, 90 Ga. 437, 16 S. E. 94; *Lilly v. Griffin*, 71 Ga. 535; *Vaughn v. State*, 17 Ga. App. 268, 86 S. E. 461, calculations referred to by counsel during his argument. *Ill.*—*Indianapolis & St. L. R. R. Co. v. Miller*, 71 Ill. 463, may do so of his own motion but should not do it at request of counsel. *Ind.*—*Long v. State*, 95 Ind. 481, counsel not objecting thereto. *La.*—*State v. Joseph*, 45 La. Ann. 903, 12 So. 934. *Md.*—*Cahill v. Mayor of Baltimore*, 98 Atl. 235. *Mass.*—*Com. v. Tucker*, 189 Mass. 457, 497, 76 N. E. 127, 7 L. R. A. (N. S.) 1056. *Mo.*—*State v. Robinson*, 117 Mo. 649, 23 S. W. 1066. *Neb.*—*Omaha Fire Ins. Co. v. Crighton*, 50 Neb. 314, 69 N. W. 766. *Ohio.*—*Palmer & Son v. Cowie*, 77 Ohio Cir. Ct. 617, discontinued at request of the court.

[a] **Necessity of an Objection.**—"In the case under consideration, the defendant did not object to the jurors taking notes, nor did the juror act in disobedience to the order of the court. As the defendant did not at the time object, we will presume that it was done with his consent and he cannot be heard here to object to what he consented to in the court below." *Cluck v. State*, 40 Ind. 263. See also *State v. Robinson*, 117 Mo. 649, 23 S. W. 1066.

[b] **A sketch of the scene of a murder** was made by a juror during the trial from descriptions of witnesses and used by the jury during its deliberation, without prejudice following in *State v. Keehn*, 85 Kan. 765, 118 Pac. 851.

[c] **Sending notes of the evidence**

to a newspaper (defendant consenting to the taking of the notes but not knowing of their intended use) does not require a new trial. *State v. Cottrell*, 19 R. I. 724, 37 Atl. 947.

[d] **On appeal**, the discretion of the trial court in allowing notes to be taken will not be reviewed. *Com. v. Tucker*, 189 Mass. 457, 497, 76 N. E. 127, 7 L. R. A. (N. S.) 1056.

1. *United States v. Davis*, 103 Fed. 457. See *Gipson v. Com.*, 133 Ky. 398, 118 S. W. 334.

[a] **Criticism of the Practice.**—"It gives the juror taking notes an undue influence in discussing the case when he appeals to his notes to settle conflicts of memory. Without corrupt purpose his notes may be inaccurate, or meager, or careless, and loosely deficient, partial and altogether incomplete. With a corrupt purpose, they may be false in fact, entered for the purpose of misleading or deceiving his fellows when he comes to appeal to them. There is no protection against such dangers, except to forbid the practice." *United States v. Davis*, 103 Fed. 457.

2. *Lilly v. Griffin*, 71 Ga. 535; *Tift v. Towns*, 63 Ga. 237.

3. *Cheek v. State*, 35 Ind. 492. See *Battersoh v. State*, 63 Ind. 531.

4. *Smith v. Com.*, 140 Ky. 599, 131 S. W. 499.

[a] "It is always allowable and we think courts generally approve of jurors asking occasional questions of witnesses while giving their testimony. But it is manifestly improper for a juror to enter upon disputes, and call for the reading of minutes of testimony previously given, and to enter upon a discussion and controversy with counsel in the case as to the construction of written evidence." But the irregularity was held to have been cured by the instruction of the court.

of scars or wounds.⁵ It is not necessarily misconduct for a juror to confirm a statement by a witness,⁶ or to ask the court to allow a witness to tell his story in his own way.⁷ A juror may properly address pertinent questions to the court;⁸ but he should not attempt to discover how the jury stood on a former trial.⁹ Nor should he express his agreement with or disapprobation of statements by counsel.¹⁰ The expression of an intention not to consider certain material evidence is improper.¹¹ Urging haste in the conduct of the trial is harmless,¹² unless done in such a manner as to indicate partiality or prejudice on the part of the juror.¹³ A suggestion that a view of the premises be had by the jury is harmless, even though the court refuses their request.¹⁴ Conversing in the jurybox about matters other than those

Truman v. Bishop, 83 Iowa 697, 702, 50 N. W. 278.

[b] If a juror asks a question that is irrelevant or incompetent, the court on its own motion, should admonish the juror that the question is not proper. *Smith v. Com.*, 140 Ky. 599, 131 S. W. 499.

[c] A question "pregnant with an assertion of the guilt of the accused," propounded by a juror did not require a new trial. *State v. Rideau*, 116 La. 245, 40 So. 691.

[d] Where an argument took place between the witness and a juror, the latter having personal knowledge of the facts to which the witness testified and practically charging the witness with perjury, a mistrial resulted. *Smalls v. State*, 102 Ga. 31, 29 S. E. 153.

[e] Cross-examination by juror may be a manifestation of his prejudice. See *Chicago, M. & St. P. Ry. Co. v. Krueger*, 124 Ill. 457, 17 N. E. 52.

5. *State v. Bradford*, 87 S. C. 546, 70 S. E. 308. See *Spohn v. People's Ry. Co. (Del.)*, 92 Atl. 727.

6. *Atlantic & D. Ry. Co. v. Peake*, 87 Va. 130, 12 S. E. 348.

7. *State v. Gates*, 28 Wash. 689, 69 Pac. 385, failure of court to reprimand the juror harmless.

8. *Republican Val. R. Co. v. Boyse*, 14 Neb. 130, 15 N. W. 364.

Communications between court and jury, see *supra*, IX, E.

9. *Prewitt v. Southwestern T. & T. Co.*, 46 Tex. Civ. App. 123, 101 S. W. 812.

10. *Schwartz v. McQuaid*, 214 Ill. 357, 73 N. E. 582, 105 Am. St. Rep. 112, where the court promptly reproved the juror.

[a] Illustration.—A juror remarked during counsel's argument: "That won't help you a bit, that will not do you any good." . . . "While it was improper for a juror to make a remark of that character and while the court might, with propriety, impose a small fine on a juror for a disregard of duty, yet we are not aware of any authority for reversing a judgment where an irregularity of that character has intervened on the trial of a cause." *Chicago & E. R. Co. v. Holland*, 122 Ill. 461, 13 N. E. 145.

[b] Answering Supposed Question of Counsel.—The fact that a juror supposing a question propounded by counsel during his argument addressed to him, answers it, is a harmless irregularity. *Freeman v. McElroy (Tex. Civ. App.)*, 149 S. W. 428.

[c] Expression of approval of an improper remark of counsel, unrebuked by the court was held to require a new trial, since "the comment of the juror indicated such prejudice as disqualified him in the proper performance of his duty. . . . The presiding judge did not rebuke either attorney or juror, and failed to caution the jury that they should not be influenced by these improper observations." *Farrington v. Cheponis*, 82 Conn. 258, 73 Atl. 139.

11. *Chicago City Ry. Co. v. Brecher*, 112 Ill. App. 106.

12. *State v. Schlosser*, 85 N. J. L. 165, 89 Atl. 522, *affirmed*, 86 N. J. L. 374, 91 Atl. 1071.

13. *State v. Walls*, 52 La. Ann. 1002, 27 So. 537.

14. *Judd v. Letts*, 158 Cal. 359, 111 Pac. 12, 41 L. R. A. (N. S.) 156.

involved in the case is harmless,¹⁵ and remarks about the case made to gain information as to what has been said or done, are not prohibited.¹⁶ Jurors should not, of course, converse about the case, out of court during the trial; to do so is a violation of their oath;¹⁷ but not all improper statements are ground for a new trial.¹⁸ They should

15. *People v. Kramer*, 117 Cal. 647, 49 Pac. 842.

Discussing the evidence before final submission of the case, see *supra*, IX, G, 1.

16. *People v. West*, 73 Cal. 345, 14 Pac. 848.

[a] **Asking Another Juror as to Testimony.**—"During the progress of a trial a juror may not hear clearly what has been said and without impropriety may ask a fellow juror whether the testimony is as he understands it." *People v. West*, 73 Cal. 345, 14 Pac. 848.

17. **U. S.**—*Pool v. Chicago, B. & Q. R. Co.*, 2 McCrary 251, 6 Fed. 844. **Conn.**—*Hamilton v. Pease*, 38 Conn. 115; *Bow v. Parsons*, 1 Root 429; *Bennett v. Howard*, 3 Day 219. **Ga.**—*Blacklock v. Phillips*, 38 Ga. 216; *Foster v. Brooks*, 6 Ga. 287. **Ind. Ter.**—*Ostrom v. Clapp*, 6 Ind. Ter. 203, 90 S. W. 478. **Ia.**—*Walker v. Dailey*, 87 Iowa 375, 54 N. W. 344. **Ky.**—*Albin Co. v. Demorest Mfg. Co.*, 22 Ky. L. Rep. 245, 56 S. W. 982. **Me.**—*Heffron v. Gallupe*, 55 Me. 563. **N. Y.**—*Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. Pr. 141. **N. C.** *State v. Perry*, 121 N. C. 533, 27 S. E. 997, 61 Am. St. Rep. 683. **Tex.**—*Andrews Lumb. Co. v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 158 S. W. 1194. **Vt.**—*Clement v. Spear*, 56 Vt. 401; *McDaniels v. McDaniels*, 40 Vt. 363, 94 Am. Dec. 408.

See also, *supra*, IX, F.

[a] **Psychology of the Rule.**—"Now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilections than similar declarations which he may hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are too apt to stand by their own public declarations, in defiance of evidence. This pride of opinion and of consistency belongs to human nature. Where, therefore, a juror talks outside the jury room about a case pending, and undecided before him, he gives the clear-

est evidence that he is not an impartial and unbiased juror." *Pool v. Chicago, B. & Q. R. Co.*, 6 Fed. 844.

[b] **Public sentiment and opinion** should be kept from them. *Churchill v. Alpena Circ. Judge*, 56 Mich. 536, 23 N. W. 211.

18. **U. S.**—*United States v. Daubner*, 17 Fed. 793; *United States v. Swett*, 2 Hask. 310, 28 Fed. Cas. No. 16,427. **Ark.**—*Ary v. State*, 104 Ark. 212, 148 S. W. 1032. **Fla.**—*Jordan v. State*, 22 Fla. 528. **Ind.**—*Harrison v. Price*, 22 Ind. 165; *Barlow v. State*, 2 Blackf. 114. **Ia.**—*Foedisch v. Chicago & N. W. Ry. Co.*, 100 Iowa 728, 69 N. W. 1055. **N. H.**—*McIlvaine v. Wilkins*, 12 N. H. 474, 477. **S. C.**—*Lamb v. Saltus*, 3 Brev. L. 130.

[a] **Illustrations.**—A remark, "That there was no use in the lawyers occupying so much time examining witnesses and trying to humbug the jury, and that the one who made the shortest speech would get a verdict," was charged to "ignorance or loquaciousness," and not to wilful misconduct. *Taylor v. California Stage Co.*, 6 Cal. 228, 229.

[b] So a remark that a witness had to be given a rest because the attorneys worried him so and that it was an outrage, did not require a new trial. *State v. Allen*, 89 Iowa 49, 56 N. W. 261.

[c] A message given by a juror to a friend to be given the defendant that if he were not excused from the jury he would convict the defendant, was held not to require a new trial. *State v. Robidou*, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015.

[d] "So long as the conversation was all by the jurors, and no answers were made to their questions, they were not advised of anything by reason of such conversation which they did not already know, and hence it is impossible that the plaintiffs could have been prejudiced thereby." *Foedisch v. Chicago, M. & St. P. Ry. Co.*, 100 Iowa 728, 731, 69 N. W. 1055.

[e] **The substance of what was said** by the juror must be shown to the

not voluntarily listen to remarks concerning it made to them or in their presence,¹⁹ though the fact that they do so listen is not of itself a sufficient reason for setting aside the verdict.²⁰ Expressions of opinion,²¹ and, in general, comments on the weight and effect of evidence and the credibility of witnesses, are frequently not prejudicial.²² The expression, by a juror, of a fixed, formed opinion on the merits of the case, disqualifies him,²³ and a new trial will be granted

court in order to enable it to determine whether the merits of the case had been discussed to the prejudice of the parties. *Walker v. Dailey*, 87 Iowa 375, 54 N. W. 344; *Ridenour v. Clarinda*, 65 Iowa 465, 21 N. W. 779.

19. Cal.—*People v. Turner*, 39 Cal. 370. Conn.—*Hamilton v. Pease*, 38 Conn. 115; *State v. Andrews*, 29 Conn. 100, 76 Am. Dec. 593; *Bennett v. Howard*, 3 Day 219. Ill.—*Reins v. People*, 30 Ill. 256. Ia.—*Welch v. Taverner*, 78 Iowa 207, 42 N. W. 650.

See also *supra*, IX, F, 7.

[a] "The jurors who suffered themselves to be so approached, though they may have meant no wrong, were guilty not only of a violation of the law but also of the oath they had taken to say nothing to any person about the business and matters in their charge but to their fellow jurors, and to suffer no one to speak to them about the same but in court. Both were liable to severe and summary punishment." *McDaniels v. McDaniels*, 40 Vt. 363, 375, 94 Am. Dec. 408.

[b] Juror should ask that conversation regarding the case in his presence be stopped. *State v. Andrews*, 29 Conn. 100, 76 Am. Dec. 593.

[c] Voluntary attendance at a public meeting at which the matters in issue in the pending case are discussed, requires a new trial. *People v. Turner*, 39 Cal. 370.

20. *People v. McCurdy*, 68 Cal. 576, 10 Pac. 207.

21. Ia.—*State v. Baughman*, 111 Iowa 71, 82 N. W. 842; *Stockwell v. Chicago, C. & D. R. Co.*, 43 Iowa 470. Minn.—*Chalmers v. Whittemore*, 22 Minn. 305, 307. R. I.—*Kaul v. Brown*, 17 R. I. 14, 40 Atl. 10. Tex.—*Freeman v. Vetter*, 61 Tex. Civ. App. 569, 128 S. W. 909, 130 S. W. 190. Wash. *State v. Aker*, 54 Wash. 342, 103 Pac. 420. Wis.—*Jackson v. Smith*, 21 Wis. 26.

[a] Reason for the Rule.—"The mischief of such expressions is, that

they tend to commit the mind of the juror uttering them to a foregone conclusion. Nevertheless they are not always regarded as sufficient ground for new trial. . . . The truth seems to be, that there is no unvarying rule, but that courts, unless the misconduct is very gross or has been participated in by the successful party, exercise their discretion and grant or refuse a new trial as they think justice requires." *Kaul v. Brown*, 17 R. I. 14, 16, 20 Atl. 10.

[b] "Prejudging and giving an opinion on the statement of certain facts are very different things. The first implies a strong disposition to favor the one side or the other, a determination to find in one way, let the evidence be what it will. The last involves the truth of certain facts and propositions in the sentiments delivered; and impressions thus made may be effaced by the production of other evidence." *Goodright v. M'Causland*, 1 Yeates (Pa.) 372, 378.

[c] Statement that the verdict was going to be for the plaintiff, is harmless. *Harrison v. Price*, 22 Ind. 165. To similar effect, see: *Clarke v. South Kingstown*, 18 R. I. 283, 27 Atl. 336; *Clement v. Spear*, 56 Vt. 401. Compare *Norcross v. Willard*, 82 Vt. 185, 72 Atl. 820.

22. *State v. Carter*, 11 Ohio Dec. (Reprint) 123.

[a] The remark that "some of the witnesses of the state had poor memories" was held harmless. *Humphrey v. State*, 78 Wis. 569, 47 N. W. 836.

23. *Ewers' Admr. v. National Imp. Co.*, 63 Fed. 562, 563. See *Strauss & Bro. v. Dashney*, 9 Ohio Dec. (Reprint) 329.

[a] "Absence of prejudice is not only a qualification precedent to the acceptance of a juror, but its maintenance throughout the trial is also essential to the continuance of the juror's qualification. To lose it during the course of proceeding would incapacitate

in such a case,²⁴ as well as where the statement indicates an intention to exercise no judgment in agreeing upon a verdict.²⁵ Statements made after the verdict has been returned seldom call for the granting of a new trial.²⁶

b. *Statements of Jurors to Each Other.*—While it is the better practice for the jury not to discuss the evidence until the entire case is in and submitted to them, such conduct does not require a reversal.²⁷ Declarations of the jurors to each other, with reference to the case, are seldom held to affect the verdict rendered.²⁸ Statements

a juror from fairly hearing the evidence and properly exercising his reason and judgment." *State v. Carter*, 11 Ohio Dec. (Reprint) 123, 124.

Maintaining open and impartial mind, see *supra*, IX, G, 3.

24. U. S.—*Ewers' Admr. v. National Imp. Co.*, 63 Fed. 562. Cal.—*People v. Turner*, 39 Cal. 370. Ind. Ter. *Ostrom v. Clapp*, 6 Ind. Ter. 203, 90 S. W. 478.

[a] "It is a well known rule, that where, during the progress of a trial and before the submission of the case, a juror has made statements outside the juryroom concerning the case, or evidence offered therein, indicating a fixed opinion, unfavorable to the moving party, or ill will towards him, it is ground for a new trial." *Cooper v. Carr*, 161 Mich. 405, 126 N. W. 468.

[b] Remarks "characterized by their intense personality in respect to this defendant, and [which] were uniformly directed to her personal appearance, her personal conduct, and her doom," require a new trial. *State v. Carter*, 11 Ohio Dec. (Reprint) 123, 125.

[c] **Illustration.**—A new trial was granted because of a juror's statement that things were "going pretty well, Mrs. Willard is going to beat the doctor." This statement "amounts to an expression of opinion by the juror that Mrs. Willard was going to win and to an assertion that he should be pleased to have her win. This was to all intents and purposes the formation and the expression of an opinion on the merits of the case, for it is not to be assumed that the juror supposed she was going to win regardless of the merits. The formation of such an opinion by a juror, and its expression during the trial to anyone but his fellow jurors, disqualifies him as much as the formation and expres-

sion of such an opinion would before trial. It is the expression of the opinion that disqualifies, not the formation of it." *Noreross v. Willard*, 82 Vt. 185, 72 Atl. 820.

25. *State v. White*, 48 La. Ann. 1444, 21 So. 26.

26. *Goldberg v. Berman*, 33 R. I. 488, 82 Atl. 288.

[a] "It is proper to assume, in the absence of testimony to the contrary, that his condition of mind was the product of the testimony and conduct of the witnesses at the trial; in other words, that it proceeded from proof and not from prejudice." *Goldberg v. Berman*, 33 R. I. 488, 82 Atl. 288.

[b] **Shaking hands with the successful plaintiff and congratulating her** was held not to be misconduct. *Reese v. Stadler*, 54 How. Pr. (N. Y.) 492.

27. Cal.—*People v. Kramer*, 117 Cal. 647, 49 Pac. 842; *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190, 194, 22 Pac. 590; *People v. West*, 73 Cal. 345, 14 Pac. 848. La.—*State v. Cook*, 52 La. Ann. 114, 26 So. 751, where it is merely casual. Mo.—*Paramore v. Lindsey*, 63 Mo. 63. Ohio.—*Alm v. Andrews Bros. Co.*, 9 Ohio Cir. Ct. 591, 6 Ohio Cir. Dec. 514. Tex.—*Scott v. State*, 43 Tex. Crim. 591, 68 S. W. 177. Wash.—*State v. Aker*, 54 Wash. 342, 103 Pac. 420.

Compare Edney v. Baum, 44 Neb. 294, 62 N. W. 461.

Admonishment by court not to discuss case, see *supra*, IX, D, 1, g.

[a] **Whispering together while on a view** is not prejudicial. *People v. Bush*, 68 Cal. 623, 10 Pac. 169.

28. Ia.—*State v. Copeland*, 106 Iowa 102, 76 N. W. 522. Ky.—*Higgins v. Dean Gas Engine & F. Co.*, 140 Ky. 44, 130 S. W. 800. N. Y.—*People v. Thompson*, 198 N. Y. 396, 91 N. E. 838. Tex.—*Tinker v. State*, 58 Tex.

by jurors indicative of the fact that they may not have been governed entirely by the evidence in the case in arriving at their verdict do not constitute prejudicial misconduct,²⁹ such matters inhering in the verdict itself.³⁰ The assertion of facts appertaining to the case and within the personal knowledge of the jurors is improper;³¹ but such statements are not prejudicial where they do not concern material or disputed facts,³² or where they are not statements of positive facts.³³ Comments in favor of or against the credibility of witnesses are improper.³⁴

6. Relations With Officers, Parties and Attorneys.—It is not prejudicial misconduct for the jury to have its photograph taken in

Crim. 321, 125 S. W. 890 (that defendant was a ringleader in the transaction); *Vaughn v. State*, 51 Tex. Crim. 180, 101 S. W. 445.

[a] **Remark Derogatory to One of Parties.**—A "casual remark or statement made by a juror derogatory to one of the contesting parties" does not require a new trial. *Ayrhart v. Wilhelmy*, 135 Iowa 290, 112 N. W. 782.

[b] **Insinuations regarding the motive and conduct of a juror, shown to have been spoken in jest, do not require a new trial.** *State v. Olds*, 106 Iowa 110, 76 N. W. 644.

29. *Cal.*—*Kimie v. San Jose-Los Gatos I. R. Co.*, 156 Cal. 379, 104 Pac. 312. *Ia.*—*Alexander v. Crosby*, 150 Iowa 239, 129 N. W. 959; *Austin v. Smith*, 109 N. W. 289. *Kan.*—*State v. Wallace*, 92 Kan. 440, 140 Pac. 863. *La.*—*State v. Riggs*, 110 La. 509, 34 So. 655, statements indicating a predisposition to convict.

[a] "If every bit of gossip or irrelevant statement or conversation which finds expression in a juryroom is sufficient to vitiate a verdict, few, if any, would be permitted to stand against attack by the unsuccessful party. True, if extrinsic or irrelevant matter is introduced into the deliberations of the jury in such manner as to raise any reasonable question whether it did not influence the verdict, the court may properly interfere and set it aside; but a casual remark or statement made by a juror derogatory to one of the contesting parties ought not to be so regarded, in the absence of any showing that anybody gave heed to the statement, or was in any manner influenced thereby." *Ayrhart v. Wilhelmy*, 135 Iowa 290, 112 N. W. 782.

30. *Austin v. Smith* (Iowa), 109 N. W. 289.

31. *Ia.*—*Wilberding v. City of Dubuque*, 111 Iowa 484, 82 N. W. 957; *State v. Wright*, 98 Iowa 702, 68 N. W. 440. *Kan.*—*State v. Duncan*, 70 Kan. 883, 78 Pac. 427; *State v. Woods*, 49 Kan. 237, 30 Pac. 520; *State v. Beam*, 1 Kan. App. 688, 42 Pac. 394. *Me.* *McIntire v. Hussey*, 57 Me. 493. *Neb.* *Wessel v. Bishop*, 76 Neb. 74, 107 N. W. 220. *Pa.*—*Com. v. Kulp*, 5 Pa. Dist. 468.

[a] **Illustrations.**—Statement by a juror that he had heard that the plaintiff who had been injured was stealing a ride at the time, requires a new trial. *Yanez v. San Antonio Tr. Co.* (Tex. Civ. App.), 126 S. W. 1176.

Use of personal knowledge, see generally *infra*, IX, J, 5.

32. *State v. Woodson*, 41 Iowa 425; *Douglas v. Smith*, 75 Neb. 169, 106 N. W. 173. See *Davis v. Lowman*, 9 Ga. 504.

Irrelevant facts should not be stated or discussed, see *infra*, IX, J, 5, d.

33. *Madison v. Kansas City, M. & O. R. Co.*, 88 Kan. 784, 129 Pac. 1157, statement of mere rumors is harmless.

[a] "Whether the statement was made as a fact and within the personal knowledge of the juror making it was a question of fact for the trial court to determine." *Madison v. Kansas City, M. & O. Ry. Co.*, 88 Kan. 784, 129 Pac. 1157.

[b] **Mere intimation on part of juror** that he has personal knowledge of important facts, which however, he does not disclose to his fellow jurors, does not require a new trial. *Irvine v. State*, 104 Tenn. 132, 56 S. W. 845.

34. See *infra*, IX, J, 5, b, (II).

a group, with the bailiff,³⁵ or to send out for refreshments;³⁶ but it is highly improper for jurors to suggest to the parties their desire to receive anything by way of treat.³⁷ Jurors should carefully abstain from association with other persons during the trial, especially with parties, counsel, or other persons interested;³⁸ but the performance of mere acts of courtesy for a party is not improper.³⁹

7. Examination of Books, Papers, and Other Things. — Generally. Where the jury is detained in the courtroom in which are legal books, a cursory examination of such books,⁴⁰ or the minutes of the evidence made by the judge and left on his desk,⁴¹ or the reporter's transcript of a previous trial,⁴² or notes of counsel,⁴³ is harmless; but it is prejudicial misconduct for the jury to obtain statutes or law books and read and consider them for the purpose of determining questions of law involved in the case,⁴⁴ and in such cases a new trial will be granted,⁴⁵ though it is sometimes held that a new trial will not be

35. Mo.—*State v. Taylor*, 134 Mo. 109, 35 S. W. 92. **Neb.**—See *Taylor v. State*, 86 Neb. 795, 126 N. W. 752. **Okla.**—*Blair v. State*, 4 Okla. Crim. 359, 111 Pac. 1003, not commended. **W. Va.**—*State v. Cottrill*, 52 W. Va. 363, 43 S. E. 244.

36. Harrison v. Rowan, 4 Wash. C. C. 32, 11 Fed. Cas. No. 6,142; *Long v. Davis*, 136 Iowa 734, 114 N. W. 197.

[a] **Lunches.**—"The alleged misconduct of the jury consists in partaking of a midnight lunch. . . . The jury paid for the lunch which was furnished them and while it would have been the better practice for them to have accepted the meals provided by the court, yet their conduct in this respect was clearly without prejudice." *State v. Beste*, 91 Iowa 565, 60 N. W. 112.

[b] **Eating watermelons** on the veranda of the courtroom on a hot night is not improper. *Spier v. State*, 89 Ga. 737, 15 S. E. 663.

Furnishing food to jurors, generally, see *supra*, IX, A, 2, b.

37. Sandstrom v. Oregon-Washington R. & Nav. Co., 69 Ore. 194, 136 Pac. 878, 45 L. R. A. (N. S.) 889. But see *Drainage Comrs. v. Knox*, 237 Ill. 148, 86 N. E. 636.

Treating by parties as misconduct, see *supra*, IX, F, 8.

38. See supra, IX, F.

39. Central R. & Banking Co. v. Wiggins, 91 Ga. 208, 18 S. E. 187, it was held not to be improper for a juror to take the arm of an invalid party and aid him in descending the courthouse steps.

40. Ga.—*Durham v. State*, 70 Ga. 264. **Mo.**—*State v. Spaugh*, 200 Mo. 571, 98 S. W. 55, where the jury read the statute fixing their fees and a decision in another murder case. **N. Y.** *People v. Priori*, 164 N. Y. 459, 58 N. E. 668.

[a] **Obtaining a code after the verdict has been agreed upon** and for the purpose of enabling the jury to put it in proper form, is harmless. *Graves v. State*, 63 Ga. 740.

[b] **Reading a printed pamphlet containing the opinion of the supreme court** on a former trial of the case does not require a new trial. *Fuller v. Fletcher*, 44 Fed. 34.

41. Graves v. Gans, 25 Wis. 41; *Chapman v. Chicago & N. W. Ry. Co.*, 26 Wis. 295, 309, 7 Am. Rep. 81. *Contra*, *Mitchell v. Carter*, 14 Hun (N. Y.) 448, 451.

42. State v. Miller, 35 Kan. 328, 10 Pac. 865, it not appearing that they read any portion of the evidence.

43. Kates Transfer & W. Co. v. Klassen, 6 Ala. App. 301, 59 So. 355.

44. Ga.—*Roberson v. State*, 15 Ga. App. 545, 83 S. E. 877. **Ia.**—*State v. Kirk*, 168 Iowa 244, 150 N. W. 91. **Neb.**—*Harris v. State*, 24 Neb. 803, 40 N. W. 317.

[a] **Examination of report of former trial of same case** in which much incompetent evidence is set out, requires a new trial. *Jones v. State*, 89 Ind. 82.

Right of jury to take statutes and law treatises to the juryroom, see *infra*, IX, K, 5, j.

45. Bouton-Perkins Lumber Co. v. Huston, 81 Wash. 678, 143 Pac. 146,

granted for such misconduct unless it affirmatively appears that the verdict was thereby influenced,⁴⁶ or at least, that the jury actually examined the books to which they had access.⁴⁷

The examination of exhibits in the courtroom, during a recess of the court, does not work prejudicial injury.⁴⁸

8. Receiving Evidence Out of Court.—a. *In General.*—For a juror to wilfully and intentionally obtain information pertaining to the case, out of court, is gross misconduct, on his part.⁴⁹ It is equally improper to send by the officer in charge for information pertaining to the case.⁵⁰

b. *Unauthorized Inspection of Premises or Articles.*—It constitutes misconduct for a jury either collectively,⁵¹ or for individual

overruling *Edwards v. Washington Territory*, 1 Wash. Ter. 195.

[a] **Consideration in Estimating Damages.**—The fact that the jury had determined upon the defendant's liability and was considering the measure of damages is immaterial. *Bouton-Perkins Lumb. Co. v. Huston*, 81 Wash. 678, 143 Pac. 146.

46. U. S.—*Colt v. United States*, 190 Fed. 305, 111 C. C. A. 205. **Miss.** *Brister v. State*, 86 Miss. 461, 38 So. 678. **N. Y.**—*People v. Priori*, 164 N. Y. 459, 58 N. E. 668; *People v. Draper*, 28 Hun 1, 1 N. Y. Crim. 138. **Tex.** *Munos v. State*, 34 Tex. Crim. 472, 31 S. W. 380.

[a] **In a prosecution for burglary** the fact that a juror reads the reported opinion in another burglary case, does not establish that he was thereby influenced in agreeing to a verdict. *Munos v. State*, 34 Tex. Crim. 472, 31 S. W. 380.

47. State v. Harris, 34 La. Ann. 118; *State v. Tanner*, 38 La. Ann. 307; *Gustavson v. State*, 10 Wyo. 300, 68 Pac. 1006.

[a] **This rule is impossible of practical application** in a state where the testimony of jurors is inadmissible to impeach their verdict. *Jones v. State*, 89 Ind. 82.

48. Cal.—*People v. Tipton*, 73 Cal. 405, 14 Pac. 894. **Ky.**—*Martin v. Com.*, 30 Ky. L. Rep. 1196, 100 S. W. 872. **N. Y.**—*People v. Wilson*, 8 Abb. Pr. 137; *Wilson v. People*, 4 Park. Crim. 619. **Okla.**—*Kennon v. Territory*, 5 Okla. 685, 50 Pac. 172.

See also *infra*, IX, J, 5, e.

[a] **Inspection of diagrams of the scene of a crime**, which have been frequently referred to by witnesses, is

harmless. *People v. Antony*, 146 Cal. 124, 79 Pac. 858.

49. Cal.—*Rodgers v. Central P. R. Co.*, 67 Cal. 607, 8 Pac. 377. **Ky.** *Ironton Lumb. Co. v. Wagner*, 119 S. W. 197. **N. C.**—*State v. Perry*, 121 N. C. 533, 27 S. E. 997, 61 Am. St. Rep. 683.

[a] **"No juror has a right to listen to testimony except such as the court directs that he shall listen to."** *Ironton Lumb. Co. v. Wagner (Ky.)*, 119 S. W. 197.

[b] **Inquiring of expert**, "one of the defendant's conductors, as to how a person leaving a car in the manner described by defendant's witnesses, before the same had been brought to a stop would probably fall," and communicating the answer to the other jurors, is ground for a new trial. *Hoskovec v. Omaha St. Ry. Co.*, 80 Neb. 784, 115 N. W. 312.

[c] **Examining hotel register to see if defendant's name was there**, he relying in defense on an alibi, was held not to require a new trial. *State v. Beasley*, 84 Iowa 83, 50 N. W. 570.

[d] **Following and observing the plaintiff to see if he was malingering**, does not require a new trial. *Gratz v. Worden*, 26 Ky. L. Rep. 721, 82 S. W. 395.

Effect of intercourse between jurors and other persons, see generally, *supra*, IX, F.

Use of own knowledge, see *infra*, IX, J, 5.

50. Ketchum v. Chicago, St. P., M. & O. Ry. Co., 150 Wis. 211, 136 N. W. 634, obtaining measurements of cars.

Misconduct of officer in giving information to jurors, see *supra*, IX, B, 4.

51. Warner v. State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415.

jurors,⁵² to visit the premises in question, without the knowledge and order of the court and there view, inspect or examine them,⁵³ or to inspect and examine articles involved in the action;⁵⁴ and it is equally improper for them to examine places or instrumentalities, similar to those involved in the suit.⁵⁵ By most courts it is held, however, that such misconduct does not call for a reversal of the judgment unless it appears to have operated to the prejudice of the defeated party,⁵⁶

52. **Ia.**—*Carbon v. Ottumwa*, 95 Iowa 524, 64 N. W. 413. **Me.**—*Winslow v. Morrill*, 68 Me. 362. **Mass.**—*Harrington v. Worcester, L. & S. St. Ry. Co.*, 157 Mass. 579, 32 N. E. 955. **Minn.**—*Floody v. Great Northern R. Co.*, 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A. (N. S.) 1196.

[a] "When real evidence concerning the subject-matter of the dispute is shown by a party to one jurymen in the absence of his fellows and of the parties, and conversation is had with him in relation to its value, etc., and their verdict is, or may be, influenced thereby," a new trial will be granted. *McIntire v. Hussey*, 57 Me. 493.

53. **U. S.**—*Ewers' Admr. v. National Imp. Co.*, 63 Fed. 562. **Cal.**—*Siemens v. Oakland, S. L. & H. Elec. Co.*, 134 Cal. 494, 66 Pac. 672. **Ia.**—*State Security Bank v. Burns*, 120 N. W. 626; *Caldwell v. Nashua*, 122 Iowa 179, 97 N. W. 1000. **Kan.**—*Ortman v. Union Pac. Ry. Co.*, 32 Kan. 419, 4 Pac. 858. **Me.**—*Bowler v. Washington*, 62 Me. 302. **Minn.**—*Twaddle v. Mendenhall*, 80 Minn. 177, 83 N. W. 135; *Woodbury v. Anoka*, 52 Minn. 329, 54 N. W. 187; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Koehler v. Cleary*, 23 Minn. 325. **N. J.**—*Deacon v. Shreve*, 22 N. J. L. 176. **N. Y.**—*Buffalo Structural Steel Co. v. Dickinson*, 98 App. Div. 355, 90 N. Y. Supp. 268; *Adams Laundry Mach. Co. v. Prunier*, 74 Misc. 529, 134 N. Y. Supp. 475; *Eastwood v. People*, 3 Park. Crim. 25. **Tex.**—*Nelson v. State (Tex. Crim.)*, 58 S. W. 107; *Darter v. State*, 39 Tex. Crim. 40, 44 S. W. 850. **Wis.**—*Parb v. State*, 143 Wis. 561, 128 N. W. 65; *Peppercorn v. Black River Falls*, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818.

[a] After a sealed verdict has been returned, it is not misconduct for a juror, for the purpose of gratifying his curiosity, to view the premises. *Com. v. Desmond*, 141 Mass. 200, 5 N. E. 856.

54. **Ill.**—*Stampofski v. Steffens*, 79 Ill. 303. **Me.**—*Driscoll v. Gatecomb*, 112 Me. 289, 92 Atl. 39, L. R. A. 1915B, 702. **Minn.**—*Thoreson v. Quinn*, 126 Minn. 48, 147 N. W. 716. **N. Y.**—*Gans v. Metropolitan St. Ry. Co.*, 84 N. Y. Supp. 914.

55. **Minn.**—*Pierce v. Brennan*, 83 Minn. 422, 86 N. W. 417. **N. Y.**—*Nance v. Kaufman*, 123 N. Y. Supp. 957. **Tex.**—*Olivares v. San Antonio & A. P. Ry. Co.*, 37 Tex. Civ. App. 278, 84 S. W. 248.

[a] In an action for malpractice, the examination by a juror of another case of clubbed feet on which defendant had operated was held ground for a new trial. *Flanders v. Mullin*, 73 Vt. 276, 50 Atl. 1055.

[b] Casual sight of similar articles is harmless. *Burho v. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300, car couplers.

Experiments and tests by jurors, see *infra*, IX, I.

56. **Cal.**—*People v. Yee King*, 24 Cal. App. 509, 141 Pac. 1047. **Conn.**—*Brodie v. Connecticut Co.*, 87 Conn. 363, 87 Atl. 798. **Ia.**—*Caldwell v. Nashua*, 122 Iowa 179, 97 N. W. 1000; *Carbon v. Ottumwa*, 95 Iowa 524, 64 N. W. 413, where the juror did not disclose his information to his fellow jurors. **Kan.**—*City of Emporia v. Juengling*, 78 Kan. 595, 96 Pac. 850, 19 L. R. A. (N. S.) 223. **Mass.**—*Harrington v. Worcester, L. & S. St. Ry. Co.*, 157 Mass. 579, 32 N. E. 955. **Minn.**—*Gunderson v. Minneapolis St. R. Co.*, 126 Minn. 168, 148 N. W. 61; *Thoreson v. Quinn*, 126 Minn. 48, 147 N. W. 716; *MacKinnon v. City of Minneapolis*, 117 Minn. 261, 135 N. W. 814; *Woodbury v. Anoka*, 52 Minn. 329, 54 N. W. 187; *Koehler v. Cleary*, 23 Minn. 325. **N. J.**—*Warner v. State*, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415. **N. Y.**—*Buffalo Structural Steel Co. v. Dick-*

especially where the location of the accident, crime, or matter in dispute has no relation to its cause or the merits of the controversy,⁵⁷ or the article inspected has no intimate relation to any material issue in the case,⁵⁸ or where the action taken was casual, with no intention of thereby obtaining information for use in the juryroom.⁵⁹ So a mere casual sight or inspection of the premises, by a single juror or by the jury as a whole while it, in charge of an officer is in the neighborhood, is harmless.⁶⁰ The circumstances should show more than a suspicion of misconduct in order to adversely affect the verdict.⁶¹ A few authorities are to be found which adopt the principle

inson, 98 App. Div. 355, 90 N. Y. Supp. 268; *Haight v. Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193 (where the inspection disclosed only facts which were not disputed); *Gans v. Metropolitan St. Ry. Co.*, 84 N. Y. Supp. 914. See *Dittman v. City of New York*, 58 Misc. 52, 110 N. Y. Supp. 40. **Tex.**—*Hardin v. State*, 40 Tex. Crim. 208, 49 S. W. 607; *McDonald v. State*, 15 Tex. App. 493. **Wis.** *Ketchum v. Chicago*, St. P., M. & O. Ry. Co., 150 Wis. 211, 136 N. W. 634; *Parb v. State*, 143 Wis. 561, 128 N. W. 65, an arson case.

[a] Where the misconduct, if it had any effect, was in favor of the appellant, no new trial will be granted. *City of Fort Worth v. Lopp* (Tex. Civ. App.), 134 S. W. 824.

[b] **Punishment of the Jurors Is Not Necessary.**—Where the jurors visited the place in question but had not been admonished not to do so and intended no harm "there was no occasion for the trial court to set aside their finding merely as a rebuke to the jurors, and for the purpose of enforcing needful judicial discipline." *St. Louis S. W. R. Co. v. Waits* (Tex. Civ. App.), 164 S. W. 870.

[c] **Subsequent application of counsel** that the jury be permitted to view the premises, he not knowing that they had already done so, indicates that no prejudice followed from their action. *St. Louis S. W. R. Co. v. Waits* (Tex. Civ. App.), 164 S. W. 870.

57. **Conn.**—*Brodie v. Connecticut Co.*, 87 Conn. 363, 87 Atl. 798. **Ia.**—*Bowman v. Western Fur Mfg. Co.*, 96 Iowa 188, 64 N. W. 775. **Mo.**—*State v. Brown*, 64 Mo. 367.

[a] "Where the locus itself is in dispute, or where its exact condition has an essential bearing upon the controversy, it may well be that a verdict

should be set aside upon proof that a juror improperly acquired knowledge of that locus, or its condition, by visiting the place but . . . where there is no controversy as to the locality inspected and no probability of prejudice resulting from the inspection, the verdict should not be disturbed." *Siemens v. Oakland S. L. & H. Elec. Co.*, 134 Cal. 494, 66 Pac. 672.

[b] **Effect of Instruction.**—No prejudice follows where the juror states the fact of his casual inspection in open court and the court instructs the juror and other jurors to disregard the knowledge thus acquired. *Brennan v. City of Seattle*, 46 Wash. 427, 90 Pac. 434.

58. *Kimie v. San Jose-Los Gatos I. Ry. Co.*, 156 Cal. 379, 104 Pac. 986.

[a] **A superficial examination of brakes** on a street car was not prejudicial, the main issue in the case being whether the motorman of a car was warranted in assuming that another car would not be at the point of collision when he reached it. *Kimie v. San Jose-Los Gatos I. Ry. Co.*, 156 Cal. 379, 104 Pac. 986.

59. **Cal.**—*People v. Rowell*, 133 Cal. 39, 65 Pac. 127. **Ky.**—*Tudor v. Com.*, 19 Ky. L. Rep. 1039, 43 S. W. 187. **Minn.**—*Lyons v. Dee*, 88 Minn. 490, 93 N. W. 899; *Rush v. St. Paul City Ry. Co.*, 70 Minn. 5, 72 N. W. 733. **Mo.** *State v. Brown*, 64 Mo. 367. **N. H.** *Palmer v. State*, 65 N. H. 221, 19 Atl. 1003. **N. C.**—*Lewis v. Fountain*, 168 N. C. 277, 84 S. E. 278. **Va.**—*Com. v. Brown*, 90 Va. 671, 19 S. E. 447.

60. **Cal.**—*Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717; *People v. Fitzgerald*, 138 Cal. 39, 70 Pac. 1014. **N. C.**—*State v. Boggan*, 133 N. C. 761, 46 S. E. 111. **Pa.**—*Com. v. Filer*, 249 Pa. 171, 94 Atl. 822.

61. *Lewis v. Fountain*, 168 N. C. 277, 84 S. E. 278.

that it is presumed that knowledge so acquired was prejudicial.⁶² A new trial will not be awarded if the party complaining has participated in the misconduct of the juror,⁶³ and the action of the trial court in passing on a motion for a new trial will not be reviewed save for an abuse of discretion.⁶⁴

9. Maintaining Secrecy of Deliberations and as to Verdicts. Jurors should not lounge in open windows, where their actions can be observed, or conduct their deliberations in such a manner that they can be overheard by other persons.⁶⁵

For a juror to make known the nature of the verdict agreed upon before it is returned in open court while an impropriety, is not a ground for a new trial.⁶⁶ The same is true, if it is a sealed verdict which is involved.⁶⁷ It is equally improper for jurors to disclose to others how the jury is divided, before any verdict has been agreed upon.⁶⁸

10. Use of Intoxicating Liquors.—a. *In General.*—The use by jurors of intoxicating liquors during the trial is a practice which is strongly condemned by the courts,⁶⁹ and constitutes misconduct on

[a] "The circumstances must be such as not merely to put suspicion on the verdict because there was opportunity and a chance for misconduct, but that there was in fact misconduct. When there is merely matter of suspicion, it is purely a matter in the discretion of the presiding judge." *Lewis v. Fountain*, 168 N. C. 277, 84 S. E. 278.

[b] "It cannot be presumed that he [the juror] went there for an improper purpose, or for the purpose of obtaining further information relative to the case." *State v. Gage*, 139 Iowa 401, 116 N. W. 596.

62. *Floody v. Great Northern R. Co.*, 102 Minn. 81, 112 N. W. 875, 1081, 13 L. R. A. (N. S.) 1196. *Adams Laundry Mach. Co. v. Prunier*, 74 Misc. 529, 134 N. Y. Supp. 474.

[a] "It is not a violent presumption that evidence received by jurors or remarks made to them out of court or views without order of court, more or less affect jurors. . . . Nothing appears in the evidence reported to rebut this presumption. We are unable to conclude that there is no possibility . . . that the juror was unaffected by his examination and comparison." *Driscoll v. Gatcomb*, 112 Me. 289, 92 Atl. 39, L. R. A. 1915B, 702.

63. *United States v. Salentine*, 8 Biss. 404, 27 Fed. Cas. No. 16,213.

64. *MacKinnon v. City of Minneapolis*, 117 Minn. 261, 135 N. W. 814.

65. *Horton v. State*, 10 Okla. Crim. 294, 136 Pac. 177.

[a] **Noise and boisterous conduct in the juryroom** does not require a new trial. *Oram v. Bishop*, 12 N. J. L. 153.

[b] **Signaling from the juryroom immediately after a verdict has been reached**, is harmless. *Davis v. State*, 54 Tex. Crim. 236, 114 S. W. 366, "it does not show any criminality nor evidence any species of corruption."

66. *Ia.*—*Hyde v. Lookabill*, 66 Iowa 453, 23 N. W. 920. *Ky.*—See *Drake v. Drake*, 107 Ky. 32, 52 S. W. 846. *N. H.*—*Fowler v. Tuttle*, 24 N. H. 9. *N. Y.*—*Bernikow v. Pommerantz*, 94 N. Y. Supp. 487.

[a] **Disclosure by order of court** is harmless. *State v. Bryant*, 21 Vt. 479.

67. *Cal.*—*Ingersoll v. Truebody*, 40 Cal. 603. *Ind.*—*McCarthy v. Kitchen*, 59 Ind. 500, where the nature of the verdict which had been agreed upon was not disclosed. *Wis.*—*Bushee v. Wright*, 1 Pinn. 104.

Compare Orcutt v. Carpenter, 1 Tyler (Vt.) 250, 4 Am. Dec. 722.

68. *Churchill v. Alpena Circ. Judge*, 56 Mich. 536, 23 N. W. 211; *State v. Cotts*, 49 W. Va. 615, 628, 39 S. E. 605, 55 L. R. A. 176. But see *State v. Wright*, 98 Iowa 702, 68 N. W. 440.

69. *Ark.*—*Payne v. State*, 66 Ark. 545, 52 S. W. 276; *Kee v. State*, 28 Ark.

their part and a contempt of court for which they may be properly punished.⁷⁰ A slight indulgence on the part of the juror, will not, however, vitiate the verdict;⁷¹ but where intoxication results and the

155. **Colo.**—*Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526. **Idaho.**—*State v. Corcoran*, 7 Idaho 220, 61 Pac. 1034. **Ind.**—*Creek v. State*, 24 Ind. 151. **La.**—*State v. Demarest*, 41 La. Ann. 413, 6 So. 654; *State v. Broussard*, 41 La. Ann. 81, 5 So. 647, 17 Am. St. Rep. 396. **Minn.**—*State v. Salverson*, 87 Minn. 40, 91 N. W. 1. **Miss.**—*Pope v. State*, 36 Miss. 121. **Mo.**—*State v. West*, 69 Mo. 401, 33 Am. Rep. 506. **Okla.**—*Bilton v. Territory*, 1 Okla. Crim. 566, 99 Pac. 163. **Pa.**—*Com. v. Cleary*, 148 Pa. 26, 23 Atl. 1110. **R. I.**—*Underwood v. Old Colony St. R. Co.*, 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318. **Tex.**—*Brown v. State*, 45 Tex. Crim. 139, 75 S. W. 33. **Wash.**—*Hedican v. Pennsylvania Fire Ins. Co.*, 21 Wash. 488, 58 Pac. 374.

70. **Ala.**—*Alabama Lumber Co. v. Cross*, 152 Ala. 562, 44 So. 563, 126 Am. St. Rep. 55. **Ariz.**—*Copper Queen Min. Co. v. Arizona Prince Copper Co.*, 2 Ariz. 10, 7 Pac. 718. **Ark.**—*McClendon v. State*, 66 Ark. 646, 51 S. W. 1062. **Colo.**—*Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526. **Idaho.**—*Walsh v. Winston Bros. Co.*, 18 Idaho 768, 111 Pac. 1090. **Ill.**—*Sanitary Dist. v. Culbertson*, 147 Ill. 385, 35 N. E. 723. **Ia.**—*State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403. **Wash.**—*Hedican v. Pennsylvania Fire Ins. Co.*, 21 Wash. 488, 58 Pac. 374.

[a] **Furnishing liquor by the officer** (1) in charge of the jury, without an order of court, constitutes a contempt of court on his part (*State v. West*, 69 Mo. 401, 33 Am. Rep. 506), (2) but does not necessarily require a new trial. *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55. See also *supra*, IX, B, 4, a.

71. **U. S.**—*United States v. Gilbert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. **Ala.**—*Alabama Lumber Co. v. Cross*, 152 Ala. 562, 44 So. 563, 126 Am. St. Rep. 55. **Ariz.**—*Levy v. Territory*, 13 Ariz. 425, 115 Pac. 415; *Copper Queen Min. Co. v. Arizona Prince Copper Co.*, 2 Ariz. 10, 7 Pac. 718. **Ark.**—*Payne v. State*, 66 Ark. 545, 52 S. W. 276; *McClendon v. State*, 66 Ark. 646, 51 S. W. 1062; *Kee v. State*, 28 Ark. 155. **Cal.**—*People v. Leary*, 105 Cal. 486, 39 Pac. 24; *People v. Bemmerly*, 98 Cal.

299, 33 Pac. 263; *People v. Sansome*, 98 Cal. 235, 33 Pac. 202; *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *People v. Romero*, 12 Cal. App. 466, 107 Pac. 709; *People v. Emmons*, 7 Cal. App. 685, 95 Pac. 1032. **Colo.**—*May v. People*, 8 Colo. 210, 6 Pac. 816; *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526. **Del.**—*State v. Harrigan*, 9 Houst. 369, 31 Atl. 1052. **Fla.**—*Gamble v. State*, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547, 1 Ann. Cas. 285. **Ga.**—*Westmoreland v. State*, 45 Ga. 225. **Idaho.**—*Walsh v. Winston Bros. Co.*, 18 Idaho 768, 111 Pac. 1090; *State v. Corcoran*, 7 Idaho 220, 61 Pac. 1034. **Ill.**—*Sanitary Dist. v. Culbertson*, 147 Ill. 385, 35 N. E. 723; *Davis v. People*, 19 Ill. 74; *Graybeal v. Gardner*, 48 Ill. App. 305, *affirmed* in 146 Ill. 337, 34 N. E. 528. **Ind.**—*Carter v. Ford Plate Glass Co.*, 85 Ind. 180; *Pratt v. State*, 56 Ind. 179; *Creek v. State*, 24 Ind. 151. **Kan.**—*State v. Tatlow*, 34 Kan. 80, 8 Pac. 267; *Larimer v. Kelley*, 13 Kan. 78; *Perry v. Bailey*, 12 Kan. 539. **Ky.**—*Gordon v. Louisville, St. L. & T. R. Co.*, 16 Ky. L. Rep. 713, 29 S. W. 321. **La.**—*State v. Bellow*, 42 La. Ann. 586, 7 So. 782; *State v. Broussard*, 41 La. Ann. 81, 5 So. 647, 17 Am. St. Rep. 396; *State v. Dorsey*, 40 La. Ann. 739, 5 So. 26. **Me.**—*Purinton v. Humphreys*, 6 Greenl. 379. **Mass.**—*Com. v. Roby*, 12 Pick. 496. **Mich.**—*In re Merriman's Appeal*, 108 Mich. 454, 66 N. W. 372. **Minn.**—*State v. Madigan*, 57 Minn. 425, 59 N. W. 490. **Miss.**—*Green v. State*, 59 Miss. 501; *Russell v. State*, 53 Miss. 367. **Mo.**—*State v. Taylor*, 134 Mo. 109, 35 S. W. 92; *State v. Washburn*, 91 Mo. 571, 4 S. W. 274; *State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314; *State v. West*, 69 Mo. 401, 33 Am. Rep. 506; *State v. Upton*, 20 Mo. 397. **Mont.**—*Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808; *Territory v. Hart*, 7 Mont. 489, 17 Pac. 718. **Neb.**—*Ankeny v. Rawhouser*, 2 Neb. (Unof.) 32, 95 N. W. 1053. **N. H.**—*Gilmanton v. Ham*, 38 N. H. 108. See *Leighton v. Sargent*, 31 N. H. 119, 64 Am. Dec. 323. **Nev.**—*Davis v. Cook*, 9 Nev. 134; *State v. Jones*, 7 Nev. 408; *Richardson v. Jones*, 1 Nev. 405. **N. J.**

faculties of the juror are affected, the verdict will be set aside;⁷² and if the drinking occurs in connection with other misconduct, a new trial will be warranted.⁷³ The use of liquor after the submission of the case is more prejudicial⁷⁴ than its use during the trial and prior

State *v.* Cucuel, 31 N. J. L. 249. **N. Y.** Wilson *v.* Abrahams, 1 Hill 207. **N. C.**—State *v.* Bailey, 100 N. C. 528, 6 S. E. 372. **Ohio.**—Pittsburg, C. & St. L. Ry. Co. *v.* Porter, 32 Ohio St. 328. **Okla.**—Easterly *v.* Gater, 17 Okla. 93, 87 Pac. 853, 10 Ann. Cas. 888. **Pa.** Com. *v.* Salyards, 158 Pa. 501, 27 Atl. 993; Com. *v.* Cleary, 148 Pa. 26, 23 Atl. 1110. **Tenn.**—Sherman *v.* State, 125 Tenn. 19, 140 S. W. 209; King *v.* State, 91 Tenn. 617, 20 S. W. 169; Rowe *v.* State, 11 Humph. 491; Stone *v.* State, 4 Humph. 27. **Tex.**—Mikeska *v.* State (Tex. Crim.), 182 S. W. 1127; Brown *v.* State, 45 Tex. Crim. 139, 75 S. W. 33; Rider *v.* State, 26 Tex. App. 334, 9 S. W. 688; Allen *v.* State, 17 Tex. App. 637; Tuttle *v.* State, 6 Tex. App. 556. **Va.**—Thompson *v.* Com., 8 Gratt. (49 Va.) 637. **Wis.**—Roman *v.* State, 41 Wis. 312. **Can.**—Reg. *v.* McClung, 1 Terr. L. R. 379.

[a] **Drinking Prior to Selection as a Juror.**—The drinking of liquor by one who immediately thereafter is selected as a juror to try a capital case is not sufficient to set aside a conviction where there was no proof that he was intoxicated or drank anything after becoming a juror. State *v.* Andre, 14 S. D. 215, 84 N. W. 783.

72. **Colo.**—Repath *v.* Walker, 13 Colo. 109, 21 Pac. 917. **Ind.**—Brown *v.* State, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180. **Kan.**—Perry *v.* Bailey, 12 Kan. 539. **La.**—State *v.* Ned, 105 La. 696, 30 So. 126, 54 L. R. A. 933; State *v.* Broussard, 41 La. Ann. 81, 5 So. 647, 17 Am. St. Rep. 396. **Minn.**—State *v.* Salverson, 87 Minn. 40, 91 N. W. 1. **Miss.**—Green *v.* State, 59 Miss. 501; Russell *v.* State, 53 Miss. 367. **Nev.**—Davis *v.* Cook, 9 Nev. 134; State *v.* Jones, 7 Nev. 408. **N. C.** State *v.* Jenkins, 116 N. C. 972, 20 S. E. 1021. **Ohio.**—Pittsburg, C. & St. L. Ry. Co. *v.* Porter, 32 Ohio St. 328. **R. I.**—Underwood *v.* Old Colony St. R. Co., 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318. **Tex.**—Brown *v.* State, 45 Tex. Crim. 139, 75 S. W. 33; Rider *v.* State, 26 Tex. App. 334, 9 S. W. 688; Webb *v.* State, 5 Tex. App. 596; Tuttle *v.* State, 6 Tex. App. 556.

Wash.—Hedican *v.* Pennsylvania Fire Ins. Co., 21 Wash. 488, 58 Pac. 574.

[a] **A presumption of prejudice** is raised by a showing that a juror was intoxicated during the progress of the trial, and the burden is upon the successful party to rebut it. Gamble *v.* State, 44 Fla. 429, 33 So. 471, 103 Am. St. Rep. 150, 60 L. R. A. 547, 1 Ann. Cas. 285; State *v.* Salverson, 87 Minn. 40, 91 N. W. 1; State *v.* Madigan, 57 Minn. 425, 59 N. W. 490.

[b] **The consumption of four or five bottles of whiskey** by three jurors is such a use of intoxicating liquors as to vitiate a verdict. March *v.* State, 44 Tex. 64.

[c] **The mere fact that ardent spirits** in sufficient quantities to produce intoxication were conveyed by the bailiff into the juryroom is sufficient to set aside the verdict, but where it affirmatively appears that such liquor was only used by one juror who was sick and he was not intoxicated the verdict will not be disturbed. Pope *v.* State, 36 Miss. 121.

73. Com. *v.* Fisher, 226 Pa. 189, 75 Atl. 204, 134 Am. St. Rep. 1027, 26 L. R. A. (N. S.) 1009.

[a] **Where a juror separated from** the other jurors and went with the bailiff to a public saloon and drank intoxicating liquor without the knowledge of the court, it was such misconduct as warranted a new trial. State *v.* Strodemier, 41 Wash. 159, 83 Pac. 22, 111 Am. St. Rep. 1012. As to separation of jurors, see *supra*, IX, E.

74. **Cal.**—People *v.* Lee Chuck, 78 Cal. 317, 20 Pac. 719 (a capital case); People *v.* Gray, 61 Cal. 164, 44 Am. Rep. 549, a capital case. **Ia.**—State *v.* Bruce, 48 Iowa 530, 30 Am. Rep. 403; Ryan *v.* Harrow, 27 Iowa 494, 1 Am. Rep. 302; State *v.* Baldy, 17 Iowa 39. **N. H.**—Leighton *v.* Sargent, 31 N. H. 119, 64 Am. Dec. 323; State *v.* Bulard, 16 N. H. 139. **N. Y.**—Hanrahan *v.* Ayres, 10 Misc. 435, 31 N. Y. Supp. 458. **Okla.**—Bilton *v.* Territory, 1 Okla. Crim. 566, 99 Pac. 163, in a capital case. **Tex.**—Jones *v.* State, 13 Tex. 168, 62 Am. Dec. 550, decided before

to submission of the case.⁷⁵ If the liquor be used in a moderate quantity, for medicinal purposes, no prejudice follows,⁷⁶ though even in such a case an order of court should be obtained authorizing them to be furnished with the same.⁷⁷

On appeal, the action of the lower court, in passing on the prejudicial effect of such misconduct on the part of a juror, will seldom be disturbed.⁷⁸

b. *Furnished by Other Persons.*⁷⁹—Where intoxicating liquors are furnished by the prevailing party or his representatives, the verdict will ordinarily be reversed and a new trial granted irrespective of whether the verdict was affected thereby,⁸⁰ though under some author-

adoption of code as to the use of intoxicants by juror.

[a] *Consent of Counsel.*—Where a juror requested permission to use such liquor as might be required for his health and counsel for accused consented thereto in open court as did the prosecuting attorney who suggested that other jurors who needed it might also drink liquor, the objection to such drinking by the jurors cannot be sustained unless it is shown that the indulgence was grossly abused and operated injuriously to the prisoners. *United States v. Gilbert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204.

75. *State v. Bruce*, 48 Iowa 530, 30 Am. Rep. 403; *Van Buskirk v. Daugherty*, 44 Iowa 42.

76. *Ia.*—*Gorham v. Sioux City Stock Yards*, 118 Iowa 749, 92 N. W. 698 (where he took quinine and whiskey for a cold); *O'Neill v. Keokuk & Des Moines R. Co.*, 45 Iowa 546, where juror took Jamaica ginger for diarrhoea. *Ia.*—*State v. Bellow*, 42 La. Ann. 586, 7 So. 782. *Mass.*—*Nichols v. Nichols*, 136 Mass. 256, furnished by the officer in charge of the jury. *N. H.* *Gilmanton v. Ham*, 38 N. H. 108. *N. Y.* *People v. Pscherhofer*, 64 Hun 483, 19 N. Y. Supp. 483, 10 N. Y. Crim. 209.

[a] Where a juror not in the habit of drinking was ill, and took for medicinal purposes without medical advice or prescription some brandy and blackberry balsam during the progress of the trial, his action will not vitiate the verdict in the absence of a showing it was used without the knowledge of accused or his counsel, or that its effects were intoxicating. *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122. See *Hopkins v. Knapp*, 92 Iowa 212, 60 N. W. 620, where the court found that

the claim liquor was used as a medicine was a subterfuge.

77. *Idaho.*—*Bernier v. Anderson*, 8 Idaho 675, 70 Pac. 1027. *Ia.*—*State v. Bellow*, 42 La. Ann. 586, 7 So. 782; *State v. Demarest*, 41 La. Ann. 413, 6 So. 654. *Miss.*—See *Pope v. State*, 36 Miss. 121. *N. J.*—*State v. Cucuel*, 31 N. J. L. 249, a capital case.

78. *Cal.*—*People v. Romero*, 12 Cal. App. 466, 107 Pac. 709. *Ill.*—*Graybeal v. Gardner*, 48 Ill. App. 305, affirmed in 146 Ill. 337, 34 N. E. 528. *Ia.* *Carlisle v. Council Bluffs*, 151 Iowa 181, 130 N. W. 813; *Hopkins v. Knapp*, 92 Iowa 212, 60 N. W. 620. *Kan.* *State v. Tatlow*, 34 Kan. 80, 8 Pac. 267. *Minn.*—*State v. Salverson*, 87 Minn. 40, 91 N. W. 1. *Neb.*—*Cortel v. McCarthy*, 37 Neb. 742, 56 N. W. 620.

79. *Treating jurors as misconduct*, see generally *supra*, IX, F, 8.

80. *Ark.*—*Pelham v. Page*, 6 Ark. 535. *Colo.*—*Scott v. Tubbs*, 43 Colo. 221, 95 Pac. 540, 19 L. R. A. (N. S.) 733. *Ga.*—*Walker v. Walker*, 11 Ga. 203. *Idaho.*—*Palmer v. Utah*, etc. Ry. Co., 2 Idaho 315, 13 Pac. 425, where the father of one of plaintiffs treated a juror. *Ill.*—*Doud v. Guthrie*, 13 Ill. App. 653; *Lyons v. Lawrence*, 12 Ill. App. 531. *Ind.*—*Huston v. Vail*, 51 Ind. 299. *Kan.*—*Perry v. Bailey*, 12 Kan. 539. *Me.*—*Studley v. Hall*, 22 Me. 198. *Minn.*—*State v. Madigan*, 57 Minn. 425, 59 N. W. 490. *Neb.*—*Vose v. Muller*, 23 Neb. 171, 36 N. W. 583. *Nev.*—*Sacramento, etc. Co. v. Showers*, 6 Nev. 291. *N. J.*—*Phillipsburgh Bank v. Fulmer*, 31 N. J. L. 52, 86 Am. Dec. 193; *Drake v. Newton*, 23 N. J. L. 111. *Ohio.*—*Pittsburg, C. & St. L. R. Co. v. Porter*, 32 Ohio St. 328; *Bender v. Buehrer*, 4 Ohio Cir. Dec. 507, 8 Ohio Cir. Ct. 244. *Pa.*—*Goodright v. McCaus-*

ities a presumption of prejudice, only, arises in such cases.⁸¹ So, where counsel for either party furnish intoxicating liquors to a juror, it is such misconduct as will warrant a new trial,⁸² unless it is clearly shown that there was no intention to influence the juror,⁸³ and that no influence did result.⁸⁴ But where both parties participate in furnishing the liquor, the verdict will not be affected unless the capacity of the jurors is affected.⁸⁵

Treating by the officer in charge of the jury is not ordinarily prejudicial in itself.⁸⁶ Nor is the mere fact that an absolute stranger

land, 1 Yeates 372, 1 Am. Dec. 306, but there must be full and clear proof of the misconduct. **S. C.**—McGill Bros. v. Seaboard Air Line Ry., 75 S. C. 177, 55 S. E. 216. See McCarty v. McCarty, 4 Rich. L. 594, wherein the court found that there was not sufficient proof to sustain the charges. **S. D.** Godfrey v. Dalquist, 27 S. D. 373, 131 N. W. 299. See State v. Andre, 14 S. D. 215, 84 N. W. 783. **Tenn.**—Mynatt v. Hubbs, 6 Heisk. 320; Sexton v. Lelievrrre, 4 Coldw. 11. **Tex.**—Palm v. Chernowsky, 28 Tex. Civ. App. 405, 67 S. W. 165. **Va.**—See Coleman v. Moody, 4 Hen. & M. 1. **Wash.**—Vollrath v. Crow, 9 Wash. 374, 37 Pac. 741. **Eng.** Hughes v. Budd, 8 Dowl. P. C. 315, 4 Jur. 150; Mounson & West's Case, 4 Jur. 151. **Can.**—Stewart v. Woolman, 26 Ont. 714.

[a] **Furnished by Prosecuting Witness.**—It is reversible error for a juror to drink liquor on the premises where the offense was committed while viewing the premises where the bar is owned by the principal witness for the prosecution, whether furnished by him in person or not. *People v. Hull*, 86 Mich. 449, 49 N. W. 288.

Liquor furnished by counsel, see *infra*, this section.

[b] **Where a town was a party to a suit and error was charged in that an inhabitant of the town had treated some of the jurors to food and liquors**, the court held that the inhabitant was not such a party to the suit as the statute contemplated and that the treating was not at the town's expense. *Carlisle v. Sheldon*, 38 Vt. 440.

[c] **After Verdict.**—Unusual civilities in treating jurors after verdict can scarcely be considered less dangerous and reprehensible than if done during the progress of the trial. *Drake v. Newton*, 23 N. J. L. 111.

81. *Bradshaw v. Degenhart*, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677.

See *Brookhaven Lumber Co. v. Illinois Cent. R. Co.*, 68 Miss. 432, 10 So. 66.

[a] **Where the deputy sheriff furnished the jury with a pitcher of cider belonging to the petitioner, but without his knowledge, the verdict will not be set aside unless injury to the respondents resulted.** *Tripp v. Bristol*, 2 Allen (Mass.) 556.

82. **Ga.**—*Rainy v. State*, 100 Ga. 82, 27 S. E. 709, where attorney for state entertained a juror at dinner during the trial. **Ill.**—*McLaughlin v. Hinds*, 151 Ill. 403, 38 N. E. 136 (even after jurors had rendered verdict); *Mobile & O. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850. **Ind.**—*Huston v. Vail*, 51 Ind. 299. **Mich.**—*People v. Montague*, 71 Mich. 447, 39 N. W. 585. **N. J.** *Demund v. Gowen*, 5 N. J. L. 687. **Ohio.** *Pittsburg, C. & St. L. Ry. Co. v. Porter*, 32 Ohio St. 328. **Wis.**—*Grottkau v. State*, 70 Wis. 462, 36 N. W. 31, where the misconduct was held waived. **Can.**—*Stewart v. Woolman*, 26 Ont. 714.

83. *Pittsburg, C. & St. L. Ry. Co. v. Porter*, 32 Ohio St. 328.

84. *People v. Lyle*, 66 Cal. xviii, 4 Pac. 977; *Pittsburg, C. & St. L. Ry. Co. v. Porter*, 32 Ohio St. 328.

85. **Ariz.**—*Copper Queen Min. Co. v. Arizona Prince Copper Co.*, 2 Ariz. 10, 7 Pac. 718. **Ill.**—*McLaughlin v. Hinds*, 151 Ill. 403, 38 N. E. 136, after a sealed verdict had been returned. **N. Y.**—*Compare Kellogg v. Wilder*, 15 Johns. 455.

86. *People v. Van Horn*, 119 Cal. 323, 51 Pac. 538.

[a] **But where a reward had been offered for a conviction and the sheriff hoped to obtain it, then the sheriff's misconduct in treating the jurors to liquors will warrant a new trial.** *People v. Myers*, 70 Cal. 582, 12 Pac. 719.

Acts and conduct of officer generally, see *supra*, IX, B, 4.

gave a juror a drink necessarily a ground for a new trial.⁸⁷

c. *Objections* on account of the misconduct of a juror in drinking intoxicating liquors,⁸⁸ or to the action of a party or person interested in furnishing them to him,⁸⁹ must be made promptly upon discovery of the misconduct;⁹⁰ advantage of such misconduct cannot be taken after verdict, where one had knowledge thereof during the trial, and failed to make proper complaint.⁹¹

11. Reading Newspapers.—Newspapers may properly be furnished the jury during the trial,⁹² though all references to the case in which they are sitting should first be removed.⁹³ But it is improper for jurors to read articles relating to the case, under any circumstances,⁹⁴ though the court has a wide discretion in determining

87. *Houston & T. C. R. Co. v. Gray* (Tex. Civ. App.), 137 S. W. 729; *Thompson v. Com.*, 8 Gratt. (49 Va.) 637. See also *supra*, IX, F, 8.

88. *Idaho*.—*Walsh v. Winston Bros. Co.*, 18 Idaho 768, 111 Pac. 1090. *Minn. State v. Salverson*, 87 Minn. 40, 91 N. W. 1. *S. C.*—*McCarty v. McCarty*, 4 Rich. L. 594.

89. *Patton v. Hughesdale Mfg. Co.*, 11 R. I. 188.

[a] *In proceedings to condemn land* objections may be made by objection to confirmation. *Detroit & T. S. L. R. Co. v. Campbell*, 140 Mich. 384, 103 N. W. 856.

90. See the cases cited in the preceding notes.

[a] But the orderly conduct of the case does not require that attention be called to the fact in open court. *State v. Salverson*, 87 Minn. 40, 91 N. W. 1.

[b] *Where counsel presented his objections to the intoxication of a juror on the day following the alleged intoxication* he cannot be presumed to have waived the misconduct inasmuch as he was entitled to a reasonable time for investigation and proof. *Underwood v. Old Colony St. R. Co.*, 31 R. I. 253, 76 Atl. 766, Ann. Cas. 1912A, 1318.

91. *Ala.*—*Alabama Lumber Co. v. Cross*, 152 Ala. 562, 44 So. 563, 126 Am. St. Rep. 55. *Cal.*—*People v. Deegan*, 88 Cal. 602, 26 Pac. 500. *Mich.* *Harrington v. Calhoun Probate Judge*, 153 Mich. 660, 117 N. W. 62. *Minn.* *State v. Salverson*, 87 Minn. 40, 91 N. W. 1. *Miss.*—*Harris v. State*, 61 Miss. 304. *Mont.*—*Bradshaw v. Degenhart*, 15 Mont. 267, 39 Pac. 90, 48 Am. St. Rep. 677. *N. Y.*—*People v. Pscherhofer*, 64 Hun 483, 19 N. Y. Supp. 483, 10 N. Y. Crim. 209. *Wis.*—*Grott-kau v. State*, 70 Wis. 462, 36 N. W.

31. *Can.*—*McNeil v. Moore*, 14 N. Bruns. 234.

92. *Ga.*—*Flanagan v. State*, 64 Ga.

52. *Ohio*.—*Farrer v. State*, 2 Ohio St.

54. *Ore.*—*State v. Brown*, 7 Ore. 186.

Wash.—*State v. Pepoon*, 62 Wash. 635, 114 Pac. 449.

[a] But it is a safer and better practice to exclude newspapers from the jury. *McCue v. Com.*, 103 Va. 870, 49 S. E. 623.

93. *U. S.*—*United States v. Gilbert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. *W. Va.*—*State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799. *Wis.*—*Burns v. State*, 145 Wis. 373, 128 N. W. 987, 140 Am. St. Rep. 1081.

Entertainment of jury, in general, see *supra*, IX, A, 3.

94. *Ark.*—*Palmore v. State*, 29 Ark. 248. *Cal.*—*People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829; *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681; *People v. Stokes*, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102; *People v. McCoy*, 71 Cal. 395, 12 Pac. 272. *Ga.* *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Am. & Eng. Ann. Cas. 176. *Ia.* *State v. Caine*, 134 Iowa 147, 111 N. W. 443; *State v. Walton*, 92 Iowa 455, 61 N. W. 179.

[a] The court ought to admonish the jury not to read newspaper articles relating to the case. *Texas & N. O. R. Co. v. Barwick*, 50 Tex. Civ. App. 544, 110 S. W. 953. Admonitory instructions generally, see 13 STANDARD PROC. 948, et seq.

[b] *Effect on Competency.*—The reading by jurors of an article in a newspaper giving the amount of the verdict in a former trial of the same cause does not render the jurors incompetent. *Sherwood v. Chicago & W.*

whether a new trial shall be awarded in such cases,⁹⁵ and its order will seldom be reversed on appeal.⁹⁶ Where prejudice may well have resulted to the defeated party, the verdict will be set aside;⁹⁷ but where the matter is of so little consequence that injury could not reasonably be expected to have followed, the verdict will not be affected.⁹⁸ A newspaper article which merely refers in general terms

M. Ry. Co., 88 Mich. 108, 50 N. W. 101; *Copeland v. Wabash Ry. Co.*, 175 Mo. 650, 75 S. W. 106. See also *supra*, VII.

95. *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021, 20 Ann. Cas. 1138; *Com. v. Valverdi*, 32 Pa. Super. 241.

96. *Minn.—State v. Briggs*, 122 Minn. 493, 142 N. W. 823. *Pa.—Com. v. Valverdi*, 32 Pa. Super. 241. *Wis. Schissler v. State*, 122 Wis. 365, 99 N. W. 593.

[a] **That the jurors read an article will not be presumed in the absence of any evidence to that effect.** *Holt v. United States*, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. ed. 1021, 20 Ann. Cas. 1138; *Fields v. Dewitt*, 71 Kan. 676, 81 Pac. 467, 6 Am. & Eng. Ann. Cas. 349.

97. **U. S.**—*Mattox v. United States*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. ed. 917; *United States v. Ogden*, 105 Fed. 371; *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337. **Cal.**—*People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829. **Pa.**—*Com. v. Landis*, 12 Phila. 576. **Wis.**—*Hempton v. State*, 111 Wis. 127, 150, 86 N. W. 596, 12 Am. Crim. Rep. 657.

[a] **Reading the charge of the court in a newspaper account of the case, requires a new trial.** *Farrer v. State*, 2 Ohio St. 54. But see *Com. v. Haines*, 15 Phila. (Pa.) 363, wherein it was held that a verdict will not be set aside because the jury had used a newspaper containing a part of the judge's charge, if the evidence of that fact depends upon the affidavit of a juror alone.

[b] **The reading of newspaper accounts of expert testimony on insanity in a case similar to the one under consideration was calculated to prejudice the case of the defendant and the verdict should be set aside.** *State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

[c] **Where the subject of an editorial was of the same class as the**

subject of the case on trial, but did not make particular reference to the case at hand, and it appealed to the passions and emotions to encourage juries to convict in capital cases it was harmful to the accused in that it tended to deprive him of a fair and impartial trial. *Styles v. State*, 129 Ga. 425, 59 S. E. 249, 12 Am. & Eng. Ann. Cas. 176.

[d] **Printed Pamphlet.**—Where the successful party handed to a juror a printed pamphlet concerning the case the verdict was set aside. *Hamilton v. Pease*, 38 Conn. 115.

98. **Cal.**—*Thrall v. Smiley*, 9 Cal. 529, where a small clipping from a newspaper containing the libel was handed to the jury by a deputy sheriff. **Mont.**—*State v. Jackson*, 9 Mont. 508, 24 Pac. 213. **Nev.**—*State v. Anderson*, 4 Nev. 265. **N. J.**—*State v. Cucuel*, 31 N. J. L. 249. **Tex.**—*Moore v. State*, 36 Tex. Crim. 88, 35 S. W. 668; *Williams v. State*, 33 Tex. Crim. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21; *Texas & N. O. R. Co. v. Barwick*, 50 Tex. Civ. App. 544, 110 S. W. 953. **W. Va.**—*Kerr v. Lunsford*, 31 W. Va. 659, 8 S. E. 493, 2 L. R. A. 668, because a newspaper during the trial made improper reference to the trial and the case, a new trial is not required. **Wis.**—*Burns v. State*, 145 Wis. 373, 128 N. W. 987, 140 Am. St. Rep. 1081; *Schissler v. State*, 122 Wis. 365, 99 N. W. 593.

[a] **Reference to the amount of a verdict in a similar case cannot be considered to have influenced the verdict either as to the defendant's liability or the amount awarded.** *Texas & N. O. R. Co. v. Barwick*, 50 Tex. Civ. App. 544, 110 S. W. 953.

[b] **Time When the Newspaper Was Read.**—Where comments adverse to the defendant had been read by a juror in the early progress of the case, and the court then issued a warning that newspaper comment be kept from jurors, there is not necessarily prejudice. *State v. Jackson*, 9 Mont. 508, 24 Pac. 213.

to the case,⁹⁹ or which is a fair and impartial report of the proceedings in the case,¹ has been considered harmless; but where the report is not a narration of the evidence but the reporter's version accompanied by comments on the evidence and calculated to excite prejudice, the verdict will be set aside and a new trial granted.²

Timely objection must be made to the misconduct of jurors in reading newspapers,³ or the irregularity will be waived.⁴

[c] **Reading After Verdict.**—Where the jurors had arrived at their verdict and were in court awaiting the judge, the fact that they were permitted to read the morning papers could in no wise have prejudiced the defendant where it was not shown that the papers made any reference to the case. *State v. Wilson*, 121 Mo. 434, 26 S. W. 357.

[d] **If no other verdict could, under the evidence, have been rendered, the verdict will not be affected.** *State v. Williams*, 96 Minn. 351, 105 N. W. 265.

[e] **Proof that a newspaper found in the juryroom had not been read establishes an entire want of prejudice.** *State v. Carta* (Conn.), 96 Atl. 411; *Chicago v. Dermody*, 61 Ill. 431.

99. *People v. Fernandez*, 3 Cal. App. 689, 86 Pac. 899; *Fogarty v. State*, 80 Ga. 450, 5 S. E. 782; *Hunter v. State*, 43 Ga. 483.

1. **U. S.**—*United States v. Reid*, 12 How. 361, 13 L. ed. 1023; *United States v. Francis*, 144 Fed. 520, modified as to sentence in 152 Fed. 155, 81 C. C. A. 407; *United States v. Gilbert*, 2 Sumn. 19, 25 Fed. Cas. No. 15,204. **Ark.** *Capps v. State*, 109 Ark. 193, 159 S. W. 193, 46 L. R. A. (N. S.) 741. **Cal.** *People v. Feld*, 149 Cal. 464, 86 Pac. 1100; *People v. Leary*, 105 Cal. 486, 39 Pac. 24. **Ga.**—*Bernstein v. Myers*, 99 Ga. 90, 24 S. E. 854; *Flanagan v. State*, 64 Ga. 52. **Ill.**—*Illinois Central R. Co. v. Souders*, 178 Ill. 585, 53 N. E. 408. **Ia.**—*State v. Caine*, 134 Iowa 147, 111 N. W. 443. **Kan.**—*State v. Dugan*, 52 Kan. 23, 34 Pac. 409. **La.** *State v. Veillon*, 105 La. 411, 29 So. 883, where a juror received a newspaper in the mail from a distant city. **Mo.** *Copeland v. Wabash R. Co.*, 175 Mo. 650, 75 S. W. 106. **N. J.**—*State v. Cucuel*, 31 N. J. L. 249. **N. Y.**—*People v. Gaffney*, 14 Abb. Pr. (N. S.) 36, Sheld. 304. **Pa.**—*Com. v. Valverdi*, 32 Pa. Super. 241; *Com. v. Haines*, 15 Phila. 363. **Tex.**—*Moore v. State*, 36 Tex. Crim. 88, 35 S. W. 668; *Wil-*

liams v. State, 33 Tex. Crim. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21; *Texas & N. O. R. Co. v. Barwick*, 50 Tex. Civ. App. 544, 110 S. W. 953. **W. Va.**—*State v. Robinson*, 20 W. Va. 713, 43 Am. Rep. 799.

2. **U. S.**—*Meyer v. Cadwalader*, 49 Fed. 32. **Ark.**—*Capps v. State*, 109 Ark. 193, 159 S. W. 193, 46 L. R. A. (N. S.) 741. **Cal.**—*People v. Stokes*, 103 Cal. 193, 37 Pac. 207, 42 Am. St. Rep. 102. **Ill.**—*West Chicago St. R. R. Co. v. Grenell*, 90 Ill. App. 30. **Ia.**—*State v. Caine*, 134 Iowa 147, 111 N. W. 443; *State v. Walton*, 92 Iowa 455, 61 N. W. 179. **Miss.**—*Cartwright v. State*, 71 Miss. 82, 14 So. 526. **Tenn.**—*Carter v. State*, 9 Lea 440. **Tex.**—*Walker v. State*, 37 Tex. 366.

[a] **Reason for the Rule.**—The reading by a juror of newspaper accounts and comments prejudicial to the defendant vitiates the verdict because they are ex parte arguments and presentations of the case made out of court, not under oath, irresponsibly made and not answerable by defendant by argument or evidence. *State v. Jackson*, 9 Mont. 508, 24 Pac. 213.

3. *People v. McCoy*, 71 Cal. 395, 12 Pac. 272; *Com. v. Chauncey*, 2 Ashm. (Pa.) 90.

[a] **Objections to Repeated Publications.**—Where it appears that counsel had made proper objections to the publication of certain articles published, and the publications continued from day to day, it was not incumbent on counsel to repeat the objections to the later articles. *Meyer v. Cadwalader*, 49 Fed. 32.

[b] **In order to preserve one's rights to assign as error for a new trial the publication of prejudicial accounts in a newspaper, it is not necessary to have the publishers cited before the court for contempt where it is doubtful that the court could so punish when no continuance had been asked because of the publication.** *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337.

4. **U. S.**—*Marrin v. United States*,

12. Misconduct in Returning Verdict.—Haste in returning a verdict is not improper, unless accompanied by an apparent disregard of duty on the part of jurors.⁵ Making incorrect and untrue answers to special interrogatories is not "misconduct" as that term is used in the statute specifying the grounds of new trial.⁶ But for a jury, which has been given leave to return a sealed verdict, to seal a pretended verdict that they agreed to disagree, is misconduct which will vitiate any subsequent verdict reached after they have reassembled.⁷

13. Effect of Misconduct.—a. *In General.*—Misconduct on the part of jurors is not, in most jurisdictions, ordinarily presumed to have caused injury to the defeated party,⁸ and a new trial will not be awarded unless prejudice to him is shown to have followed.⁹

167 Fed. 951, 93 C. C. A. 351. **Ga.** Hunter v. State, 43 Ga. 483. **Ill.**—Bulliner v. People, 95 Ill. 394. **Va.**—McCue v. Com., 103 Va. 870, 49 S. E. 623. **Can.**—Tiffany v. M'Nee, 24 Ont. Rep. 551.

[a] **Effect of Objection to Discharge of Jury.**—Where objection was taken that a juror had brought into the jury-room a newspaper containing a reference to the trial and the court offered to discharge the jury and draw a new one, to which counsel replied he would except to any such move, he is deemed to have waived his objection. State v. Brown, 7 Ore. 186.

Effect of failure to make objection to misconduct of jurors, see generally *infra*, IX, G, 13, b.

5. State v. Le Blanc, 116 La. 822, 41 So. 105 (fifteen minutes in a murder case); Urquhart v. Durham & S. C. R. Co., 156 N. C. 581, 72 S. E. 630.

[a] **Impatience and haste of individual juror** does not constitute misconduct: "The case is in no wise different from many others where jurors, on account of engagements of various kinds, are impatient and restless on account of the jury's failure to agree upon a verdict and zealously and earnestly desire to be at other places and under different surroundings. If the mere fact that the juror was apprehensive that the deliberations of the jury would keep him beyond the time when he could prepare for his daughter's marriage would be a sufficient reason for declaring a mistrial, then the floodgate for numberless motions for mistrial would certainly be open in this state. While we sympathize very much with a juror who should be caught at a time like this in the discharge of a public duty, his mind is

no more disturbed than those of many other men who have been required to discharge public duties at times when so doing seriously interferes with other engagements." Morrison v. Dickey, 122 Ga. 417, 50 S. E. 178.

Time required to be spent in reaching a verdict, see generally, IX, J, 2.

6. O'Connor & Co. v. Gillaspay, 170 Ind. 428, 83 N. E. 738.

As to special interrogations to the jury, see the title "Special Interrogatories to Juries."

7. **Ill.**—White v. Martin, 3 Ill. 69. **Ind.**—Short v. West, 30 Ind. 367. **Minn.**—Aetna Ins. Co. v. Grube, 6 Minn. 82. **N. Y.**—Oliver v. First Presbyterian Church, 5 Cow. 283. **Wis.**—Sawyer v. Bitterlee, 86 Wis. 420, 56 N. W. 1086.

8. Judd v. Letts, 158 Cal. 359, 111 Pac. 12, 41 L. R. A. (N. S.) 156; People v. Kramer, 117 Cal. 647, 49 Pac. 842; Achey v. State, 64 Ind. 56.

[a] "A fair test of whether or not the act of a juror amounts to misconduct is whether it was a necessary act or the result of a mere accident or misapprehension." State v. Cotts, 49 W. Va. 615, 39 S. E. 605, 55 L. R. A. 176.

9. **U. S.**—Colt v. United States, 190 Fed. 305, 111 C. C. A. 205. **Cal.**—Kimie v. San Jose-Los Gatos I. Ry. Co., 156 Cal. 379, 104 Pac. 986. **Colo.**—May v. People, 8 Colo. 210, 6 Pac. 816. **Ind.**—Flatter v. McDermitt, 25 Ind. 326; Harrison v. Price, 22 Ind. 165. **Ia.**—Montgomery v. Hanson, 122 Iowa 222, 97 N. W. 1081; Foedisch v. Chicago & N. W. Ry. Co., 100 Iowa 728, 69 N. W. 1055; Carbon v. Ottumwa, 95 Iowa 524, 64 N. W. 413; Stockwell v. Chicago, C. & D. R. Co., 43 Iowa 470. **Ky.**—Drake v. Drake, 107 Ky. 32, 52 S. W. 846. **La.**—Peire v. Martin, 14 La. 64.

More irregularities which it is shown could not have affected the verdict do not afford sufficient ground for a new trial;¹⁰ if, however, the misconduct was of such a character as to indicate that injury might reasonably be inferred to have resulted, it will be held to be *prima facie* prejudicial,¹¹ and, in the absence of a counter showing, a new trial will be awarded.¹² Gross misconduct has sometimes, on the ground of public policy, been held to require a new trial even though

Minn.—*State v. Snow*, 130 Minn. 206, 153 N. W. 526. **N. Y.**—*Haight v. Elmira*, 42 App. Div. 391, 59 N. Y. Supp. 193; *People v. Gaffney*, 14 Abb. Pr. (N. S.) 36, Sheld. 304. **Ohio**.—*Armleder v. Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530. **Okla.**—*Root & Morgan v. Coyle*, 15 Okla. 574, 82 Pac. 648; *Lawton v. McAdams*, 15 Okla. 412, 83 Pac. 429. **Tex.**—*Testard v. State*, 26 Tex. App. 260, 9 S. W. 888. **Wis.**—*Ketchum v. Chicago, St. P., M. & O. Ry. Co.*, 150 Wis. 211, 136 N. W. 634.

[a] "**But what is prejudice?** Can the court say that where the jury misbehave, so that the losing party has not had a fair and impartial trial, there is no prejudice because the court may be of opinion that the verdict is right? By no means; because the losing party is not bound to accept the judgment of the court: he is entitled to the verdict of an impartial jury. . . . The true idea of prejudice in this connection was this: Was the misbehaviour of the juror such as to make it probable that his mind was influenced by it so as to render him an unfair and prejudiced juror?" *Pool v. Chicago, B. & Q. R. Co.*, 6 Fed. 844.

[b] **Misbehaviour Towards the Court.** "A verdict is never set aside for a juror's misbehaviour towards the court, unless it is prejudicial to one or other of the parties." *Crane v. Sayre*, 6 N. J. L. 110.

[c] **A motion in arrest of judgment** and not a motion for a new trial is the proper proceeding by which to attack a verdict for the misconduct of a juror. *Brown v. Congdon*, 50 Conn. 302. As to grounds for arrest of judgment generally, see the title "**Arrest of Judgment.**"

10. **Cal.**—*Kimie v. San Jose-Los Gatos I. Ry. Co.*, 156 Cal. 379, 104 Pac. 986. **Ga.**—*Roberson v. State*, 15 Ga. App. 545, 83 S. E. 877. **Wis.**—*Jackson v. Smith*, 21 Wis. 26.

[a] "**The rule deduced from the cases** seems to be that, however im-

proper such conduct may have been, yet if it does not appear that it was occasioned by the prevailing party, or any one in his behalf, if it does not indicate any improper bias upon the juror's mind, and the court cannot see that it either had, or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside." *State v. Robidou*, 20 N. D. 518, 128 N. W. 1124, Ann. Cas. 1912D, 1015.

[b] **Ultimate effect of the decision** upon the administration of justice in general rather than the attainment of exact justice in the particular case, is the test. *Sales v. Maupin*, 35 S. D. 176, 151 N. W. 427.

11. **Ark.**—*Hydrick v. State*, 103 Ark. 4, 145 S. W. 542. **Cal.**—*People v. Turner*, 39 Cal. 370. **Ga.**—*Roberson v. State*, 15 Ga. App. 545, 83 S. E. 877. **Kan.**—*State v. Lowe*, 67 Kan. 183, 72 Pac. 524; *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341; *State v. Lantz*, 23 Kan. 728, 33 Am. Rep. 215. **Ky.**—*Luttrell v. Maysville & L. R. Co.*, 18 B. Mon. 291. **Mich.**—*Cooper v. Carr*, 161 Mich. 405, 126 N. W. 468. **Utah.**—*State v. Morgan*, 23 Utah 212, 64 Pac. 356.

12. **Ind.**—*Abelman v. Haehnel*, 57 Ind. App. 15, 103 N. E. 869. **Ia.**—*Jolly v. Doolittle*, 169 Iowa 658, 149 N. W. 890; *State v. Olds*, 106 Iowa 110, 76 N. W. 644; *State v. Woodson*, 41 Iowa 425. **Neb.**—*Wessel v. Bishop*, 76 Neb. 74, 107 N. W. 220. **N. J.**—*Titus v. State*, 49 N. J. L. 36, 7 Atl. 621; *State v. Cuenel*, 31 N. J. L. 249. **Ohio.**—*Armleder v. Lieberman*, 33 Ohio St. 77, 31 Am. Rep. 530. **R. I.**—*Kaul v. Brown*, 17 R. I. 14, 20 Atl. 10. **Wash.**—*State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153. **W. Va.**—*Fletcher v. Hale*, 22 W. Va. 44.

[a] **Size of the verdict** may tend to show that misconduct was prejudicial. *Goodeve v. Thompson*, 68 Ore. 411, 136 Pac. 670, 137 Pac. 744.

no injury was shown to have followed.¹³ The order of the trial court touching the misconduct of the jurors will not ordinarily be disturbed on the weight of the evidence.¹⁴ Where the misconduct is without the knowledge or participation of the successful party the courts endeavor to sustain the verdict,¹⁵ and misconduct on the part of jurors tending directly to favor the defeated party will not constitute a ground for a new trial.¹⁶

b. *Failure To Make Objection.*—If parties, with knowledge of the circumstances, make no objection at the time, they will ordinarily be held to have waived the error,¹⁷ if any, resulting from irregular conduct

13. *Smith v. State*, 122 Ga. 154, 50 S. E. 62; *Clement v. Spear*, 56 Vt. 401.

14. *Ind.*—*Long v. State*, 95 Ind. 481; *De Priest v. State*, 68 Ind. 569. *Mich.*—*Cooper v. Carr*, 161 Mich. 405, 126 N. W. 469. *Minn.*—*Thoreson v. Quinn*, 126 Minn. 48, 147 N. W. 716; *Svenson v. Chicago G. W. R. Co.*, 68 Minn. 14, 70 N. W. 795. *Mo.*—*State v. Noland*, 111 Mo. 473, 19 S. W. 715. *N. D.*—*State v. Robidou*, 20 N. D. 518, 128 N. W. 1124. *S. D.*—*Sales v. Maupin*, 35 S. D. 176, 151 N. W. 427. *Tex.*—*Ft. Worth & D. C. Ry. Co. v. Hays*, 62 Tex. Civ. App. 369, 131 S. W. 416, reversed only on ground of abuse of discretion. *Wis.*—*Cupps v. State*, 120 Wis. 504, 97 N. W. 210, 98 N. W. 546, 102 Am. St. Rep. 996.

[a] "Obviously the trial judge is in a situation where he is best informed of the probable effect, if any, such conduct would have on the verdict. . . . His conclusion on the subject is of much weight in determining the point on appeal to this court and should not be disturbed unless it satisfactorily appears that he erred in this respect." *Ketchum v. Chicago, St. P., M. & O. R. Co.*, 150 Wis. 211, 136 N. W. 634.

15. *Conn.*—*Brodie v. Connecticut Co.*, 87 Conn. 363, 87 Atl. 798. *Ia.*—*Stockwell v. Chicago, C. & D. R. Co.*, 43 Iowa 470. *Minn.*—*Eich v. Taylor*, 20 Minn. 378. *Wis.*—*Jackson v. Smith*, 21 Wis. 26.

[a] "It is not the policy of the law to punish the successful litigants for the sins of the jury." *State v. Snow*, 130 Minn. 206, 153 N. W. 526.

[b] *Rule Stated.*—"Where the prevailing party is without fault, the misconduct of a juror does not ipso facto justify the grant of a new trial. It must also appear that the losing party

was, or at least might have been, harmed thereby." *Brodie v. Connecticut Co.*, 87 Conn. 363, 87 Atl. 798.

16. *Ky.*—*Evans v. McKinsey*, Litt. Sel. Cas. 262; *Rice's Exrs. v. Wyatt*, 25 Ky. L. Rep. 1060, 76 S. W. 1087. *N. Y.*—*Nance v. Kaufman*, 123 N. Y. Supp. 957. *Wis.*—*Graves v. Gans*, 25 Wis. 41.

17. *U. S.*—*Jackson v. United States*, 102 Fed. 473, 42 C. C. A. 452; *Morse v. Montana Ore-Purchasing Co.*, 105 Fed. 337; *United States v. Boyden*, 1 Low. 266, 24 Fed. Cas. No. 14,632. *Cal.*—*Zibbell v. Southern Pac. Co.*, 160 Cal. 237, 116 Pac. 513; *Monaghan v. Pacific Rolling Mill Co.*, 81 Cal. 190, 22 Pac. 590; *Stewart v. Hinkel*, 72 Cal. 187, 13 Pac. 494. *Colo.*—*Denver City Tramway Co. v. Armstrong*, 21 Colo. App. 640, 123 Pac. 136. *Del.*—*Spahn v. People's Ry. Co.*, 92 Atl. 727. *Ga.*—*Martin v. Tidwell*, 36 Ga. 332; *Roberson v. State*, 15 Ga. App. 545, 83 S. E. 877. *Ill.*—*Stampofski v. Steffens*, 79 Ill. 303; *Soens v. Chicago W. & V. Coal Co.*, 160 Ill. App. 467; *Shelbyville v. Brant*, 61 Ill. App. 153. *Ind.*—*Trombley v. State*, 167 Ind. 231, 78 N. E. 976; *Ellis v. Hammond*, 157 Ind. 267, 61 N. E. 565; *Cleveland, C. C. & St. L. Ry. Co. v. Dixon*, 51 Ind. App. 658, 96 N. E. 815; *New v. Jackson*, 50 Ind. App. 120, 95 N. E. 328. *Ia.*—*Foedisch v. Chicago & N. W. Ry. Co.*, 100 Iowa 728, 69 N. W. 1055; *Carey v. Gunnison*, 17 N. W. 881. *La.*—*State v. Clary*, 136 La. 589, 67 So. 376; *State v. Mitchell*, 127 La. 270, 53 So. 561; *Littlefield v. Beamis*, 5 Rob. 145. *Me.*—*Belcher v. Estes*, 99 Me. 314, 59 Atl. 439; *Pelletier v. Milford L. & L. Co.*, 5 Atl. 262. *Mass.*—*Com. v. Tucker*, 189 Mass. 457, 496, 76 N. E. 127, 7 L. R. A. (N. S.) 1056, taking notes by juror. *Mich.*—*Cooper v. Carr*, 161 Mich. 405, 126 N. W. 468. *Minn.*—*Burho v. Minneapolis*

of jurors, and knowledge on the part of counsel is attributed to and binds a party.¹⁸

Want of knowledge of the juror's misconduct must be made to appear affirmatively by the party moving for a new trial.¹⁹

II. PROOF OF MISCONDUCT. — The proof of misconduct of jurors as a ground for new trial, will be found elsewhere.²⁰

I. EXPERIMENTS AND TESTS. — 1. During the Trial. — Experiments are sometimes allowed to be conducted by the parties during the trial, under the direction and control of the court, and knowledge derived by the jury from such experiments may properly be considered by them in their deliberations on the verdict.²¹ But it is

& St. L. R. Co., 121 Minn. 326, 141 N. W. 300; Johnson v. Scott, 119 Minn. 470, 138 N. W. 694. **Miss.**—Richardson v. Foster, 73 Miss. 12, 18 So. 573, 55 Am. St. Rep. 481. **Mo.**—Easley v. Missouri Pac. Ry. Co., 113 Mo. 236, 20 S. W. 1073. **Neb.**—Bunting v. Oak Creek Drainage Dist., 99 Neb. 843, 157 N. W. 1028; Nye & Schneider Co. v. Snyder, 56 Neb. 754, 77 N. W. 118; Scott v. Waldeck, 12 Neb. 5, 10 N. W. 413. **N. H.**—Lyman v. Brown, 73 N. H. 411, 62 Atl. 650. **N. Y.**—People v. Priori, 164 N. Y. 459, 58 N. E. 668; Werner v. Interurban St. Ry. Co., 99 App. Div. 592, 91 N. Y. Supp. 111; Ahrhart v. Stark, 10 Misc. 448, 31 N. Y. Supp. 871, 64 N. Y. St. 782; Ayres v. Hammondsport, 13 Civ. Proc. 236, 11 N. Y. St. 706; Perry v. New York C. & H. R. Co., 154 N. Y. Supp. 736; Winder v. Pollack, 154 N. Y. Supp. 105; Bernikow v. Pommerantz, 94 N. Y. Supp. 487. **N. C.**—Lewis v. Fountain, 168 N. C. 277, 84 S. E. 278. **Ohio.**—Gable v. City of Toledo, 16 Ohio Cir. Ct. 515. **Ore.**—Osmun v. Winters, 30 Ore. 177, 46 Pac. 780. **S. C.**—Hugbins v. Atlantic Coast Line R. Co., 96 S. C. 267, 79 S. E. 406; State v. Ballaw, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019. **S. D.**—Ewing v. Lunn, 22 S. D. 95, 115 N. W. 527. **Tex.**—Williams v. Phelps (Tex. Civ. App.), 171 S. W. 1100; Gulf, C. & S. F. Ry. Co. v. Gibson, 42 Tex. Civ. App. 306, 93 S. W. 469; Olivares v. San Antonio & A. P. Ry. Co., 37 Tex. Civ. App. 278, 84 S. W. 248. **Vt.**—Whitcher v. Peacham, 52 Vt. 242. **Va.**—Jones v. Town of Martinsville, 111 Va. 103, 68 S. E. 265, Ann. Cas. 1912A, 222; Atlantic & D. Ry. Co. v. Peake, 87 Va. 130, 12 S. E. 348. **Wash.**—Cloherty v. Griffiths, 82 Wash. 634, 144 Pac. 912. **W. Va.**—Fletcher v. Hale, 22 W. Va. 44, 49.

But see Ryan v. Rooney, 88 Vt. 88, 90 Atl. 891.

18. *Fletcher v. Hale*, 22 W. Va. 44.

[a] **Nature of the Question.**—Whether counsel acquired knowledge of the misconduct in season to properly bring it to the attention of the court during the trial is a fact upon which the decision of the court on a motion for a new trial is conclusive. *Roberson v. State*, 15 Ga. App. 545, 83 S. E. 877.

19. **Ga.**—Brooks v. Camak, 130 Ga. 213, 60 S. E. 456. **Ill.**—Taylor v. Roby, 37 Ill. App. 147. **Ind.**—Aurora & L. Tpk. Co. v. Niebrugge, 25 Ind. App. 567, 58 N. E. 864; Fifth Ave. Sav. Bank v. Cooper, 19 Ind. App. 13, 48 N. E. 236. **Ky.**—Drake v. Drake, 107 Ky. 32, 52 S. W. 846. **Me.**—Townsend v. Kelley, 5 Atl. 69. **Mo.**—State v. Robinson, 117 Mo. 649, 23 S. W. 1066. **Neb.**—Peterson v. Skjelver, 43 Neb. 663, 62 N. W. 43; Watson v. Roode, 42 Neb. 348, 61 N. W. 625. **N. D.**—Kinneberg v. Kinneberg, 8 N. D. 311, 79 N. W. 337. **S. D.**—Grantz v. Deadwood, 20 S. D. 495, 107 N. W. 832.

20. See 3 ENCY. OF EV. 218, et seq.; 8 ENCY. OF EV. 961, et seq.; and generally the title "New Trial."

21. *Stockwell v. Chicago, C. & D. R. Co.*, 43 Iowa 470 (running a train to see if sparks from the locomotive could be prevented); *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550, properly refused in the discretion of the court. See 5 ENCY. OF EV. 471.

[a] **Intoxicating Liquors.**—(1) Jury may be allowed, during the trial, to taste and smell contents of bottles alleged to contain intoxicating liquors. **Mich.**—*People v. Kinney*, 124 Mich. 486, 83 N. W. 147. **Neb.**—*Schulenberg v. State*, 79 Neb. 65, 112 N. W. 304.

improper for the jury itself to conduct such experiments surreptitiously and out of the presence of the court,²² or for individual jurors to make tests of any sort,²³ and it is equally improper and amounts to a contempt of court for counsel to perform any act with an exhibit, during a recess of court and in the presence of some or all of the jurors which the court has ordered not to be done.²⁴ While viewing the premises the jury must closely observe the directions of the court and should not undertake to make investigations on its own part.²⁵

2. After Submission of the Case.—a. *In General.*—It is not permissible for the jury to receive evidence out of court and any experiment or test which amounts to a reception of evidence is misconduct on the part of the jury which calls for a new trial.²⁶ But

Wash.—See *State v. Baker*, 67 Wash. 595, 122 Pac. 335. (2) But the practice of permitting jurors to taste liquors is not approved by all courts. *State v. Eldred*, 8 Kan. App. 625, 56 Pac. 153 (not reversible error in absence of an objection); *State v. Lindgrove*, 1 Kan. App. 51, 41 Pac. 688; *Com. v. Brelsford*, 161 Mass. 61, 36 N. E. 677. After submission of case, see *infra*, IX, I, 2, b.

[b] "There are three channels through which tribunals of fact receive evidence, namely, inspection, documents, and oral testimony. No jury ever decided any controverted question of fact without using one or more of their five senses. The senses of hearing and sight are used in every case for more purposes than that of simply seeing the witnesses and hearing their words. Through these senses impressions are made upon the minds of the jurors which cause them to accept as true, or reject as false the statements made by the several witnesses. Thus the exercise of these senses, on the part of the jurors, affects their verdicts. But this does not make them witnesses in the case. They have simply tested the credibility of the witnesses by the personal experience and other observations of the jurors. . . . In this case jurors were permitted to smell the contents of the bottle offered in evidence, to enable them to decide as to whether the prosecuting witness had told the truth about its being whiskey. By this the jurors did not learn any facts independent of the evidence; they simply tested the facts in evidence by the use of one of their senses." *Reed v. Territory*, 1 Okla. Crim. 481, 98 Pac. 583.

22. See 5 ENCY. OF EV. 503.

23. **U. S.**—Consolidated Ice Mach. Co. v. Trenton Hygeian Ice Co., 57 Fed. 898. **Cal.**—*People v. Conkling*, 111 Cal. 616, 44 Pac. 314. **Ky.**—*Wooldridge v. White*, 105 Ky. 247, 48 S. W. 1081.

See also 5 ENCY. OF EV. 502 (note 3), 503.

24. *Bronk v. Binghamton R. Co.*, 79 App. Div. 269, 79 N. Y. Supp. 577.

Use of Exhibits During Trial.—See 5 ENCY. OF EV. 468.

25. *Indianapolis v. Scott*, 72 Ind. 196; *State v. Ballew*, 83 S. C. 82, 63 S. E. 688, 64 S. E. 1019. See 5 ENCY. OF EV. 501; 13 ENCY. OF EV. 976, 980.

[a] **The operation of machinery** which is the subject of investigation requires a new trial. *Louisville Ry. Co. v. Hallahan (Ky.)*, 119 S. W. 200; *Hughes v. General Elec. L. & P. Co.*, 107 Ky. 485, 54 S. W. 723. But see *Stockwell v. Chicago, C. & D. R. Co.*, 43 Iowa 470.

[b] **Minor breaches of the rule** are harmless. *City of Emporia v. Juengling*, 78 Kan. 595, 96 Pac. 850, 19 L. R. A. (N. S.) 223. See also *Daughtry v. State*, 80 Ark. 13, 96 S. W. 748; *Indianapolis v. Scott*, 72 Ind. 196.

26. **U. S.**—*Wilson v. United States*, 116 Fed. 484, 53 C. C. A. 652. **Cal.**—*Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717. **Ga.**—*Smith v. State*, 122 Ga. 154, 50 S. E. 62. **Ia.**—*State Security Bank v. Burns*, 120 N. W. 626. **Mo.**—*State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782.

[a] **Testing Opium.**—In *Wilson v. United States*, 116 Fed. 484, the defendants were indicted for smuggling "opium prepared for smoking purposes." It was held error to instruct the jury that from a can of opium

it is not every examination or inspection of articles introduced in evidence which the court has allowed the jury to take with them to the juryroom which constitutes an unwarranted experiment.²⁷ Any use of such exhibits within the line and scope of the evidence and to enable the jury the better to weigh it, is permissible.²⁸

b. *Tasting Liquor*.—After submission of the case it is improper for jurors to taste liquor, an exhibit in the case, for the purpose of determining its nature, quality, or intoxicating effect,²⁹ though by some authorities, the practice is permitted.³⁰ But they may handle the bottle and smell of it.³¹

c. *Examining Clothing*.—Articles of clothing introduced in evidence may be used for the purpose³² for which they were intro-

introduced in evidence, they could take some of its contents, and "have a piece of candle in your juryroom and test it by taking some of it on a piece of silver or stick and see whether it will burn or not." "

[b] **To determine how far voices could be heard** through a wooden door and partition, jurors sent the constable out of their room, talked louder than commonly, and asked him if he could hear. "This mode of arriving at the truth of testimony cannot be permitted; it is too vague and uncertain. A different intonation of voice, a difference in the structure of the rooms, would destroy its virtue as a test; and besides, they had to take the word of the constable as to the fact whether they were heard." *Jim v. State*, 4 *Humph. (Tenn.)* 289.

27. *Bias v. Chesapeake & O. Ry. Co.*, 46 *W. Va.* 349, 33 *S. E.* 240.

[a] "They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter. They may carry out experiments within the lines of offered evidence; but if their experiments shall invade new fields, and they shall be influenced in their verdict by discoveries from such experiments which will not fall fairly within the scope and purview of the evidence, then manifestly, the jury has been itself taking evidence without the knowledge of either party, evidence which it is not possible for the party injured to meet, answer, or explain." *Higgins v. Los Angeles Gas & Elec. Co.*, 159 *Cal.* 651, 115 *Pac.* 313, 34 *L. R. A. (N. S.)* 717.

[b] **Objections**.—Knowledge of such

misconduct on the part of the jury must be brought to the attention of the court as soon as the fact becomes known or the error will be waived. *U. S.*—*Consolidated Ice Mach. Co. v. Trenton Hygeian Ice Co.*, 57 *Fed.* 898. *Kan.*—*State v. Eldred*, 8 *Kan. App.* 625, 56 *Pac.* 153. *Miss.*—*Dillard v. State*, 58 *Miss.* 368.

28. *Cal.*—*Higgins v. Los Angeles Gas & Elec. Co.*, 159 *Cal.* 651, 115 *Pac.* 313, 34 *L. R. A. (N. S.)* 717. *Okla.*—*Hopkins v. State*, 9 *Okla. Crim.* 104, 130 *Pac.* 1101, *Ann. Cas.* 1915B, 736. *Tex.*—See *Hendricks v. State*, 28 *Tex. App.* 416, 13 *S. W.* 672. *Va.*—*Taylor v. Com.*, 90 *Va.* 109, 17 *S. E.* 812.

29. *Ala.*—*Wadsworth v. Dunnam*, 117 *Ala.* 661, 23 *So.* 699. *N. D.*—*State v. Applegate*, 28 *N. D.* 395, 149 *N. W.* 356, *L. R. A.* 1915C, 315, where three bottles of liquor were found empty after the verdict was returned. *Tex.*—*Galloway v. State*, 42 *Tex. Crim.* 380, 57 *S. W.* 658, harmless where done by consent of both parties.

Tasting in presence of court during trial, see *supra*, IX, I, 1.

30. *Me.*—*State v. McCafferty*, 63 *Me.* 223. *Neb.*—*Weinandt v. State*, 80 *Neb.* 161, 113 *N. W.* 1040. *Wash.*—*State v. Baker*, 67 *Wash.* 595, 122 *Pac.* 335.

Compare supra, IX, I, 1.

31. *Okla.*—*Reed v. Territory*, 1 *Okla. Crim.* 481, 98 *Pac.* 583, 129 *Am. St. Rep.* 861. *Tex.*—*Thompson v. State*, 72 *Tex. Crim.* 6, 160 *S. W.* 685. *Wash.*—*State v. Baker*, 67 *Wash.* 595, 122 *Pac.* 335.

32. *Saunders v. State*, 4 *Okla. Crim.* 264, 111 *Pac.* 965, 974, *Ann. Cas.* 1912B, 766.

[a] **Trying on Clothing**.—"It is

duced, but any further use of them made by the jury is improper.³³

d. *With Fire Arms.*—The jury should not experiment with fire arms, which they have been permitted to take with them to the juryroom.³⁴

e. *Use of Magnifying Glass.*—A magnifying glass used during the trial may be taken to the juryroom with the exhibits and there used by the jury for the purpose of making a closer scrutiny and examination of them,³⁵ and even if the glass had not been used during the trial, its use by the jury is permissible.³⁶

f. *Admonition by Court.*—Whenever an exhibit is sent to the juryroom which from its very nature and from the character of the issues in the case, might be subjected by the jury to improper use, the court should carefully instruct the jury as to the use they may make of it.³⁷

also urged that the jurors were guilty of misconduct in that some of them put on one of the coats in the juryroom for the purpose of ascertaining the exact location of the bullet's entrance into the body. We can conceive of no other purpose for which the jurors could want the coats. Certainly they did not request permission to take the coats to their juryroom merely to throw them down in a corner.'" *Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965, 974, Ann. Cas. 1912B, 766.

33. *Puryear v. State*, 50 Tex. Crim. 454, 98 S. W. 258.

[a] *Bloodstained clothing* of the decedent was taken to the juryroom. The jurors used it "in the juryroom to illustrate the position in which deceased's arm was at the time he was shot as tending to show that at that particular time he was not reaching for a pistol. It further appears in this connection that some of the jurors tried on these bloody clothes in the juryroom and one of them . . . became sick, evidently from the effect of this experiment." The action of the jurors was criticised. *Puryear v. State*, 50 Tex. Crim. 454, 98 S. W. 258.

34. *Forehand v. State*, 51 Ark. 553, 11 S. W. 766 (experiments with a gun); *Yates v. People*, 38 Ill. 527.

35. *Conn.*—*State v. Wallace*, 78 Conn. 677, 63 Atl. 448. *Ill.*—*Grand Lodge A. O. U. W. v. Young*, 123 Ill. App. 628. *Ind.*—*Alexander v. Blackburn*, 178 Ind. 66, 98 N. E. 711, Ann. Cas. 1915B, 1091; *Short v. State*, 63 Ind. 376. See *White Sewing Machine*

Co. v. Gordon, 124 Ind. 495, 24 N. E. 1053, 19 Am. St. Rep. 109. *Ia.*—*Barker v. Town of Perry*, 67 Iowa 146, 25 N. W. 100. *Mass.*—See *Cotton v. Boston Elev. R. Co.*, 191 Mass. 103, 77 N. E. 698. *Mich.*—*Morse v. Blanchard*, 117 Mich. 37, 75 N. W. 93. *N. J.* *Titus v. State*, 49 N. J. L. 36, 7 Atl. 621. *Tenn.*—*Kannon v. Galloway*, 2 Baxt. 230. *Tex.*—*Hatch v. State*, 6 Tex. App. 384.

[a] *Jury Should Be Placed in Same Position Occupied by Expert Witnesses.* "Unless the jury were afforded the same opportunity possessed by the witnesses, who testified to the erasure of certain words and figures, the writing over such erasure in different ink from that used in the body of the receipts and that the outline of portions of certain words and figures so erased, not visible with the naked eye was discernible with the aid of a magnifying glass, they could neither apply nor weigh the evidence of the witnesses in arriving at a conclusion." *Grand Lodge A. O. U. W. v. Young*, 123 Ill. App. 628.

36. *Cal.*—*In re Thomas' Estate*, 155 Cal. 488, 499, 101 Pac. 798. *Conn.* *State v. Wallace*, 78 Conn. 677, 63 Atl. 448. *Ia.*—*Barker v. Town of Perry*, 67 Iowa 146, 25 N. W. 100.

37. *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717.

[a] *Admonition of jury is imperative* in a jurisdiction where jurors are not allowed to impeach their verdict by their own affidavits. *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313, 34 L. R. A. (N. S.) 717.

J. CONSIDERATION OF THE VERDICT. — 1. **Place.**³⁸ — When the jury is ready to retire, such accommodations should be furnished it as will enable it to conduct its deliberations in privacy and secrecy.³⁹ It is not always possible, however, to provide the jury with quarters fully adapted to its use,⁴⁰ and, where no improper intercourse with other persons is shown to have taken place, the fact that the room in which the jury was kept did not afford it entire seclusion does not adversely affect the verdict.⁴¹ There is no rule which requires them to leave the courtroom and they may, if they desire, agree upon a verdict without leaving the jurybox.⁴² It is not improper, where circumstances require it, to leave the jury in a courtroom in which are left state reports, statutes, and other customary furnishings.⁴³

2. **Time Spent in Deliberation.** — A jury is not required to spend any particular space of time in deliberation before agreeing upon a verdict,⁴⁴ and the fact that a verdict is returned after a very brief deliberation is no ground for impeaching it;⁴⁵ and in some jurisdictions a verdict concurred in by less than the total number of

38. **Changing place of deliberations,** see *supra*, IX, A, 2, a.

39. **Ga.**—Hall *v.* State, 141 Ga. 7, 80 S. E. 307; Blalock *v.* Phillips, 38 Ga. 216. **Ill.**—Jewsberry *v.* Sperry, 85 Ill. 56. **Minn.**—Hurlbut *v.* Leachman, 126 Minn. 180, 148 N. W. 51.

[a] **Retiring to the adjacent woods,** with the officer at a respectful distance to guard them from the approach of others. Coker *v.* State, 20 Ark. 53.

[b] **Doors and windows of the jury-room** may be kept open unless outside influences are thereby allowed to distract them and interfere with their deliberations. State *v.* Robertson, 133 La. 806, 63 So. 363.

40. Hall *v.* State, 141 Ga. 7, 80 S. E. 307.

41. Hall *v.* State, 141 Ga. 7, 80 S. E. 307.

42. **Ala.**—Comer *v.* Jackson, 50 Ala. 384. **Mich.**—Bottomley *v.* Goldsmith, 36 Mich. 27; Owners of Ship Milwaukee *v.* Hale, 1 Dougl. 306. **Tex.**—Gulf, B. & K. C. Ry. Co. *v.* Harrison (Tex. Civ. App.), 104 S. W. 399.

Necessity of appointment of custodian if jury does not leave the courtroom, see *supra*, IX, B, 1.

43. **Ga.**—Durham *v.* State, 70 Ga. 264, where the defendant's counsel expressly consents to the practice. See Lovett *v.* State, 60 Ga. 257. **Mo.** State *v.* Hopper, 71 Mo. 425. See State *v.* Spangh, 200 Mo. 571, 98 S. W. 55. **Wis.**—Chapman *v.* Chicago & N. W. Ry. Co., 26 Wis. 295, 309, 7 Am. Rep. 81.

Misconduct of jury in examining legal books left in the room in which they are confined, see *infra*, IX, G, 7.

Right to take law books to the jury room, see *infra*, IX, K, 1, j.

44. Urquhart *v.* Durham & S. C. R. Co., 156 N. C. 581, 72 S. E. 630.

[a] **Time at which jury is to be sent out** is largely within the discretion of the court. Haymond *v.* Saucer, 84 Ind. 3, proper to send them out at 10 o'clock p. m.

[b] **Their deliberations in the eyes of the law** must be presumed to have continued up to the time that their verdict was returned in open court and in fact until after the jury had been polled, if a poll had been demanded. State *v.* Applegate, 28 N. D. 395, 149 N. W. 356, L. R. A. 1915C, 315.

45. Turner *v.* State (Tex. Crim.), 74 S. W. 777 (five minutes); Smith *v.* State, 40 Tex. Crim. 391, 50 S. W. 938 (twenty-five minutes in a murder case); Gulf, B. & K. C. Ry. Co. *v.* Harrison (Tex. Civ. App.), 104 S. W. 399, ten minutes.

[a] **Statement of the Rule.**—"The case had doubtless been so fully, carefully, and indeed minutely presented to their consideration in every aspect by the able counsel in the cause, both in presenting the testimony and in arguing the case, as well as by the lucid instructions of his honor, that the jury doubtless thoroughly understood the points at issue and did not need more time. Of that they are usually the best judges." Urquhart *v.*

jurors is permissible after a certain period of deliberation.⁴⁶ A verdict will stand although returned after the court had authorized the separation of the jury,⁴⁷ even if this fact had been concealed from them.⁴⁸

3. Manner of Deliberating.—Jurors are to be left to a consideration of their verdict in such a manner as seems best to them,⁴⁹ but the adoption of unreasonable restrictions on the expression of opinions by the various jurors is improper.⁵⁰ The jurors may properly discuss the case in small groups;⁵¹ the fact that the jury discussed a part of the testimony before the evidence was all in, while a practice not approved, does not call for a reversal.⁵² A jurymen may

Durham & S. C. R. R. Co., 156 N. C. 581, 72 S. E. 630.

[b] "It may, as suggested, by appellant, have been a 'quick funeral,' but if decency and order were kept in view, the swiftness of it will not lessen its propriety." *Gulf, B. & K. C. Ry. Co. v. Harrison* (Tex. Civ. App.), 104 S. W. 399.

[c] A new trial was refused where it appeared that one of the jurors said: "Boys, let's hurry up and sign the verdict and go to see the balloon ascension," which was returned within five minutes after the case was submitted to them. *Wade v. Sumner*, 30 Okla. 784, 120 Pac. 1011.

Haste in returning a verdict as misconduct, see *supra*, IX, G, 4.

46. See *In re Hurlbut's Estate*, 126 Minn. 180, 148 N. W. 51.

47. *Hopkins v. Sawyer*, 84 Me. 321, 24 Atl. 872.

48. *Spinney v. Bowman* (Me.), 10 Atl. 252.

49. See cases cited *infra*, this note.

[a] "There is no power in the court or elsewhere, to formulate a procedure or mode of discussing a case by a jury." *Balls v. State* (Tex. Crim.), 40 S. W. 801.

[b] "Their deliberations are not necessarily confined to discussions with each other. While such discussions are essential to the proper consideration of matters concerning which there is a difference of opinion, a juror may deliberate as wisely and to as good effect when he is considering and weighing the evidence in his own mind, as when he is pressing his conclusions upon his fellows. Because jurors are not debating, it does not follow that they are not deliberating; and it is not for the court to say that they are

deliberating at one moment; and are not deliberating at some other moment." *In re Hurlbut's Estate*, 126 Minn. 180, 148 N. W. 51.

[c] Special interrogatories may be considered and answered prior to the agreement of the jury on a general verdict. *Deep Vein Coal Co. v. Raney* (Ind. App.), 112 N. E. 392. And see *Wabash R. Co. v. Gretzinger*, 182 Ind. 155, 104 N. E. 69.

50. *Pool v. Chicago, B. & Q. R. R. Co.*, 2 McCrary 251, 6 Fed. 844.

[a] Parliamentary procedure is out of place in the jury room. "This seems to have been an arbitrary mode of procedure. A jury, and each member thereof, should be absolutely free to express their opinions of the case. It occurs often, perhaps generally, that there are men upon the jury of the soundest judgment and good sense who are yet unfamiliar with rules of debate, and unaccustomed to rise in their places and address the chairman of a meeting in a formal manner and according to parliamentary rules. Such men might be more or less intimidated by such a rule in the jury room as is here objected to." *Hutchins v. State*, 140 Ind. 78, 39 N. E. 243.

[b] Balloting.—The jury should not be directed to decide the case by a ballot. See *Whitelaw's Exr. v. Whitelaw*, 83 Va. 40, 1 S. E. 407.

51. *State v. Turner*, 6 Baxt. (Tenn.) 201.

[a] Merely because two of the jury may have conversed or deliberated apart from the others for a short time in the same room, or even adjoining room, does not justify setting aside the verdict. *Blyew v. Com.*, 91 Ky. 200, 15 S. W. 356.

52. *Scott v. State*, 43 Tex. Crim.

properly draw a diagram on a blackboard to illustrate his recollection of the testimony.⁵³

4. Matters To Be Considered.—A jury is to be guided wholly by the evidence produced during the trial,⁵⁴ with the inferences which may properly be drawn therefrom,⁵⁵ and the law, as stated by the court.⁵⁶ The consideration by them of matters not regularly in evidence, is improper,⁵⁷ but where in the course of the trial it appears that the jury has been considering facts not in evidence and the court thereupon charges them that they must decide the case solely on the evidence adduced at the trial, the irregularity will be cured.⁵⁸ And in any case the complaining party must make the facts appear,⁵⁹ and to require a new trial they must be such as probably influenced the verdict.⁶⁰ The jury should not speculate,⁶¹ nor resort to conjecture,⁶² in determining the issues in the case.⁶³ Being sole judges of the credibility of the witnesses, jurors may properly discuss their testimony in the juryroom.⁶⁴ The disputes or strictures of counsel should be disregarded,⁶⁵ and the effect of the verdict should not be considered.⁶⁶ Conflicting evidence should be reconciled, if possible,⁶⁷

591, 68 S. W. 177. And see *supra*, IX, G, 5.

53. *People v. Gallaner*, 9 Cal. App. 431, 86 Pac. 814. And see *Higgins v. United States*, 185 Fed. 710, 108 C. C. A. 48; *Railey v. State*, 58 Tex. Crim. 1, 121 S. W. 1120, 125 S. W. 576.

Diagram from juror's own knowledge of the premises, cannot be used. See *infra*, IX, J, 5, f, (I).

54. *Del.*—*Joseph v. Johnson*, 7 Penne. 468, 82 Atl. 30; *State v. Luff*, 1 Boyce 152, 74 Atl. 1079; *State v. Samuels*, 6 Penne. 36, 67 Atl. 164. *Kan.*—*Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807. *Wash.*—*Bastelli v. Henry*, 73 Wash. 227, 131 Pac. 643.

55. *U. S.*—*Chicago, M. & St. P. Ry. Co. v. Moore*, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962. *Ga.*—*Savannah Chemical Co. v. D. Bragg & Son*, 14 Ga. App. 371, 80 S. E. 858. *Mo.*—*Ross v. Citizens' Ins. Co.*, 7 Mo. App. 575. *N. H.*—*Clark v. Manchester*, 64 N. H. 471, 13 Atl. 867. *Tex.*—*Borer v. State* (Tex. Crim.), 28 S. W. 951.

And see *infra*, IX, J, 5, f.

[a] **Inferences.**—"No court has ever denied the power of a court or jury to infer the existence of a fact from circumstances proved. The only question being as to whether or not the fact inferred was a reasonable inference." *Waters-Pierce Oil Co. v. Deselms*, 18 Okla. 107, 122, 89 Pac. 212.

56. *Del.*—*Rodney v. Burton*, 4 Boyce 171, 86 Atl. 826; *Klair v. Philadelphia*,

B. & W. R. Co., 2 Boyce 274, 78 Atl. 1085. *Kan.*—*Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807. *Tenn.*—*Wade v. Ordway*, 1 Baxt. 229.

57. **Receiving evidence out of court**, as misconduct, see *supra*, IX, G, 8.

58. *U. S.*—*United States v. Horn*, 5 Blatchf. 102, 26 Fed. Cas. No. 15,389. *Ga.*—*Levan v. State*, 114 Ga. 258, 40 S. E. 252. *Ky.*—*Barnes v. Com.*, 101 Ky. 556, 41 S. W. 772.

59. *Bernstein v. Myers*, 99 Ga. 90, 24 S. E. 854.

60. *Hendricks v. State*, 28 Tex. App. 416, 13 S. W. 672.

61. *Eaton v. Wilmington City R. Co.*, 1 Boyce (Del.) 435, 75 Atl. 369; *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405.

62. *Ala.*—*Smith v. Jernigan*, 83 Ala. 256, 3 So. 515. *Wash.*—*Rastelli v. Henry*, 73 Wash. 227, 131 Pac. 643. *Wis.*—*Sherman v. Menominee River L. Co.*, 77 Wis. 14, 45 N. W. 1079.

63. **Determining verdicts by chance**, see *infra*, IX, M, 2.

64. *Claussen v. State*, 70 Tex. Crim. 607, 157 S. W. 477; *Reagan v. State*, 57 Tex. Crim. 642, 124 S. W. 685.

65. *Linthicum v. Truitt*, 2 Boyce (Del.) 338, 80 Atl. 245.

66. *State v. Shaffner*, 6 Penne. (Del.) 576, 69 Atl. 1004. See *Purcell v. Tibbles*, 101 Iowa 24, 69 N. W. 1120, and *infra*, IX, J, 5, d.

67. *Del.*—*State v. Dougherty*, 4 Boyce 163, 86 Atl. 736; *State v. Stockley*, 3 Boyce 246, 82 Atl. 1078; *Riccio*

but if this is impossible the verdict must be for the party in whose favor the evidence preponderates,⁶⁸ credit being given to that testimony which is most reliable and most entitled to belief.⁶⁹ The actions and demeanor of an accused person may be considered in weighing his testimony.⁷⁰ All the evidence should be considered whether it be oral or documentary,⁷¹ direct or circumstantial.⁷² The jury cannot arbitrarily disregard relevant and competent testimony.⁷³

5. Facts Personally Known to Jurors.—a. *In General.*—At the early common law jurors were selected for the peculiar personal knowledge they had of the facts involved in the case and their verdict was based largely upon this personal knowledge.⁷⁴ Under modern conditions, however, a verdict must be based solely on the evidence introduced in the case and the personal knowledge of the jurors as to the matters and facts involved will not be allowed to enter into their deliberations upon the verdict,⁷⁵ whether such knowledge be

v. People's Ry. Co., 3 Boyce 235, 82 Atl. 604; *Gismondi v. People's Ry. Co.*, 2 Boyce 577, 83 Atl. 136. **Fla.**—Atlantic Coast Line R. Co. *v. Miller*, 53 Fla. 246, 44 So. 247. **Mo.**—*Ewing v. Gass*, 41 Mo. 492; *State v. Fraser*, 161 Mo. App. 333, 143 S. W. 545.

[a] "Where the testimony of the witnesses is conflicting it is the province of the jury to extract the truth from all of it as best they can." *Atchison, T. & S. F. Ry. Co. v. Green*, 57 Kan 580, 47 Pac. 514.

68. *State v. Naylor*, 5 Boyce (Del.) 99, 90 Atl. 880; *Grier v. Samuel*, 4 Boyce (Del.) 106, 86 Atl. 209. See the "Encyclopaedia of Evidence," the titles "Burden of Proof," "Weight and Effect of Evidence."

69. *Brown v. City of Wilmington*, 4 Boyce (Del.) 492, 90 Atl. 44; *Gatta v. Philadelphia, B. & W. R. Co.*, 2 Boyce (Del.) 551, 83 Atl. 788. See the "Encyclopaedia of Evidence," the titles "Corroboration," "Credibility of Witnesses," "Impeachment of Witnesses," "Weight and Effect of Evidence," etc.

70. *Epley v. People*, 51 Colo. 501, 119 Pac. 153.

[a] Peculiarities in a defendant's conduct during the trial may be considered and commented on in the jury room. *People v. Mullen*, 49 Misc. 289, 99 N. Y. Supp. 227, 19 N. Y. Crim. 589.

71. *People's Nat. Bank v. Rhoades*, 5 Boyce (Del.) 65, 90 Atl. 409; *Kingan & Co. v. King*, 179 Ind. 285, 100 N. E. 1044; *Oliver v. Pate*, 43 Ind. 132.

72. *United States v. Kenney*, 90 Fed. 257.

73. **Ark.**—*Duckworth v. State*, 83 Ark. 192, 103 S. W. 601. **Colo.**—*McGraw v. Kerr*, 23 Colo. App. 163, 128 Pac. 870. **Kan.**—*Union Pac. Ry. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564.

See 14 ENCY. OF EV. 121, et seq.

74. **Ky.**—*Clarke v. Robinson*, 5 B. Mon. 55. **Mass.**—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray 529. **Neb.**—*Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529. **Tenn.**—*Sam v. State*, 1 Swan 61.

Instructions as to Use of Juror's Own Knowledge.—See 13 STANDARD PROC. 932.

75. **U. S.**—*Bradley's Lessee v. Bradley*, 4 Dall. 112, 1 L. ed. 763; *United States v. Fourteen Packages of Pins*, 1 Gilp. 235, 25 Fed. Cas. No. 15,151; *Cherry v. Sweeny*, 1 Cranch C. C. 530, 5 Fed. Cas. No. 2,641, harmless if verdict works justice. **Fla.**—*Doggett v. Jordan*, 2 Fla. 541. **Ga.**—*Gibson v. Carreker*, 91 Ga. 617, 17 S. E. 965; *Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853. **Ill.**—*Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043; *Ottawa Gas Light & C. Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263. **Ia.**—*State v. Steidley*, 135 Iowa 512, 113 N. W. 333; *Hydinger v. Chicago, B. & Q. R. Co.*, 126 Iowa 222, 101 N. W. 746; *Douglass v. Agne*, 125 Iowa 67, 99 N. W. 550; *Wilberding v. City of Dubuque*, 111 Iowa 484, 82 N. W. 957; *Bohn v. Chicago & N. W. Ry. Co.*, 78 N. W. 200; *State v. Wright*, 98 Iowa 702, 68 N. W. 440; *Hathaway v. Burlington, C. R. & N. Ry. Co.*, 97 Iowa

the knowledge of one or of all the jurors.⁷⁶ If a juror knows any material fact relevant to the case he should be sworn and give his testimony in open court;⁷⁷ his personal knowledge does not preclude him from acting as a juror in the case.⁷⁸ This general rule is based on the principles that the relevancy and competency of all evidence should be passed on by the court⁷⁹ before being submitted to the

747, 66 N. W. 892; *Griffin v. Harriman*, 74 Iowa 436, 38 N. W. 139; *Kraidenier v. Shields*, 70 Iowa 428, 30 N. W. 681; *Close v. Samm*, 27 Iowa 503; *Hall & Co. v. Robison*, 25 Iowa 91. **Kan.**—*State v. Duncan*, 70 Kan. 883, 78 Pac. 427; *State v. Lowe*, 67 Kan. 183, 72 Pac. 524; *State v. Burton*, 65 Kan. 704, 70 Pac. 640; *Union Pac. R. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564; *Craver v. Hornburg*, 26 Kan. 94; *Missouri River R. Co. v. Richards*, 8 Kan. 101; *State v. Bean*, 1 Kan. App. 688, 42 Pac. 394. **Ky.**—*Clarke v. Robinson*, 5 B. Mon. 55. **Me.**—*State v. Maine Cent. R. R. Co.*, 86 Me. 309, 29 Atl. 1086; *Douglass v. Trask*, 77 Me. 35; *Winslow v. Morrill*, 68 Me. 362; *McIntire v. Hussey*, 57 Me. 493; *State v. Bartley*, 47 Me. 388. **Mass.**—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray 529. **Mich.**—*Karrer v. City of Detroit*, 142 Mich. 331, 106 N. W. 64. **Minn.**—*Johnson v. Hillstrom*, 37 Minn. 122, 33 N. W. 547. **Mo.**—*Bowman v. American Car & Foundry Co.*, 226 Mo. 53, 125 S. W. 1120. **Neb.**—*Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529; *Ewing v. Hoffine*, 55 Neb. 131, 75 N. W. 537; *Wood River Bank v. Dodge*, 36 Neb. 708, 55 N. W. 234; *Richards v. State*, 36 Neb. 17, 53 N. W. 1027. **N. J.**—*De Gray v. New York & N. J. Tel. Co.*, 68 N. J. L. 454, 53 Atl. 200. **Pa.**—*Brunson v. Graham*, 2 Yeates 166; *Simpson v. Kent*, 9 Phila. 30. **S. C.**—*State v. Jacob*, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897; *State v. Jones*, 29 S. C. 201, 233, 7 S. E. 296. **Tenn.**—*Jackson & Suburban St. R. & Tel. Co. v. Simmons*, 107 Tenn. 392, 64 S. W. 705; *Citizens' St. Ry. Co. v. Burke*, 98 Tenn. 650, 40 S. W. 1085. **Tex.**—*Green v. Hill*, 4 Tex. 465; *Melton v. State*, 71 Tex. Crim. 130, 158 S. W. 550; *Railey v. State*, 58 Tex. Crim. 1, 121 S. W. 1120, 125 S. W. 576; *Winslow v. State*, 50 Tex. Crim. 465, 98 S. W. 866; *Hambricht v. State*, 47 Tex. Crim. 518, 84 S. W. 597; *Dixon v. State*, 46 Tex. Crim. 154, 79 S. W. 310; *Simms v. Price*, Dall. Dig. 554. **Vt.**—*Flanders*

v. Mullins, 73 Vt. 276, 50 Atl. 1055. **Wash.**—*State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153; *State v. Parker*, 25 Wash. 405, 65 Pac. 776. **Wis.**—*Solberg v. Robbins Lumb. Co.*, 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790; *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

[a] Instruction should be given that the jury "must look alone to the testimony adduced in the evidence before them on the trial and should not permit one of their number to communicate to them any fact in his knowledge not deposited to in court." *Morton v. State*, 1 Lea (Tenn.) 498.

[b] It is wholly immaterial at what stage of the trial the improper statements of fact are made by one juror to the others—whether before or after any evidence has been introduced. *Ryan v. State*, 97 Tenn. 206, 36 S. W. 930.

76. *Craver v. Hornburg*, 26 Kan. 94; *State v. Jacob*, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

77. **Ga.**—*Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853. **Ill.**—*Ottawa Gas Light & C. Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263. **Ia.**—*Hall & Co. v. Robison*, 25 Iowa 91. **Kan.**—*Union Pac. Ry. Co. v. Shannon*, 33 Kan. 446, 6 Pac. 564. **Mass.**—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray 529. **Neb.**—*Corn Exch. Nat. Bank v. Ochlare Orchards Co.*, 97 Neb. 536, 150 N. W. 651; *Ewing v. Hoffine*, 55 Neb. 131, 75 N. W. 537; *Wood River Bank v. Dodge*, 36 Neb. 708, 55 N. W. 234. **N. J.**—*De Gray v. New York & N. J. Tel. Co.*, 68 N. J. L. 454, 53 Atl. 200.

Jurors as witnesses, see 3 ENCY. OF EV. 218.

78. *Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529; *Dunbar v. Parks*, 2 Tyler (Vt.) 217.

79. *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529; *Wood River Bank v. Dodge*, 36 Neb. 708, 55 N. W. 234.

jury; that testimony can only be legally given under oath;⁸⁰ and with the right to have it sifted by cross-examination by the adverse party;⁸¹ and met by countervailing proof;⁸² and that the court and parties have the right to know upon what evidence the verdict was rendered.⁸³ In criminal cases there is the further reason that an accused person is entitled to be confronted by the witnesses.⁸⁴ In some jurisdictions, the mere fact that the jurors have acted on their personal knowledge constitutes error for which the judgment will be reversed or a new trial granted,⁸⁵ but the more modern tendency is to hold that such error will not vitiate the verdict in the absence of a showing that prejudice has followed from it,⁸⁶ or if the verdict appears to be a just one in view of all the circumstances.⁸⁷

80. *Patterson v. Boston*, 20 Pick. (Mass.) 159; *Donston v. State*, 6 Humph. (Tenn.) 275.

81. *Neb.*—*Ewing v. Hoffine*, 55 Neb. 131, 75 N. W. 537. *Tenn.*—*Wade v. Ordway*, 1 Baxt. 229. *Wis.*—*Solberg v. Robbins Lumb. Co.*, 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790.

82. *Jackson & Suburban St. Ry. & Tel. Co. v. Simmons*, 107 Tenn. 392, 64 S. W. 705.

83. *Mass.*—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray 529; *Patterson v. Boston*, 20 Pick. 159. *Neb.*—*Ewing v. Hoffine*, 55 Neb. 131, 75 N. W. 537. *N. J.*—*De Gray v. New York & N. J. Tel. Co.*, 68 N. J. L. 454, 53 Atl. 200.

84. *Sam v. State*, 1 Swan (Tenn.) 61; *Booby v. State*, 4 Yerg. (Tenn.) 111.

[a] "In criminal cases, more emphatically, there can be no exception under our law, because, among other rights absolutely secured by the constitution to the accused, in all criminal prosecutions is the right 'to meet the witnesses face to face.'" *Sam v. State*, 1 Swan (Tenn.) 61.

85. *Me.*—*Winslow v. Morrill*, 68 Me. 262. *Neb.*—*Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529; *Ewing v. Hoffine*, 55 Neb. 131, 75 N. W. 537. *Tenn.*—*Ryan v. State*, 97 Tenn. 206, 36 S. W. 930; *Sam v. State*, 1 Swan 61.

[a] **Statements by jurors that they were not influenced by the facts thus improperly called to their attention are given but slight weight.** *Sam v. State*, 1 Swan (Tenn.) 61.

86. *Ia.*—*Montgomery v. Hanson*, 122 Iowa 222, 97 N. W. 1081; *State v. Olds*, 106 Iowa 110, 76 N. W. 644; *Purcell v. Tibbles*, 101 Iowa 24, 69 N. W.

1120; *Hall & Co. v. Robison*, 25 Iowa 91. *Kan.*—*Hamilton v. Atchison*, T. & S. F. R. Co., 95 Kan. 353, 148 Pac. 648; *Karner v. Kansas City El. Ry. Co.*, 82 Kan. 842, 109 Pac. 676. But see *State v. Burton*, 65 Kan. 704, 70 Pac. 640. *Miss.*—*Taylor v. State*, 52 Miss. 84. *Neb.*—*Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359. *Tex.*—*Railey v. State*, 58 Tex. Crim. 1, 121 S. W. 1120, 125 S. W. 576.

[a] "The successful party ought not to be defeated simply because jurors engage in unnecessary or improper discussion, and a verdict should be set aside only where it appears that it is a result of such misconduct and but for the misconduct the verdict would not have been reached." *Montgomery v. Hanson*, 122 Iowa 222, 97 N. W. 1081.

[b] **Cases Involving Value of or Damages to Land.**—"Knowledge of the value of land is possessed by practically every person of sufficient intelligence to make him a competent juror. Some one of the jurors on almost any jury will be personally acquainted with any tract of land in controversy, and will know something of its value. . . . Jurors with this knowledge will speak of it in the jury room. If jurors of this kind are not wanted, they should be questioned on this subject when examined on their voir dire, and then challenged." *Hamilton v. Atchison*, T. & S. F. Ry. Co., 95 Kan. 353, 148 Pac. 648.

87. *U. S.*—*Cherry v. Sweeny*, 1 Cranch C. C. 530, 5 Fed. Cas. No. 2,641. *Ga.*—*Gibson v. Carreker*, 91 Ga. 617, 17 S. E. 965. *Ia.*—*Hathaway v. Burlington, C. R. & N. Ry. Co.*, 97 Iowa 747, 66 N. W. 892.

b. *Imparting Personal Knowledge to Fellow Jurors.*—(I.) *In General.* It is improper for a juror to state facts relevant to the case to the other jurors, where there is no evidence of such facts;⁸⁸ but when the statements of the juror are mere expressions of opinion and not positive statements of fact, the general rule is not violated.⁸⁹ A diagram of the place in question should not be drawn by a juror from his personal knowledge for the use and consideration of the jury.⁹⁰

(II.) *Statements Affecting Credibility of Witnesses.*—A juror who has personal knowledge of a witness which would tend either to strengthen or weaken his testimony should refrain from speaking of the matter to his fellow jurors.⁹¹ Such remarks are not, however, always treated as prejudicial misconduct.⁹²

c. *Relating Personal Experiences.*—The practice sometimes indulged in by jurors of relating their personal experiences or the experiences of others which have come under their observation, under circumstances similar to those in evidence is strongly condemned by the courts and is improper.⁹³ Statements of jurors as to the nature

88. *Hobrecht v. San Antonio & A. P. Ry. Co. (Tex.)*, 141 S. W. 579; *Solberg v. Robbins Lumb. Co.*, 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790.

89. *Hulett v. Hancock*, 66 Kan. 519, 72 Pac. 224; *Corn Exch. Nat. Bank v. Ochlar Orchards Co.*, 97 Neb. 536, 150 N. W. 651.

[a] *Knowledge Affirmed but Not Disclosed.*—"We know of no case where a mere suggestion of undisclosed knowledge was permitted to have such an effect [i. e., to compel the setting aside of a verdict]. Such an assumption of superior knowledge on the part of a juror, however much it deserved rebuke from his fellow jurors, as an exhibition of bad taste, cannot be held to vitiate a verdict." *Irvine v. State*, 104 Tenn. 132, 56 S. W. 845.

90. *Hathaway v. Burlington, C. R. & N. Ry. Co.*, 97 Iowa 747, 66 N. W. 892; *Railey v. State*, 58 Tex. Crim. 1, 121 S. W. 1120, 125 S. W. 576 (not prejudicial); *Buessing v. State*, 43 Tex. Crim. 85, 63 S. W. 318; *Makey v. Dryden (Tex. Civ. App.)*, 128 S. W. 633, harmless where it appears that the verdict was not influenced.

91. *Ia.*—*Douglass v. Agne*, 125 Iowa 67, 99 N. W. 550; *Darrance v. Preston*, 18 Iowa 396. *Tenn.*—*Donston v. State*, 6 Humph. 275. *Tex.*—*Allen v. State*, 62 Tex. Crim. 557, 138 S. W. 593; *Battles v. State*, 53 Tex. Crim. 202, 109 S. W. 195; *Winslow v. State*, 50 Tex. Crim. 465, 98 S. W. 866; *Williams v. State*, 45 Tex. Crim. 240, 75 S. W.

509; *Tate v. State*, 38 Tex. Crim. 261, 42 S. W. 595; *Anschicks v. State*, 6 Tex. App. 524. *Wash.*—*State v. Lorenzy*, 59 Wash. 308, 109 Pac. 1064, Ann. Cas. 1912B, 153.

[a] A statement that the defendant was "the meanest man that ever lived," and had brought a groundless action on another occasion, were held presumptively prejudicial. *Jolly v. Doolittle*, 169 Iowa 658, 149 N. W. 890.

Use of juror's own knowledge in weighing credibility of witness, see *infra*, IX, J, 5, f, (III), (E).

92. *Young Chung v. State*, 15 Ariz. 79, 136 Pac. 631; *Virginia Fire & M. Ins. Co. v. St. Louis & S. W. Ry. Co. (Tex. Civ. App.)*, 173 S. W. 487, where the testimony of the witnesses was immaterial.

93. *Ia.*—See *Purell v. Tibbles*, 101 Iowa 24, 69 N. W. 1120. *Kan.*—*Karner v. Kansas City El. Ry. Co.*, 82 Kan. 842, 109 Pac. 676 (statements of former railroad man as to how quickly a train could be stopped); *Lillard v. Chicago, R. I. & P. Ry. Co.*, 79 Kan. 25, 98 Pac. 213. *Tex.*—*Green v. Hill*, 4 Tex. 465; *Barnes v. State*, 43 Tex. Crim. 355, 65 S. W. 922; *Pridgen v. Cook (Tex. Civ. App.)*, 184 S. W. 713.

[a] *The practice "is especially wrong in principle and exceedingly pernicious in its tendency as affording a pretense for disregarding the evidence and relying on their own supposed personal knowledge of the fact, discolored by passion and prejudice and warped*

and extent of suffering they have endured from similar accidents or diseases,⁹⁴ or the amount of damage they have suffered from a similar injury,⁹⁵ have been condemned, although they do not call for a reversal, unless prejudice appears with reasonable certainty to have followed from the making of the statement.⁹⁶ Mere assertions of jurors based on facts in evidence are not improper although they involve the juror's past experiences and qualifications.⁹⁷

d. *Facts Irrelevant to the Issues.*—(I.) In General. —It is irregular for the jury in the course of their deliberations to consider any facts or matters not regularly in evidence and irrelevant to the issues in the case.⁹⁸ The fact that any sum of money recovered by the

by every variety of personal feeling.”
Green v. Hill, 4 Tex. 465.

[b] “When a zealous juror makes an expert witness of himself in the privacy of the jury room, after all the public evidence has been heard and the law of the case given by the court, and flatly contradicts the evidence of witnesses who testified, and by his claim of knowledge and experience superior to that of the witnesses influenced the verdict of two or more jurors, and gained a verdict for the defense,” a new trial will be awarded. *Hobrecht v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.), 141 S. W. 579.

[c] In a prosecution for maintaining a liquor nuisance, it was improper for a juror to state that he knew defendant sold liquor because he had purchased some from defendant himself. *State v. Wright*, 98 Iowa 702, 68 N. W. 440. And see *State v. Duncan*, 70 Kan. 883, 78 Pac. 427.

94. *Galveston, H. & S. A. Ry. Co. v. Brassell* (Tex. Civ. App.), 173 S. W. 522; *Gulf, C. & S. F. Ry. Co. v. Cook* (Tex. Civ. App.), 102 S. W. 121.

95. *Atchison, T. & S. F. Ry. Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741.

96. *Purcell v. Tibbles*, 101 Iowa 24, 69 N. W. 1120; *Karner v. Kansas City El. Ry. Co.*, 82 Kan. 842, 109 Pac. 676; *Atchison, T. & S. F. Ry. Co. v. Bayes*, 42 Kan. 609, 22 Pac. 741.

[a] The conclusions drawn by the juror from the experience related must be shown. *Lillard v. Chicago, R. I. & P. Ry. Co.*, 79 Kan. 25, 98 Pac. 213.

97. *Corn Exch. Nat. Bank v. Ochlare Orchards Co.*, 97 Neb. 536, 150 N. W. 651.

[a] Illustration.—In *Corn Exch. Nat. Bank v. Ochlare Orchards Co.*, 97 Neb. 536, 150 N. W. 651, an action

on promissory notes, jurors stated that from their experience they could tell when certain indorsements were made. “These jurors were not assuming to state evidence of facts within their personal knowledge. They were stating their opinions derived from the facts in evidence, and fortifying those opinions by showing their ability to judge such matters. Such opinions and discussions of jurors are matters that inhere in the verdict, and no prejudicial error can be predicated thereon.” *Corn Exch. Nat. Bank v. Ochlare Orchards Co.*, 97 Neb. 536, 150 N. W. 651.

[b] In an action to recover attorney fees, statement of a juror that he was himself an attorney and knew that the plaintiff was entitled to recover all he sued for was held not to require a new trial, the evidence supporting the verdict rendered. *Wessel v. Bishop*, 76 Neb. 74, 107 N. W. 220.

98. *Favro v. State* (Tex. Crim.), 59 S. W. 885; *San Antonio Traction Co. v. Cassanova* (Tex. Civ. App.), 154 S. W. 1190.

[a] Where the sole defense in a murder case was insanity, a verdict was set aside where it appeared that the argument was used by jurors that there was a lunacy commission at the penitentiary and that this commission was better able to pass on defendant's insanity than the doctors who testified at the trial, and if the commission found the defendant was insane he would not be placed in the penitentiary. *White v. State*, 72 Tex. Crim. 185, 161 S. W. 977.

[b] In fixing the term of imprisonment, the jury considered the fact that defendant's father had also been imprisoned for a similar crime. The judgment was set aside. *McDaniel v. State* (Tex. Crim.), 77 S. W. 802.

plaintiff will have to be shared with his attorneys,¹⁰ or partly expended in settlement of doctors' or hospital bills,¹ should not be considered by the jury as it inevitably tends to increase the verdict above a proper amount. The following irrelevant matters should not be discussed by the jury: That there has already been one recovery of damages caused by the accident;² that the defendant had offered to compromise the case;³ the damages favored by various jurors on a former mistrial of the case;⁴ the sentiment of the general public as to the character of the verdict which should be rendered;⁵ that a juror had seen the defendant on other occasions, acting as plaintiff alleged he acted at the time in question;⁶ that if an injustice were done defendant by his conviction he could appeal;⁷ that defendant was well able to pay any verdict rendered against him;⁸ that de-

[c] **Agreement to disregard irrelevant statements** theretofore made, concerning other acts of the defendants, cures the irregularity. *State v. Olds*, 106 Iowa 110, 76 N. W. 644.

[d] **Instruction Desirable.**—"District judges should make it a part of their duty to admonish jurors in every case against discussing or alluding to any matters connected with the defendant on trial outside of the record testimony against him." *Gallihar v. State* (Tex. Crim.), 37 S. W. 329.

Instructions as to Use of Juror's Own Knowledge.—See 13 STANDARD PROC. 932, et seq.

99. *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Tex. Civ. App.), 173 S. W. 937; *Gulf, C. & S. F. Ry. Co. v. McKinnell* (Tex. Civ. App.), 171 S. W. 1091; *San Antonio Traction Co. v. Casanova* (Tex. Civ. App.), 154 S. W. 1190; *Missouri, K. & T. Ry. v. Brown* (Tex. Civ. App.), 140 S. W. 1172 (held not prejudicial); *Houston & T. C. R. Co. v. Gray* (Tex. Civ. App.), 137 S. W. 729, this was an "expression of opinion" and not a "statement of a fact purporting to be within his knowledge."

1. *San Antonio Traction Co. v. Casanova* (Tex. Civ. App.), 154 S. W. 1190.

2. *Forsyth v. Central Mfg. Co.*, 103 Tenn. 497, 53 S. W. 731.

[a] **One Accident the Foundation of Two Causes of Action.**—Where a son had recovered damages for an injury he had sustained, it was held improper and ground for a new trial for this fact to be considered by the jury in an action by the mother to recover for loss of the services of the son.

Forsyth v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

3. *Street R. R. & Tel. Companies v. Simmons*, 107 Tenn. 392, 64 S. W. 705.

[a] **A casual statement** that the defendant had settled another similar case for a specified amount is harmless. *Wilberding v. City of Dubuque*, 111 Iowa 484, 82 N. W. 957.

4. *Street R. R. & Tel. Companies v. Simmons*, 107 Tenn. 392, 64 S. W. 705.

5. **Kan.**—*State v. Burton*, 65 Kan. 704, 70 Pac. 640. **Mich.**—*Churchill v. Alpena Circ. Judge*, 56 Mich. 536, 23 N. W. 211. **Tex.**—*Mason v. State* (Tex. Crim.), 16 S. W. 766.

6. *Cresswell v. Wainwright*, 154 Iowa 167, 134 N. W. 594, driving his automobile at a light rate of speed.

7. *Richards v. State*, 59 Tex. Crim. 203, 127 S. W. 823 (not prejudicial where of a most general character); *Tuller v. State*, 58 Tex. Crim. 571, 126 S. W. 1158.

[a] **When Harmless.**—"Every man of sufficient understanding to be competent as a juror knows that the right of appeal exists in such cases, and hence the mere fact that it was spoken of in the jury room would not in itself be unusual, or out of place. Of course if it were made to appear that on account of such knowledge, or because of such talk, the jury had not given a case due consideration, but had violated its sworn duty and attempted to shift its responsibility, the court would grant a new trial. But the presumption is that a jury has done its duty." *State v. Lucas*, 122 Iowa 141, 97 N. W. 1003.

8. *Cresswell v. Wainwright*, 154 Iowa 167, 134 N. W. 594.

defendant was insured and would not have to pay the damages;⁹ a discussion of plaintiff's inability to pay the costs, if verdict was rendered against him;¹⁰ that plaintiff who had been injured had a family;¹¹ or would lose his present position.¹²

In a criminal case, there should be no comment on or criticism by the jury of the fact that the defendant has not testified,¹³ nor should there be any discussion or consideration of the fact that defendant had not conducted himself properly in other matters or had been guilty or convicted of other crimes,¹⁴ or was under indictment for

[a] **Not Prejudicial.**—*Steward v. Hinkel*, 72 Cal. 187, 191, 13 Pac. 494.

9. *Ruekle v. American Car & Foundry Co.*, 194 Fed. 459; *Wolfe & Co. v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.), 144 S. W. 347.

10. *City of Fort Worth v. Lopp* (Tex. Civ. App.), 134 S. W. 824.

11. *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

12. *Freeman v. McElroy* (Tex. Civ. App.), 149 S. W. 428.

[a] **Drawing up and signing a letter** asking the defendant to give employment to the plaintiff, who had been injured, the verdict being for defendant, was held to justify a new trial. *Svenson v. Chicago, G. W. R. Co.*, 68 Minn. 14, 70 N. W. 795.

13. *State v. Rambo*, 69 Kan. 777, 77 Pac. 563; *Fry v. State* (Tex. Crim.), 182 S. W. 331; *Clark v. State* (Tex. Crim.), 177 S. W. 84; *Witty v. State*, 75 Tex. Crim. 440, 171 S. W. 229; *Portwood v. State*, 71 Tex. Crim. 447, 160 S. W. 345; *Jones v. State*, 72 Tex. Crim. 496, 162 S. W. 1142; *Huddleston v. State*, 70 Tex. Crim. 260, 156 S. W. 1168; *Walling v. State*, 59 Tex. Crim. 279, 128 S. W. 624; *Tuller v. State*, 58 Tex. Crim. 571, 126 S. W. 1158; *Hall v. State*, 52 Tex. Crim. 250, 106 S. W. 379 (held prejudicial); *Fults v. State*, 50 Tex. Crim. 502, 98 S. W. 1057; *Doulton v. State* (Tex. Crim.), 73 S. W. 395.

[a] **New trial required for violation of this rule.** *Richards v. State*, 59 Tex. Crim. 203, 127 S. W. 823; *Adams v. State* (Tex. Crim.), 64 S. W. 1055.

No presumption or inference from defendant's failure to testify, see 9 ENCY. OF EV. 971; 14 ENCY. OF EV. 677.

[b] **Refusal of an instruction** that the jury should not consider the fact that defendant has not testified, is error. *State v. Goff*, 62 Kan. 104, 61 Pac. 683.

Instructions as to accused's failure to testify, see 13 STANDARD PROC. 919, et seq.

[c] **Where an accused person voluntarily takes the stand but fails to testify fully**, the jury may properly comment on his apparent desire to conceal some of the facts. *Diggs v. United States*, 220 Fed. 545, 136 C. C. A. 147.

14. **Colo.**—*Moore v. People*, 26 Colo. 213, 57 Pac. 857. **Ga.**—*Martin v. State*, 25 Ga. 494. **Ia.**—See *State v. Olds*, 106 Iowa 110, 76 N. W. 644. **Kan.**—*State v. Lowe*, 67 Kan. 183, 72 Pac. 524; *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341. **Mo.**—See *State v. Sprague*, 149 Mo. 409, 50 S. W. 901. **Neb.**—*Richards v. State*, 36 Neb. 17, 53 N. W. 1027. **Tenn.**—*Ryan v. State*, 97 Tenn. 206, 36 S. W. 930; *Morton v. State*, 1 Lea 498; *Booby v. State*, 4 Yerg. 111. **Tex.**—*Dunn v. State*, 72 Tex. Crim. 170, 161 S. W. 467; *Clements v. State*, 69 Tex. Crim. 369, 153 S. W. 1137; *Williamson v. State*, 62 Tex. Crim. 132, 136 S. W. 1071; *Tuller v. State*, 58 Tex. Crim. 571, 126 S. W. 1158; *Warren v. State*, 57 Tex. Crim. 518, 123 S. W. 115; *Helvenston v. State*, 53 Tex. Crim. 636, 111 S. W. 959; *Hall v. State*, 52 Tex. Crim. 250, 106 S. W. 379; *Hargrove v. State*, 51 Tex. Crim. 47, 99 S. W. 1121; *Foster v. State*, 51 Tex. Crim. 77, 100 S. W. 1159; *Vanduran v. State*, 50 Tex. Crim. 440, 98 S. W. 247; *Kegans v. State* (Tex. Crim.), 96 S. W. 16; *Crow v. State*, 47 Tex. Crim. 225, 82 S. W. 1033; *Hopkins v. State* (Tex. Crim.), 68 S. W. 986; *Lankster v. State*, 43 Tex. Crim. 298, 65 S. W. 373; *Darter v. State*, 39 Tex. Crim. 40, 44 S. W. 850. **Wash.**—*State v. Parker*, 25 Wash. 405, 65 Pac. 776.

Compare *Taylor v. State*, 52 Miss. 84.

[a] **Non-Prejudicial Statement.** Statement that the case would have

other crimes,¹⁵ or that his codefendant had been found guilty and punished.¹⁶ The probability of the exercise of clemency by the court in sentencing a defendant must not be considered.¹⁷ A former verdict in a criminal case and the punishment assessed should not be discussed.¹⁸

(II.) **Effect.** — Whether such conduct calls for a reversal of the judgment will depend upon its prejudicial effect in view of all the circumstances of the case,¹⁹ though in some jurisdictions prejudice will always be presumed to exist in such cases.²⁰ When the discussion does not occur until after the verdict has been agreed upon the ver-

been tried at a prior term if the defendant had not induced a material witness to feign sickness, does not require a new trial. *Gallihar v. State* (Tex. Crim.), 37 S. W. 329.

[b] Former altercations between the same parties should not be discussed. *Mann v. State*, 47 Tex. Crim. 250, 33 S. W. 195.

15. *Maples v. State*, 60 Tex. Crim. 169, 131 S. W. 567; *Battles v. State*, 53 Tex. Crim. 202, 109 S. W. 195; *Kegans v. State* (Tex. Crim.), 96 S. W. 16.

16. *Horn v. State*, 50 Tex. Crim. 404, 97 S. W. 822.

[a] Comment on the fact that defendant's co-defendant had been convicted and given a specified punishment and that the jury should not assess a less punishment on the defendant, requires a new trial. *Tutt v. State*, 49 Tex. Crim. 202, 91 S. W. 584.

17. *Crawford v. State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467.

[a] A verdict will be set aside (1) where one juror agreed to only because of an agreement with his fellow jurors that the defendant would be recommended to the mercy of the governor and his mistaken belief that thereupon he would be discharged. *Crawford v. State*, 2 Yerg. (Tenn.) 60, 24 Am. Dec. 467. (2) So a verdict will be set aside where rendered only after the court has agreed to exercise clemency. *State v. Kiefer*, 16 S. D. 180, 91 N. W. 1117; *McBean v. State*, 83 Wis. 206, 53 N. W. 497.

[b] But where the jury have agreed on the defendant's guilt but not as to his punishment, the verdict of second degree murder will not be set aside because of a letter by the jury to the judge asking him to exercise all possible clemency, written and signed be-

fore the final unanimous verdict was taken. *State v. Keehn*, 85 Kan. 765, 118 Pac. 851.

18. Kan.—*State v. Burton*, 65 Kan. 704, 70 Pac. 640; *State v. McCormick*, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341. Neb.—See *Russell v. State*, 66 Neb. 497, 92 N. W. 751. Tex.—*Hill v. State*, 54 Tex. Crim. 646, 114 S. W. 117; *Casey v. State*, 51 Tex. Crim. 433, 102 S. W. 725 (the rule should be rigidly adhered to); *Horn v. State*, 50 Tex. Crim. 404, 97 S. W. 822; *Morawitz v. State*, 49 Tex. Crim. 366, 91 S. W. 227; *Hefner v. State*, 44 Tex. Crim. 441, 71 S. W. 964; *Hughes v. State*, 43 Tex. Crim. 511, 67 S. W. 104.

[a] Mere reference (1) to former verdict not cause for reversal (*Arnwine v. State*, 54 Tex. Crim. 213, 114 S. W. 796; *Moore v. State*, 52 Tex. Crim. 336, 107 S. W. 540; *Gaines v. State* (Tex. Crim.), 77 S. W. 10; *Baines v. State*, 43 Tex. Crim. 490, 66 S. W. 847), (2) especially where the evidence amply supports the verdict. *Smith v. State*, 52 Tex. Crim. 344, 106 S. W. 1161.

19. See cases cited *supra*, this section.

[a] Statements not hostile to the defeated party are not prejudicial. *Huntley & Son v. Chicago, B. & Q. R. Co.*, 142 Iowa 697, 121 N. W. 377.

[b] Where the statements of a juror were merely repetitions of statements he had made on his voir dire, no prejudice follows. *Huntley & Son v. Chicago, B. & Q. R. Co.*, 142 Iowa 697, 121 N. W. 377.

[c] Under Kansas statute non-prejudicial statements do not require new trial. *Hamilton v. Atchison, T. & S. F. R. Co.*, 95 Kan. 353, 148 Pac. 648.

20. *Street R. R. & Tel. Companies v. Simmons*, 107 Tenn. 392, 64 S. W.

diet will not ordinarily be affected.²¹ When the statements of the jurors were made casually and appear to have made no special impression on the other jurors they will be held unprejudicial,²² but when the discussion is a general one, and is not limited to a statement by a single one of the jurors the tendency is to hold the error prejudicial.²³ Denials by jurors that they were influenced by irrelevant and improper statements made in the juryroom, are not given great credence.²⁴ If the trial court disbelieves the testimony tending to show that the jury were influenced thereby, the appellate court will seldom interfere with its decision.²⁵

e. *Knowledge Acquired Pending the Trial.*—An examination²⁶ of

705; Forsyth v. Central Mfg. Co., 103 Tenn. 497, 53 S. W. 731.

21. Wise v. Bosley, 32 Iowa 34; Missouri, K. & T. Ry. v. Blalack (Tex.), 128 S. W. 706; Hernandez v. State, 60 Tex. Crim. 30, 129 S. W. 1109; Parker v. State (Tex. Crim.), 30 S. W. 553.

22. Ia.—State v. Thomas, 135 Iowa 717, 109 N. W. 900; Montgomery v. Hanson, 122 Iowa 222, 97 N. W. 1081. Kan.—State v. Brooks, 74 Kan. 175, 85 Pac. 1013. La.—See State v. Thompson, 109 La. 296, 33 So. 320, result of a former trial. Tex.—Howard v. State, 76 Tex. Crim. 297, 174 S. W. 607; Clark v. State, 74 Tex. Crim. 464, 169 S. W. 895; Burge v. State, 73 Tex. Crim. 505, 167 S. W. 63; Coffman v. State, 73 Tex. Crim. 295, 165 S. W. 939; Espinoza v. State, 73 Tex. Crim. 237, 165 S. W. 208; Cooper v. State, 72 Tex. Crim. 266, 162 S. W. 364; Powers v. State (Tex. Crim.), 154 S. W. 1020; Rhodes v. State, 69 Tex. Crim. 45, 153 S. W. 128; Allen v. State, 62 Tex. Crim. 557, 138 S. W. 593; Johnson v. State, 53 Tex. Crim. 339, 109 S. W. 936; Leslie v. State (Tex. Crim.), 49 S. W. 73; Williams v. State, 33 Tex. Crim. 128, 25 S. W. 629, 28 S. W. 958, 47 Am. St. Rep. 21, defendant's attempt to commit suicide.

[a] *Statement by the foreman*—"that they could not consider the fact that appellant did not testify was but a reiteration of the charge of the court to the jury." Veach v. State, 71 Tex. Crim. 181, 159 S. W. 1069.

[b] "We think the true rule is that where, as in this case, the testimony supports the verdict, . . . a verdict ought not to be set aside for every incidental and casual mention of a former trial or former conviction and that in no case should it be set aside in a case tried according to law, where

the conviction is supported by the testimony, unless the court may fairly and reasonably see in the light of all the circumstances that such reference and discussion did or might have prejudiced the appellant's case." Smith v. State, 52 Tex. Crim. 344, 106 S. W. 1161.

[c] *Sufficiency of the evidence to sustain the verdict* is a fact to be considered in determining the prejudicial effect of such statements. State v. Cross, 95 Iowa 629, 64 N. W. 614.

[d] *Prejudice Is Not Presumed.* State v. Cross, 95 Iowa 629, 633, 64 N. W. 614.

[e] *Failure of wife of defendant to testify* should not be considered, but a casual reference thereto is not prejudicial. State v. Evans, 90 Kan. 795, 136 Pac. 270; State v. McKinney, 31 Kan. 570, 3 Pac. 356.

23. San Antonio Tr. Co. v. Cassanova (Tex. Civ. App.), 154 S. W. 1190.

24. State v. Burton, 65 Kan. 704, 70 Pac. 640; Doulton v. State (Tex. Crim.), 73 S. W. 395.

[a] "Obvious language, expressive of opinion, indicating thought on a matter respecting which the words are used, is the best evidence that the person speaking has, to a greater or less degree, considered the subject to which the language relates." State v. Rambo, 69 Kan. 777, 77 Pac. 563.

25. State v. Dreiling, 95 Kan. 241, 147 Pac. 1108, limiting State v. Rambo, 69 Kan. 777, 77 Pac. 563.

26. Kan.—Ortman v. Union Pac. Ry. Co., 32 Kan. 419, 4 Pac. 858. Me. Winslow v. Morrill, 68 Me. 362; Bowler v. Washington, 62 Me. 302. Mass. Harrington v. Worcester L. & S. St. Ry. Co., 157 Mass. 579, 32 N. E. 955. Minn.—Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W.

the premises in question, other than by an authorized view,²⁷ or an inspection of persons, or things,²⁸ or in fact the receipt or obtaining of any knowledge or information appertaining to the case, out of court,²⁹ by one or all of the members of the jury is highly improper, as it is immaterial whether the personal knowledge, use of which by jurors is prohibited, is acquired before or during the trial.³⁰

The fact that information was improperly received must be satisfactorily established; mere surmise or conjecture that it may have been received is insufficient.³¹ Merely examining or handling exhibits introduced in evidence, during a recess of court does not constitute a reception of evidence out of court.³²

f. *Use of General Knowledge and Information.*—(I.) In General.

An exception to the rule that jurors are not to use matters within their personal knowledge necessarily exists as to those facts which are

1072. **Neb.**—*Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529; *Chicago, B. & Q. R. Co. v. Oyster*, 58 Neb. 1, 78 N. W. 359. **N. Y.**—*Buffalo Structural Steel Co. v. Dickinson*, 98 App. Div. 355, 90 N. Y. Supp. 268; *Adams Laundry Mach. Co. v. Prunier*, 74 Misc. 529, 134 N. Y. Supp. 475; *Eastwood v. People*, 3 Park. Crim. 25. **N. C.**—*State v. Perry*, 121 N. C. 533, 27 S. E. 997, 61 Am. St. Rep. 683. **R. I.**—*Garside v. Ladd Watch Case Co.*, 17 R. I. 691, 24 Atl. 470. **Tenn.**—*Wade v. Ordway*, 1 Baxt. 229. **Tex.**—*Nelson v. State* (Tex. Crim.), 58 S. W. 107; *Darter v. State*, 39 Tex. Crim. 40, 44 S. W. 850.

See *supra*, IX, G, 7 and 8.

[a] **Requires Granting New Trial.** *Adams Laundry Mach. Co. v. Prunier*, 74 Misc. 529, 134 N. Y. Supp. 475.

Effect of unauthorised view, see 13 ENCY. OF EV. 989.

27. See the title "View," and 13 ENCY. OF EV. 981.

28. *Consolidated Ice Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. 898; *Flanders v. Mullin*, 73 Vt. 276, 50 Atl. 1055. See *supra*, IX, G, 7.

[a] **In an action for malpractice, an examination of another person upon whom defendant had performed a similar operation was improper.** *Flanders v. Mullin*, 73 Vt. 276, 50 Atl. 1055.

[b] **Personal examination by a juror of furniture claimed to be made in an unworkmanlike manner is improper.** *Stampofski v. Steffens*, 79 Ill. 303.

29. *Brunson v. Graham*, 2 Yeates (Pa.) 166; *Simpson v. Kent*, 9 Phila. (Pa.) 30; *South Texas Mortg. Co. v. Dozier* (Tex. Civ. App.), 158 S. W. 1051.

[a] **Where a juror procured a copy of the state statutes and took it to the jury room and various sections were read to the jurors, the verdict was set aside.** *Harris v. State*, 24 Neb. 803, 40 N. W. 317.

Taking documents and articles to the jury room, which have not been introduced in evidence, see *infra*, IX, K.

[b] **Motive of Juror is Immaterial.** *Heffron v. Gallupe*, 55 Me. 563.

[c] **A statute which provides that a new trial may be granted "when the jury has received any evidence, papers or documents not authorized by the court" is "not mandatory and it clearly does not belong to the class in which a new trial must be peremptorily granted without any inquiry into consequences upon substantial rights."** *State v. Keehn*, 85 Kan. 765, 118 Pac. 851.

30. See *supra*, IX, G, 7.

[a] **Nature of Such Misconduct.** "The procurement of additional evidence on the jury's own motion after they have retired is not a matter inhering in the verdict. It is something entirely different from the misunderstanding or misrecollection of the evidence properly before the jury, or the formation of a wrong judgment. It is something which antedates and causes the formation of the wrong judgment." *Kruidenier Bros. v. Shields*, 70 Iowa 428, 30 N. W. 681.

31. *McWhorter v. Haigler Mercantile Co.*, 4 Ala. App. 296, 58 So. 790.

32. **Cal.**—*People v. Tipton*, 73 Cal. 405, 14 Pac. 894. **N. Y.**—*Wilson v. People*, 4 Park. Crim. 619. **Okla.**—*Kennon v. Territory*, 5 Okla. 685, 50 Pac. 172.

mere matters of common and general knowledge. Such facts may be used and considered by the jurors in the course of their deliberations on the verdict and in drawing inferences and conclusions from facts as to which there is direct testimony.³³ Indeed this is but another way of saying that in arriving at conclusions jurors may exercise their common sense and bring to the determination of the questions submitted to them the knowledge and experience which qualifies them to act as triors of the facts.³⁴ Some courts, however, draw a distinction between an instruction which allows jurors to use their personal knowledge, experience, and information as evidence in the case, and one which allows them to consider their general and common knowledge for the purpose of weighing the evidence and testing the credibility

And see *supra*, IX, G, 3.

33. U. S.—Chicago, M. & St. P. Ry. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962; La Fayette Bridge Co. v. Olsen, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33. **Ala.**—Sloss-Sheffield Steel & I. Co. v. Hutchinson, 144 Ala. 221, 40 So. 114; Smith v. Jernigan, 83 Ala. 256, 3 So. 515. **Ark.**—Graysonia-Nashville Lumb. Co. v. Carroll, 102 Ark. 460, 144 S. W. 519. **Cal.**—Baker v. Borello, 136 Cal. 160, 68 Pac. 591. **Colo.**—Denver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; Mutual Life Ins. Co. v. Good, 25 Colo. App. 204, 136 Pac. 821. **Fla.**—Marshall v. State, 54 Fla. 66, 44 So. 742; Morrison v. State, 42 Fla. 149, 28 So. 97. **Ill.**—Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 538, 546; Kitzinger v. Sanborn, 70 Ill. 146. **Ind.**—Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 50 N. E. 760; Jenney Elec. Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Renard v. Grande, 29 Ind. App. 579, 64 N. E. 644. **Ia.**—Purcell v. Tibbles, 101 Iowa 24, 69 N. W. 1120; State v. Elsham, 70 Iowa 531, 31 N. W. 66. **Kan.**—Sanford v. Gates, 38 Kan. 405, 16 Pac. 807; Craver v. Hornburg, 26 Kan. 94; Missouri River R. Co. v. Richards, 8 Kan. 101; Clark v. Ford, 7 Kan. App. 332, 51 Pac. 938. **Mass.**—McGarrahan v. New York, N. H. & H. R. Co., 171 Mass. 211, 50 N. E. 610; Bradford v. Cunard S. S. Co., 147 Mass. 55, 16 N. E. 719; Com. v. Peckham, 2 Gray 514; Patterson v. Boston, 20 Pick. 159. **Mich.**—Lillibridge v. McCann, 117 Mich. 84, 75 N. W. 288, 72 Am. St. Rep. 553, 41 L. R. A. 381. **Minn.**—Johnson v. Hillstrom, 37 Minn. 122, 33 N. W. 547. **Mont.**—See State v. Kremer, 34 Mont. 6, 85 Pac. 736. **N. C.**—Rice v. Norfolk-Southern R. Co.,

167 N. C. 1, 82 S. E. 1034; Deans v. Wilmington & W. R. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902. **Ore.**—Willis v. Lance, 28 Ore. 371, 43 Pac. 384, 487. **S. D.**—Merrill v. Minneapolis & St. L. R. Co., 27 S. D. 1, 129 N. W. 468; State v. Bjelkstrom, 20 S. D. 1, 104 N. W. 481. **Tex.**—Galveston, H. & S. A. Ry. Co. v. Davis, 92 Tex. 372, 48 S. W. 570; Memphis Cotton Oil Co. v. Tolbert (Tex. Civ. App.), 171 S. W. 309; Missouri, K. & T. Ry. Co. v. Vance (Tex. Civ. App.), 41 S. W. 167. **W. Va.**—Gunn v. Ohio R. Co., 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842. **Wis.**—Cook v. Gust, 155 Wis. 594, 145 N. W. 225; Disotell v. Henry Luther Co., 90 Wis. 635, 64 N. W. 425.

See also 7 ENCY. OF EV. 888, et seq.

34. Dunlop v. United States, 165 U. S. 486, 499, 17 Sup. Ct. 375, 41 L. ed. 799; Graysonia-Nashville Lumb. Co. v. Carroll, 102 Ark. 460, 144 S. W. 519. See also Patterson v. Boston, 20 Pick. (Mass.) 159, 166.

Instructions as to use of general knowledge, see 13 STANDARD PROC. 933.

[a] "The jury were at liberty to exercise their own common sense, and to use the knowledge acquired by their observation and experience in everyday life in solving the question." Deans v. Wilmington & W. Ry. Co., 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902.

[b] Jurors are not "expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct." Chicago, M. &

of the witnesses; the latter being proper but the former improper.³⁵ General knowledge to be properly used must be the knowledge which men in general have and not knowledge common to a few or to a particular class,³⁶ or knowledge common only to the jury.³⁷ Moreover, the inferences which jurors are entitled to draw from their general experience and knowledge must be based on and drawn from facts already in evidence.³⁸

(II.) **Judicial Notice by Jurors.**—While, perhaps, strictly speaking, jurors cannot take "judicial notice" of facts,³⁹ they, by analogy at least, may exercise similar powers, and the rule, as commonly stated, is that jurors may consider any facts of which judicial notice may be taken.⁴⁰

St. P. Ry. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962.

35. *De Gray v. New York & N. J. Tel. Co.*, 68 N. J. L. 454, 53 Atl. 200.

36. *Ala.*—*Sloss-Sheffield S. & I. Co. v. Hutchinson*, 144 Ala. 221, 40 So. 114. *Kan.*—*Craver v. Hornburg*, 26 Kan. 94. *Me.*—*State v. Maine Cent. R. Co.*, 86 Me. 309, 29 Atl. 1086. *Mo.*—*Bowman v. American Car & Foundry Co.*, 226 Mo. 53, 125 S. W. 1120. *Neb.*—*Chicago, B. & Q. R. Co. v. Krayenbuhl*, 65 Neb. 889, 21 N. W. 880, 59 L. R. A. 920.

But see *Solberg v. Robbins Lumb. Co.*, 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790.

[a] "The facts of nature which may be so considered are those which are so plain that there can be no difference of opinion about them." *Hoskovec v. Omaha St. Ry. Co.*, 80 Neb. 784, 115 N. W. 312, whether a person stepping from a moving street car would fall backwards or forwards is not such a fact.

[b] Whether a fire would have been prevented if a proper screen had been used on a smokestack is not to be determined by the jury in the exercise of their experience and knowledge. *Burrows v. Delta Transp. Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468.

[c] That a particular street at a certain hour in the evening was generally deserted cannot be judicially noticed by the jury. *Lenahan v. People*, 3 Hun (N. Y.) 164.

37. *Clark v. Ford*, 7 Kan. App. 332, 51 Pac. 938.

38. *Ill.*—*Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043; *Hancock v. Chicago, B. & Q. R. Co.*, 145 Ill. App. 491. *Mich.*—*Burrows v. Delta Transp.*

Co., 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468. *N. J.*—*De Gray v. New York & N. J. Tel. Co.*, 68 N. J. L. 454, 53 Atl. 200. *Wis.*—*Sherman v. Menominee River Lumber Co.*, 77 Wis. 14, 45 N. W. 1079.

39. See cases cited *infra*, this section.

[a] **Statement of the Principle.**—"It may be said that there are certain matters, of which, by reason of common knowledge, observation and experience, the courts take judicial notice. These 'courts may and should notice without proof, and assume as known by others, whatever, as the phrase is, everybody knows.' Thayer on Ev. 301. Greenleaf says: 'In general, the jury may, in modern times, act only upon evidence properly laid before them in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of knowledge and experience, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this possession in making up their minds. . . . But the scope of this doctrine is narrow and is strictly limited to a few matters of elemental experience in human nature, commercial affairs and everyday life.' 1 Evidence (16th ed.), 17. Professor Thayer discussing the subject, says: 'But as the jury is bound to keep within the restrictions imposed upon courts by the principle of judicial notice, so also it has the liberty which that principle allows to courts. The circumstance that the jury is a subordinate tribunal does not change the nature of their office.' Ev., 296; Wigmore Ev., sec. 2565." *Jenkins v. Southern Ry. Co.*, 146 N. C. 178, 59 S. E. 663.

40. *Ill.*—*Chicago, B. & Q. R. Co. v.*

(III.) **Matters of Common Knowledge.**—(A.) **IN GENERAL.**—A great variety of matters have been held to be of such a common and general character as to justify the jury in considering them, even in the absence of direct evidence of their existence.⁴¹ The age,⁴² or intelligence and mental capacity⁴³ of a person who has appeared before the jury, and that pain and mental suffering followed from the crushing and mangling of a person's arm;⁴⁴ have been held to be facts of which the jury may take notice within this rule. The characteristics and

Warner, 108 Ill. 538. **Kan.**—Bank of Wilber v. Freeburg, 84 Kan. 235, 114 Pac. 207 (existence of state of panic); Metropolitan St. Ry. Co. v. Summers, 75 Kan. 342, 89 Pac. 652. **Me.**—State v. Maine C. R. R. Co., 86 Me. 309, 29 Atl. 1086. **Mo.**—See Bowman v. American Car & Foundry Co., 226 Mo. 53, 125 S. W. 1120. **N. Y.**—See Lenahan v. People, 3 Hun 164. **N. C.**—Jenkins v. Southern Ry. Co., 146 N. C. 178, 59 S. E. 663. **Okla.**—Waters-Pierce Oil Co. v. Deselms, 18 Okla. 107, 89 Pac. 212. **Vt.**—State v. Barron, 37 Vt. 57.

See *infra*, IX, J, 5, f, (III).

Judicial notice by jury, see 7 ENCY. OF EV. 887.

[a] "It is not always easy to determine whether or not a given fact has become sufficiently notorious to be taken judicial notice of without proof. If it has, then jurors may act upon it without proof. If it has not, then they cannot be allowed to act upon it without proof, although the fact may be known to one or more of the panel." State v. Maine Cent. R. Co., 86 Me. 309, 29 Atl. 1086.

Facts of which judicial notice may be taken, see 7 ENCY. OF EV. 869, et seq.

41. See 7 ENCY. OF EV. 890, et seq.

[a] **Rate at Which One Walks.** That a person walking at an ordinarily rapid gait will travel about four miles an hour. Merrill v. Minneapolis & St. L. R. Co., 27 S. D. 1, 129 N. W. 468.

[b] **Elementary Principles of Mechanics.**—"Being men of ordinary observation and experience, they must have possessed some practical knowledge of the law of gravitation, of the elementary principles of mechanics, of the common use of pins in holding the wheels of various vehicles in place upon their spindles and in holding together different parts of other appliances and machinery, of the quality, strength and size of those pins, and of the relative quality, strength and

size of twenty penny wire nails." Chicago, M. & St. P. Ry. Co. v. Moore, 166 Fed. 663, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962.

[c] **That prices and values of articles in small places are governed by prices and values at the nearest large market.** Kitzinger v. Sanborn, 70 Ill. 146.

[d] **The custom of using coal oil to kindle fires.** Waters-Pierce Oil Co. v. Deselms, 18 Okla. 107, 89 Pac. 212.

[e] **The expectancy of a person's life, his age being known.** Ala.—Louisville & N. R. R. Co. v. Morgan, 114 Ala. 449, 22 So. 20. Ark.—See Helena Gas Co. v. Rogers, 104 Ark. 59, 147 S. W. 473. Ia.—Beems v. Chicago, R. I. & P. Ry. Co., 67 Iowa 435, 25 N. W. 693. See 7 ENCY. OF EV. 922; 8 ENCY. OF EV. 633, 639.

[f] **The kind of goods kept in a stock of drugs.** Kern v. Wilson, 82 Iowa 407, 48 N. W. 919.

[g] **That vacant buildings are more exposed to danger from fire than they would be if occupied.** White v. Phoenix Ins. Co., 83 Me. 279, 22 Atl. 167.

[h] **Whether the manner of unloading a wagon was proper and whether sufficient men were employed therein.** Dow Wire & Iron Wks. v. Smith (Ky.), 124 S. W. 819.

[i] **The care which should be given country roads by highway authorities.** Lunney v. Inhab. of Shapleigh, 112 Me. 172, 90 Atl. 496.

42. Hermann v. State, 73 Wis. 248, 41 N. W. 171, 9 Am. St. Rep. 789. But see People v. Kielczewski, 269 Ill. 293, 109 N. E. 981; Wistrand v. People, 213 Ill. 72, 72 N. E. 748; Orschein v. Scott, 90 Mo. App. 352, 369, relying on Phelps v. City of Salisbury, 161 Mo. 1, 61 S. W. 582.

43. Disotell v. Henry Luther Co., 90 Wis. 635, 64 N. W. 425.

44. Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 538.

habits of animals are matters of common knowledge;⁴⁵ as are the ordinary incidents of travel and transportation,⁴⁶ and the facts of general knowledge relating to the instrumentalities of transportation and commerce.⁴⁷

(B.) DAMAGES.—In estimating damages the jury are not bound to take the evidence introduced as conclusive, but they may weigh it in the light of their general knowledge.⁴⁸ The damages sustained from personal injuries are, to a considerable extent, not provable by witnesses,⁴⁹ and the jury must necessarily form their conclusions from their general knowledge and experience, applied to the facts in evidence.⁵⁰ The value of services lost is also often a matter within the general knowledge of the jurors.⁵¹

45. *State v. Maine Cent. R. R. Co.*, 86 Me. 309, 29 Atl. 1086. See 7 ENCY. OF EV. 907.

[a] The nature and cause of a "curb" causing a horse to go lame, is not a matter of common knowledge. *Douglass v. Trask*, 77 Me. 35.

[b] Whether an ox which drools is a defective animal, is not a matter of common knowledge. *Page v. Alexander*, 84 Me. 83, 24 Atl. 584.

[c] That horses are liable to be frightened by locomotive engines and moving cars is a fact of which the jury may take notice. *State v. Maine Cent. R. R. Co.*, 86 Me. 309, 29 Atl. 1086. But see 7 ENCY. OF EV. 907.

46. See 7 ENCY. OF EV. 933.

[a] What constitutes a reasonable time for the transportation of goods by freight. *Jenkins v. Southern Ry. Co.*, 146 N. C. 178, 59 S. E. 663. But see 7 ENCY. OF EV. 933.

[b] That it would take a few seconds at least for a person to go upon a railroad trestle and seat himself on a guard rail. *Gunn v. Ohio R. Co.*, 36 W. Va. 165, 14 S. E. 465, 32 Am. St. Rep. 842.

[c] The amount and character of traffic on the street on which a street railroad is located. *Metropolitan St. Ry. Co. v. Summers*, 75 Kan. 342, 89 Pac. 652.

47. See 7 ENCY. OF EV. 941, et seq.; 10 ENCY. OF EV. 564.

[a] That street cars are easily and readily stopped. *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179, 28 Pac. 829. See 7 ENCY. OF EV. 945.

48. *Ia.*—*Clark v. Iowa Cent. R. Co.*, 162 Iowa 630, 144 N. W. 332 (cost of board in action for death); *Hoyt v. Chicago, M. & St. P. Ry. Co.*, 117 Iowa 296, 90 N. W. 724, damages in eminent

domain proceedings. *Kan.*—*Missouri River R. Co. v. Richards*, 8 Kan. 101. *Mass.*—*Bradford v. Cunard S. S. Co.*, 147 Mass. 55, 16 N. E. 719; *Patterson v. Boston*, 20 Pick. 159. *Neb.*—*Chicago, B. & Q. R. Co. v. Kravenbuhl*, 65 Neb. 889, 21 N. W. 880, 59 L. R. A. 920. *N. J.*—*Compare De Gray v. New York & N. J. Tel. Co.*, 68 N. J. L. 454, 53 Atl. 200.

[a] "Evidence that a sick person is kept and cared for at a private house other than his home justifies a finding that he is there upon expense." *McGarrahan v. New York, N. H. & H. R. R. Co.*, 171 Mass. 211, 50 N. E. 610.

49. *Houston & T. C. R. Co. v. Maxwell*, 61 Tex. Civ. App. 80, 128 S. W. 160.

[a] "Should a witness undertake to state what would compensate a party for physical or mental suffering in such case, he would simply be giving his opinion in a matter about which, if the circumstances have been proven, he is in no better position to form a correct conclusion than are the jury." *Houston & T. C. R. Co. v. Maxwell*, 61 Tex. Civ. App. 80, 128 S. W. 160.

50. *McGarrahan v. New York, N. H. & H. R. R. Co.*, 171 Mass. 211, 50 N. E. 610; *Memphis Cotton Oil Co. v. Tolbert* (Tex. Civ. App.), 171 S. W. 309; *Houston & T. C. R. Co. v. Maxwell*, 61 Tex. Civ. App. 80, 128 S. W. 160; *Missouri, K. & T. Ry. Co. v. Vance* (Tex. Civ. App.), 41 S. W. 167.

[a] Mental suffering may be inferred by the jurors from their knowledge of human nature. *Western Union Tel. Co. v. Chilson* (Tex. Civ. App.), 168 S. W. 878.

51. *Standard Oil Co. v. Reagan*, 15 Ga. App. 571, 84 S. E. 69; *Rice v.*

(C.) MATTERS THE SUBJECT OF EXPERT TESTIMONY.—In considering matters which have been the subject of expert testimony jurors are not bound to find in accordance with such testimony but are to consider it in the light of their common knowledge and general understanding.⁵² In estimating the reasonable value of professional services the jury may consider their own knowledge and experience.⁵³ They are not bound to take the opinion of real estate experts in determining the value of land to be condemned,⁵⁴ but if the evidence in the case is entirely uncontradicted they cannot ignore it and form an independent conclusion as to their value.⁵⁵

(D.) CREDIBILITY OF EVIDENCE.—In weighing the evidence and determining its credibility, jurors may use the general knowledge which they have gained from observation and experience.⁵⁶ According to

Norfolk-Southern R. Co., 167 N. C. 1, 82 S. E. 1034.

52. U. S.—The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. ed. 937; Chicago, M. & St. P. Ry. Co. v. Moore, 166 Fed. 663, 668, 92 C. C. A. 357, 23 L. R. A. (N. S.) 962; La Fayette Bridge Co. v. Olsen, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33. Ill. McReynolds v. Burlington & O. R. Ry. Co., 106 Ill. 152. Ky.—Morehead's Trustee v. Anderson, 125 Ky. 77, 100 S. W. 340. Minn.—Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842; Johnson v. Chicago, B. & N. R. Co., 37 Minn. 519, 35 N. W. 438. Mo. Rose v. Spies, 44 Mo. 20.

[a] "They should not have been instructed to accept the conclusions of the professional witnesses, in place of their own, however much that testimony may have been entitled to consideration. The judgment of witnesses, as a matter of law, is in no case to be substituted for that of the jurors." Head v. Hargrave, 105 U. S. 45, 26 L. ed. 1028.

[b] An instruction that in such cases, the jury is not confined to the evidence of the expert witnesses should not be given as it would be in effect, to discredit such testimony. Morehead's Trustee v. Anderson, 125 Ky. 77, 100 S. W. 340.

Weight of Expert Testimony.—See 5 ENCY. OF EV. 637.

53. U. S.—Head v. Hargrave, 105 U. S. 45, 26 L. ed. 1028. Kan.—Bentley v. Brown, 37 Kan. 14, 14 Pac. 434; Anthony v. Stinson, 4 Kan. 211. Ky. Adams Express Co. v. James, 164 Ky. 484, 175 S. W. 1012; Morehead's Trustee v. Anderson, 125 Ky. 77, 100 S. W.

340. Minn.—Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842.

54. Ill.—Green v. Chicago, 97 Ill. 370. Kan.—Chicago, K. & W. R. Co. v. Drake, 46 Kan. 568, 26 Pac. 1039. Mich.—Toledo, A. A. & G. T. R. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271. See 5 ENCY. OF EV. 212.

55. Wood v. Barker, 49 Mich. 295, 13 N. W. 597.

56. Ala.—Sloss-Sheffield S. & I. Co. v. Hutchinson, 144 Ala. 221, 40 So. 114. Cal.—Baker v. Borello, 136 Cal. 160, 68 Pac. 591. Colo.—Denver & R. G. R. Co. v. Warring, 37 Colo. 122, 86 Pac. 305; Mutual Life Ins. Co. v. Good, 25 Colo. App. 204, 136 Pac. 821. Fla. Marshall v. State, 54 Fla. 66, 44 So. 742; Morrison v. State, 42 Fla. 149, 28 So. 97. Ga.—White v. Hammond, 79 Ga. 182, 4 S. E. 102. Ill.—McReynolds v. Burlington & O. R. Ry. Co., 106 Ill. 152; Kitzinger v. Sanborn, 70 Ill. 146; Ottawa Gas Light & C. Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263. Ia. Purcell v. Tibbles, 101 Iowa 24, 69 N. W. 1120. Me.—Lunney v. Inhab. of Shapleigh, 112 Me. 172, 90 Atl. 496. See Douglass v. Trask, 77 Me. 35. Mass.—Parks v. Boston, 15 Pick. 198. Minn.—Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842. Ore. Willis v. Lance, 28 Ore. 371, 43 Pac. 384. S. D.—State v. Bjelkstrom, 20 S. D. 1, 104 N. W. 481. Tex.—Melton v. State, 71 Tex. Crim. 130, 158 S. W. 550. See Hobrecht v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.), 141 S. W. 579. Wis.—Solberg v. Robbins Lumb. Co., 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790; Stiles v. Neillsville Milling Co., 87 Wis. 266, 58 N. W. 411; Johnson v. Boorman, 63

some authorities this knowledge must be knowledge that is common to all the jurors,⁵⁷ but other courts hold that this is not necessary.⁵⁸

(E.) CREDIBILITY OF WITNESSES.—In exercising their function of determining the credibility of witnesses, jurors are to be governed by those characteristics and peculiarities of the witnesses while testifying which by common consent are the tests of honest and truthful witnesses.⁵⁹ It has been held that a juror who has knowledge of facts affecting the credibility of a witness, may use this knowledge in formulating his own opinion of the credibility of the witness⁶⁰ although

Wis. 268, 22 N. W. 514. Compare Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

[a] "Jurors are not authorized to consider any evidence except such as is given at the trial, but they have the right to test its truth and weight by their general knowledge derived from experience and observation in their relations with others." Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 50 N. E. 760.

[b] "A person is not supposed to forget everything he ever knew and become an automaton when he is sworn as a juror. He may make use of the intelligence with which he is endowed and the knowledge he has gained for the legitimate purpose of passing upon the credibility of the evidence." Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790.

57. Craver v. Hornburg, 26 Kan. 94; Clark v. Ford, 7 Kan. App. 332, 51 Pac. 938; Schmidt v. New York U. M. F. Ins. Co., 1 Gray (Mass.) 529.

58. Solberg v. Robbins Lumb. Co., 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790, disapproving Northern Supply Co. v. Wangard, 123 Wis. 1, 100 N. W. 1066, 107 Am. St. Rep. 984.

[a] Reason for the Rule.—"Usually our juries are cosmopolitan in character, being made up of the farmer, the mechanic, the business man, and the ordinary laborer. It is largely because juries are selected from all the walks of life that they ordinarily make such desirable triers of fact. Some jurors on almost every panel are at least apt to have some knowledge that is not common to all the jurors, and which may be a valuable aid in separating false or mistaken testimony from that which is true. . . . Must they divest

themselves of this knowledge, because it is not common to all the jurors? We do not think so. Looking at the question from the practical point of view, they cannot do so, and there is little use in building up a theoretical rule of law that will not, and in fact cannot, work when it is put to practical application." Solberg v. Robbins Lumber Co., 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790.

59. U. S.—Nyback v. Champagne Lumb. Co., 109 Fed. 732, 48 C. C. A. 632. Ind.—Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 50 N. E. 760; Jenney Elec. Co. v. Branham, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 395; Renard v. Grande, 29 Ind. App. 579, 64 N. E. 644. Neb.—Falls City v. Sperry, 68 Neb. 420, 94 N. W. 529.

60. State v. Jacob, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897; McKain v. Love, 2 Hill (S. C.) 506, 27 Am. Dec. 401.

Imparting such knowledge to fellow jurors, see *supra*, IX, J, 5, b, (II).

[a] "The credibility of testimony is a question exclusively for the jury and we do not see how it is possible for a juror in considering that question to exclude from his mind his own knowledge of the character of the witnesses. The question is, what impression does the testimony make upon the minds of the jurors, and that impression must necessarily be affected by their own knowledge of the character of the witnesses from whom such testimony proceeds. We suppose that it rarely, if ever, happens that the character of at least some of the witnesses is not known to some or all of the jurors, and we do not see how any rule of law can prevent such knowledge from having its weight. If a fact is testified to by a witness whom the jurors know to be of such an infamous

such knowledge is not common to all the jurors. There are, however, authorities to the contrary.⁶¹

K. SENDING PAPERS AND ARTICLES TO THE JURY ROOM.—1. In General.⁶²—The practice in trials at common law was to refuse to allow the jury to take with it upon retirement, papers which had been introduced in evidence,⁶³ at least if they were not under seal.⁶⁴ Under the modern practice, in the absence of statute, the propriety of such action rests largely in the discretion of the trial court.⁶⁵

2. Time and Manner of Delivery to Jury.—The better practice is to deliver all papers to the jury at the close of the trial and in the presence of the parties and their counsel.⁶⁶ If not taken out by the jury when they retire, such documents may properly be sent⁶⁷ to them

character as to render him totally unworthy of belief, it is difficult to understand how any rule of law can compel a jury to believe that which they cannot believe. The constitution of the human mind renders such a rule as that contended for utterly impracticable." *State v. Jacob*, 30 S. C. 131, 8 S. E. 698, 14 Am. St. Rep. 897.

61. *Ga.*—*Collins v. State*, 94 Ga. 394, 19 S. E. 243; *Pettyjohn v. Liebscher*, 92 Ga. 149, 17 S. E. 1007; *Chattanooga R. & C. R. Co. v. Owen*, 90 Ga. 265, 15 S. E. 853, *overruling Howard v. State*, 73 Ga. 83; *Head v. Bridges*, 67 Ga. 227; *Anderson v. Tribble*, 66 Ga. 584. *Mass.*—*Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray 529. *Wis.* *Johnson v. Superior Rapid Tr. R. Co.*, 91 Wis. 233, 64 N. W. 753.

62. See 5 ENCY. OF EV. 459.

63. *State v. Young*, 134 Iowa 505, 110 N. W. 292.

64. *Neb.*—See *Langworthy v. Connelly*, 14 Neb. 340, 15 N. W. 737, 45 Am. Rep. 117. *N. J.*—*State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328. *Pa.*—*Alexander v. Jameson*, 5 Binn. 238. *W. Va.*—*State v. Stover*, 64 W. Va. 668, 63 S. E. 315.

[a] "The common-law rule was that jurors were allowed to take with them in their deliberations only such instruments as were under seal, and that they were not permitted to take with them any unsealed papers excepting by consent of the parties. The reason for this, according to Lord Hale and Lord Gilbert was, that jurors were supposed to be, and for the most part were, unlettered men. They could not read. A writing conveyed to them nothing. But in the case of sealed instruments, as these jurors were drawn

from the vicinage, they were quite apt to be familiar with the armorial bearings of their neighborhood great from which the seals were derived. An instrument under seal, therefore, spoke for itself, and the jurors were permitted to take such instruments with them, not for the purpose of reading the instrument itself, but rather for the purpose of verifying their recollection of the seal and testing its genuineness. . . . But in the case of other exhibits not involving a knowledge of reading or writing, it seems to have been a matter of discretion with the court to allow the jury to take them into the jury room in aid of their deliberations." *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313.

65. See *State v. Young*, 134 Iowa 505, 110 N. W. 292, and the sections following.

66. *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527.

[a] In the Presence of the Accused. "The correct practice is that the indictment, the written instructions of the court, or other writings proper to be given into the hands of the jury upon their retirement from the presence of the court, or afterwards, should be delivered to them in the presence of the prisoner and his counsel, that objection may be made at that time, if there be objection." *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527.

See in general, *supra*, IX, E.

67. *Smith v. Holcomb*, 99 Mass. 552.

[a] Taking jury into the courtyard to inspect the hide of a steer, alleged to have been stolen, the hide having been introduced in evidence, was proper. *State v. Squirrel Coat*, 32 S. D. 569, 143 N. W. 958.

afterwards, on receiving a request for them,⁶⁸ or they may be recalled and given the document.⁶⁹ While the documents should preferably be first read in the courtroom, failure to do so is not error.⁷⁰

3. **Pleadings.**—a. *In General.*—It rests largely in the discretion of the court whether pleadings shall be sent out with the jury.⁷¹ The practice is one which is often condemned.⁷² It is not reversible error,⁷³

As to communications between judge and jury, see *supra*, IX, E.

68. *Peterson v. Haugen*, 34 Iowa 395. See *supra*, IX, E, 1.

69. *Findley v. People*, 1 Mich. 234 (which is the better practice); *Flanders v. Colby*, 28 N. H. 34.

[a] **The conduct of the court in recalling the jury and having them examine the evidence (bullets) in open court instead of granting their request that the articles be sent to the jury room has been strongly commended.** "By this course every possibility of mistake or any exchange of the bullets was safely guarded." *Potts v. State*, 56 Tex. Crim. 39, 118 S. W. 535.

Reading testimony and recalling witnesses after submission of case to jury, see *supra*, IX, L.

70. *Winters v. United States*, 201 Fed. 845, 120 C. C. A. 175. Compare *People v. Thornton*, 74 Cal. 482, 16 Pac. 244.

[a] **Obscene Letters.**—In *Winters v. United States*, 201 Fed. 845, 120 C. C. A. 175, the letters in question were of an obscene character. It is said: "The letters were introduced in evidence on the trial, seen and inspected by the defendant, and we think the mere matter of the letters being taken by the jury to be read in their room while deliberating upon the case, rather than being read to the jury or by the jury on the trial of the case, was a matter which defendant could waive. It would be better practice, however, to have the letters either read to the jury, or given to the jury and each one of the jurors required to read them while the case was on trial rather than to have them take them to the jury room, to be there first read."

71. *Chicago & E. R. Co. v. Ohio City Lumb. Co.*, 214 Fed. 751, 131 C. C. A. 57; *Chicago City Ry. Co. v. Reddick*, 139 Ill. App. 160.

72. Cal.—*Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722. Ill.—*Elgin, A. & S. Tr. Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436. Ia.—*Mayo v. Halley*, 124

Iowa 675, 100 N. W. 529. Kan.—*Kansas City, Ft. S. & M. Ry. Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887. Md.—*Hitchins v. Frostburg*, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422. Minn.—*Mattson v. Minnesota & N. W. R. Co.*, 98 Minn. 296, 108 N. W. 517. Mo.—*Blue-dorn v. Missouri Pac. Ry. Co.*, 121 Mo. 258, 25 S. W. 943. N. Y.—*Raynolds v. Vinier*, 125 App. Div. 18, 109 N. Y. Supp. 293.

[a] "The declaration is not evidence. It is a technical legal document, requiring a knowledge of common-law pleading to correctly interpret, and it cannot be intelligently applied to facts in issue without interpretation. It would seem to us that ordinarily a declaration would be more liable to confuse than enlighten the jury. The instructions upon the law of the case generally include sufficient explanation as to the relation of the issues joined by the pleadings to the facts." *Chicago City Ry. Co. v. Reddick*, 139 Ill. App. 160.

[b] "Properly the jury have nothing to do with the pleadings, and argument directed to them should be addressed to the court. They are often drawn in technical language which may be easily misunderstood by a juror. In some instances they contain allegations with reference to matter which has been withdrawn or excluded. Occasionally, in certain kinds of actions, pleadings contain denunciatory matter and a profusion of adjectives which might improperly influence jurors." *Mattson v. Minnesota & N. W. R. Co.*, 98 Minn. 296, 108 N. W. 517.

73. Cal.—*Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722. Conn.—*State v. Tucker*, 75 Conn. 201, 52 Atl. 741. Ill.—*Hanchett v. Haas*, 219 Ill. 546, 76 N. E. 845; *Elgin A. & S. Tr. Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *City of East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. E. 1077; *Austerlode v. Chicago City Ry. Co.*, 190 Ill. App. 92. Ind.—*Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Summers v. Great-*

however, to do so, when requested by either party,⁷⁴ but neither is it error to refuse to send them out.⁷⁵ The indictment, in a criminal case, may properly be sent to the jury.⁷⁶

A few courts hold that it is improper to permit the jury to take pleadings with them,⁷⁷ unless they have been placed in evidence to prove some particular fact and are considered as exhibits.⁷⁸ They should never be sent out for the purpose of allowing or compelling the jury to ascertain the issues in the case,⁷⁹ nor unless the court has first told the jury what are the real issues in the case as presented by the pleadings.⁸⁰ If they are lengthy, prolix, and complex, they should not go out,⁸¹ but if short and easily understandable, they may

house, 87 Ind. 205; *Bell v. Pavey*, 7 Ind. App. 19, 33 N. E. 1011. **Ia.** *State Bank v. Brewer*, 100 Iowa 576, 69 N. W. 1011; *Dorr v. Simerson*, 73 Iowa 89, 34 N. W. 752; *McGinty v. City of Keokuk*, 66 Iowa 725, 24 N. W. 506. **La.**—*Wakeman v. Marquard*, 5 Mart. (N. S.) 265. **Md.**—*Cahill v. Baltimore*, 129 Md. 17, 98 Atl. 235. **Minn.**—*Brazil v. Moran*, 8 Minn. 236. **Mo.**—*Bluedorn v. Missouri Pac. Ry. Co.*, 121 Mo. 258, 25 S. W. 943. *Compare* *Blackmore v. Missouri Pac. Ry. Co.*, 162 Mo. 455, 62 S. W. 993. **N. H.**

Rich v. Flanders, 39 N. H. 304. **S. C.** *Willoughby v. Willoughby*, 70 S. C. 516, 50 S. E. 208. **Tex.**—*International & G. N. Ry. Co. v. Leak*, 64 Tex. 654. **74.** *Hanchett v. Haas*, 125 Ill. App. 111 (*affirmed*), 219 Ill. 546, 76 N. E. 845; *North Peoria v. Rogers*, 98 Ill. App. 355. **75.** *Hitchins v. Frostburg*, 68 Md. 100, 11 Atl. 826, 6 Am. St. Rep. 422. See *Muncie & P. Tr. Co. v. Hall*, 173 Ind. 95, 89 N. E. 484; *Branham v. Berry*, 4 Ky. L. Rep. 894.

[a] Where by oversight the pleadings were not sent out, and this was discovered after the verdict was read but before it had been received or filed and the court thereupon sent the jury out again with the pleadings and they returned with the same verdict, the error, if any, was cured. *Matthews v. City of Spokane*, 50 Wash. 107, 96 Pac. 827. **76. Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Stout v. State*, 90 Ind. 1. **La.**—See *State v. Williams*, 34 La. Ann. 959. **Tex.**—See *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194. **Va.**—*Bowles v. Com.*, 103 Va. 816, 48 S. E. 527. **W. Va.**—See *State v. Stover*, 64 W. Va. 668, 63 S. E. 315.

[a] Affidavits filed with an information should not be sent to the jury. *State v. Clark*, 34 Kan. 289, 8 Pac. 528.

77. *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060; *Harding v. Norwich Union Fire Ins. Co.*, 10 S. D. 64, 71 N. W. 755; *Pulos v. Denver & R. G. R. Co.*, 37 Utah 238, 107 Pac. 241. **78.** See *Pulos v. Denver & R. G. R. Co.*, 37 Utah 238, 107 Pac. 241. **79.** **Ia.**—*Swanson v. Allen*, 108 Iowa 419, 79 N. W. 132. **Kan.**—*Kansas City, Ft. S. & M. Ry. Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887. See *Culbertson v. Sheridan*, 93 Kan. 268, 144 Pac. 268, 271. **Minn.**—*Mattson v. Minnesota & N. W. R. Co.*, 98 Minn. 296, 108 N. W. 517. **Mo.**—*Blackmore v. Missouri Pac. Ry. Co.*, 162 Mo. 455, 62 S. W. 993; *Sherwood v. Grand Ave. Ry. Co.*, 132 Mo. 339, 33 S. W. 774; *Britton v. St. Louis*, 120 Mo. 437, 25 S. W. 366; *Dassler v. Wisley*, 32 Mo. 498.

[a] "It is the duty of the court to evolve from the pleadings and the evidence the issues to be passed upon by the jury. The verdict is the jurors' response to the charge of the court, not to the pleadings." *International & G. N. Ry. Co. v. Leak*, 64 Tex. 654. [b] Counsel May Have the Issues Presented in the Instructions.—*Elgin, A. & S. Tr. Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436. See 13 STANDARD PROC. 779, et seq. **80. Ill.**—*Rink v. St. Louis S. W. Ry. Co.*, 151 Ill. App. 429. **Ia.**—*Dorr v. Simerson*, 73 Iowa 89, 34 N. W. 752; *McGinty v. City of Keokuk*, 66 Iowa 725, 24 N. W. 506. **Kan.**—*Culbertson v. Sheridan*, 93 Kan. 268, 144 Pac. 268.

81. *Kansas City, Ft. S. & M. Ry. Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887.

well be allowed in the jury room.⁸² An answer which consists of inconsistent denials should be kept from the jury.⁸³ If the instructions are so framed as to be meaningless without a consideration of the complaint, it is proper to send it out.⁸⁴ As a general rule, when any of the pleadings are permitted to go to the jury, they should all go, but where there is no proof to support some of the counts, such counts should not be sent out, at least without some explanation or instruction.⁸⁵ Pleadings which have been superseded should not be sent out,⁸⁶ and where separate counts or defenses have been stricken out by the court, or demurrers thereto sustained, the pleadings should never be sent out until such counts or defenses have been detached or removed;⁸⁷ it is not enough that they are cancelled and marked "stricken out."⁸⁸ Error in this particular is not, however, ordinarily prejudicial.⁸⁹ The fact that exhibits are attached to the pleadings does not render it error for the court to submit the pleadings to the jury,⁹⁰ at least where they are properly cautioned as to the use they are to make of them;⁹¹ and if the exhibit is a document which has also been introduced in evidence, there is an added reason why it should be submitted.⁹² A former verdict in a civil case attached to the pleadings should be detached or concealed in some way before they are sent out,⁹³ but failure to do so may not constitute prejudicial

82. *Culbertson v. Sheridan*, 93 Kan. 268, 144 Pac. 268, 271; *Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997.

83. *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060.

84. *Boyrezka v. Janowski*, 182 Ill. App. 97.

[a] "In the present instance it was peculiarly important that the jury have the plaintiff's statement before them, not only because it showed the specific items of her claim, but because the charge of the court was directly based upon it. Going over it item by item, attention was called to the evidence bearing on each, and the discrepancies between the amounts proved and those claimed pointed out. Certain of them also were directed to be entirely disregarded, as being without evidence to sustain them. The statement was thus virtually incorporated into the charge, and it is difficult to see how the jury could have followed and applied their instructions without having it before them." *Tridell v. Munhall*, 124 Fed. 802.

85. *Lee v. Toledo*, St. L. & W. R. Co., 184 Ill. App. 144.

86. Pa.—*Hall v. Rupley*, 10 Pa. 231. Tex.—*Hall v. Cook* (Tex. Civ. App.), 117 S. W. 449. Wash.—*Swadling v.*

Barneson, 21 Wash. 699, 59 Pac. 506, does not constitute error.

87. *Elgin, A. & S. Tr. Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436; *Chicago City Ry. Co. v. Reddick*, 139 Ill. App. 160; *North Peoria v. Rogers*, 98 Ill. App. 355; *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683. But see *Steele v. Swayne*, 4 Ky. L. Rep. 721.

88. *Havlik v. St. Paul Fire & Marine Ins. Co.*, 87 Neb. 427, 127 N. W. 248; *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683.

89. Ill.—*West Chicago St. R. Co. v. Buckley*, 200 Ill. 260, 65 N. E. 708. Neb.—*Havlik v. St. Paul Fire & Marine Ins. Co.*, 87 Neb. 427, 127 N. W. 248. Tex.—See *Joy v. Liverpool & L. & G. Ins. Co.*, 32 Tex. Civ. App. 433, 74 S. W. 822.

90. U. S.—*Tridell v. Munhall*, 124 Fed. 802, applying Pennsylvania practice. Ind.—*Snyder v. Braden*, 58 Ind. 143. La.—*Wakeman v. Marquard*, 5 Mart. (N. S.) 265. Pa.—*Odd Fellows' Hall v. Masser*, 24 Pa. 507, 64 Am. Dec. 675.

91. *Dawson v. Briscoe*, 97 Ga. 408, 24 S. E. 157; *Mayo v. Halley*, 124 Iowa 675, 100 N. W. 529.

92. *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596.

93. *Dawson v. Briscoe*, 97 Ga. 408,

error,⁹⁴ if it is not considered by the jurors,⁹⁵ or if they are properly cautioned in regard to its use,⁹⁶ unless it appears that it was fraudulently and designedly delivered to them to influence their verdict.⁹⁷ In criminal cases, the fact that a verdict in a former trial,⁹⁸ or a verdict of guilty found against a codefendant tried under the same indictment,⁹⁹ is attached to the indictment which is sent to the jury, is not ground for a new trial, at least where no objection is made at the time;¹ though it is better practice to conceal the verdict.²

The fact that a pleading contains admissions by a party does not require the court to send it to the jury.³ The jury should not be instructed that it is their duty to read the pleadings.⁴ Where a statute authorizes papers read in evidence to be taken out by the jury and is silent as to pleadings, this does not preclude the court from sending them out, in its discretion,⁵ though it may also properly refuse to do so.⁶

Bills of particulars have sometimes been kept from the jury,⁷ although they are more often sent out with the pleadings.⁸ Various other

24 S. E. 157; *Georgia P. Ry. Co. v. Dooley*, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342.

94. See *Com. v. Dow*, 11 Gray (Mass.) 316.

95. *Smalls v. State*, 105 Ga. 669, 31 S. E. 571; *Fulton County v. Phillips*, 91 Ga. 65, 16 S. E. 260; *Georgia P. Ry. Co. v. Dooley*, 86 Ga. 294, 12 S. E. 923, 12 L. R. A. 342.

96. *Dawson v. Briscoe*, 97 Ga. 408, 24 S. E. 157.

97. *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571; *St. Louis, I. M. & S. Ry. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 653.

98. *Conn.—State v. Tucker*, 75 Conn. 201, 52 Atl. 741, verdict of the trial in lower court. *Ga.—Kincaid v. State*, 13 Ga. App. 683, 79 S. E. 770. *Tex. Lancaster v. State*, 36 Tex. Crim. 16, 35 S. W. 165. But see *Hjeronymous v. State*, 47 Tex. Crim. 366, 83 S. W. 708. *Va.—Forbes v. Com.*, 90 Va. 550, 19 S. E. 164. *W. Va.—State v. Stover*, 64 W. Va. 668, 63 S. E. 315. See *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

Contra, *Ogden v. United States*, 112 Fed. 523, 50 C. C. A. 380.

99. *Sanders v. State*, 131 Ala. 1, 31 So. 564; *State v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. Rep. 875.

1. *State v. Tucker*, 75 Conn. 201, 52 Atl. 741.

2. *Green v. State*, 38 Ark. 304; *At-*

kins v. State, 16 Ark. 568 (record of committing magistrate should be concealed); *Harvey v. State*, 35 Tex. Crim. 545, 34 S. W. 623.

3. *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486.

[a] **Facts Admitted in the Pleadings Should Be Stated by the Court.** *Branthover v. Monarch Elev. Co.*, 33 N. Dak. 454, 156 N. W. 927.

4. *International & G. N. Ry. Co. v. Leak*, 64 Tex. 654.

5. *City of East Dubuque v. Burhyte*, 173 Ill. 553, 50 N. E. 1077. *Compare Harding v. Norwich Union Fire Ins. Soc.*, 10 S. D. 64, 71 N. W. 755.

6. *Spaulding v. Saltiel*, 18 Colo. 86, 31 Pac. 486; *Mattson v. Minnesota & N. W. R. Co.*, 98 Minn. 296, 108 N. W. 517.

7. *Citizens' Sav. L. & Bldg. Assn. v. Weaver*, 127 Ill. App. 252.

8. *Ill.—Cooke v. People*, 231 Ill. 9, 82 N. E. 863. *Ind.—See Haas v. Cones & Son Mfg. Co.*, 25 Ind. App. 469, 58 N. E. 499; *M'Creary v. Hood*, 5 Blackf. 316. *Pa.—See Odd Fellows' Hall v. Masser*, 24 Pa. 507, 64 Am. Dec. 675.

[a] In a criminal case, under a general conspiracy indictment, a bill of particulars is for the purpose of notifying a defendant of the specific charge he is to meet and it may properly be given to the jury. *Cooke v. People*, 231 Ill. 9, 82 N. E. 863.

papers, properly a part of the files of the case may under differing circumstances be sent to the jury,⁹ or kept from them.¹⁰

b. *Manner of Use by Jury.*—Pleadings may be used by the jury for the purpose of refreshing their memory as to any fact to which they are pertinent,¹¹ but not as evidence in the case, beyond the admissions which may be contained in them.¹² The use to which the jury may put them should be regulated by instructions.¹³

4. *Instructions.*—There is much diversity in the practice in regard to allowing the jury to take with them the instructions given by the court. In the absence of a controlling statute, it is discretionary with the court to send out with the jury written instructions given in the case.¹⁴ In some jurisdictions it is held to be improper to send

9. See cases following.

[a] *Appeal papers* in an appeal case may be sent out by the court. *Davis v. Searle*, 8 Ga. App. 553, 69 S. E. 1086. See *Shuman v. Smith*, 100 Ga. 415, 28 S. E. 448.

10. See cases following.

[a] *Notice of withdrawal from the case by attorney* should not be sent out with the other papers. *Palmer v. Smith*, 76 Conn. 210, 56 Atl. 516.

[b] *Pauper affidavit* stating that plaintiffs had lost on a previous trial and were too poor to appeal was through inadvertence, not detached from the pleading. This was held not prejudicial error. *Southern Ry. Co. v. Coursey*, 115 Ga. 602, 41 S. E. 1013.

[c] *An affidavit used on a motion* to set aside a default judgment should not be sent out to the jury. *Nelson v. Humes*, 12 Ill. App. 52.

[d] *Award of damages by appraisers* was not sent out in a condemnation case. *Muncie & P. Tr. Co. v. Hall*, 173 Ind. 95, 89 N. E. 484.

[e] *Marginal notes* made by the judge on special questions sent to the jury, should first be erased. *Steadwell v. Morris*, 61 Ga. 97.

11. *Alexander v. Wheeler*, 69 Ala. 332.

12. *Drew v. Andrews*, 8 Hun (N. Y.) 23.

13. *Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *Bell v. Pavey*, 7 Ind. App. 19, 33 N. E. 1011.

[a] "The court specifically directed the jury that, while they would have the pleadings before them in the jury room, all claims made therein by either party, not submitted by the instructions, were withdrawn from their consideration, and that they were permitted to have the pleadings, not for

the purpose of finding what the issues were, but only that they might get the narrative statement by the parties of such of their claims as were by the instructions submitted to the jury for consideration, and they were cautioned that the pleadings were not evidence for either party." *Mayo v. Halley*, 124 Iowa 675, 100 N. W. 529.

14. *U. S.*—*Garst v. United States*, 180 Fed. 339, 103 C. C. A. 9. *Ark.*—*Culbreath v. State*, 96 Ark. 177, 131 S. W. 676 (refused); *Benton v. State*, 30 Ark. 328; *Hurley v. State*, 29 Ark. 17. *Fla.*—*Dixon v. State*, 13 Fla. 636. *Compare Holton v. State*, 2 Fla. 476. *Ga.*—See *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50, 12 S. E. 216, *criticising Gholston v. Gholston*, 31 Ga. 625. *La.*—*State v. Riggio*, 124 La. 614, 50 So. 600. *Mo.*—*State v. Tompkins*, 71 Mo. 613. *Mont.*—*Hammond v. Foster*, 4 Mont. 421, 1 Pac. 757. *Neb.*—*Langworthy v. Connelly*, 14 Neb. 340, 15 N. W. 737, 45 Am. Rep. 117. *N. C.*—*Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625, on request of the jury. *Okla.*—*Lowenstein v. Holmes*, 40 Okla. 33, 135 Pac. 727. *Ore.*—*Smith v. Lownsdale*, 6 Ore. 79, sending instructions out is bad practice. *Utah.*—*Seoville v. Salt Lake City*, 11 Utah 60, 39 Pac. 481. *Va.*—*Bowles v. Com.*, 103 Va. 816, 48 S. E. 527, it is the universal practice. *Wash.*—*Edwards v. Washington Territory*, 1 Wash. Ter. 195. *W. Va.*—See *State v. Stover*, 64 W. Va. 668, 63 S. E. 315, they "are generally carried out." *Wis.*—*Wood v. Aldrich*, 25 Wis. 695.

[a] *Conditions Under Which the Practice Is Approved.*—"The reason given by the trial judge for allowing the charge to go out in this instance, was that it had in it many statements

them to the jury.¹⁵ Statutes, in still other jurisdictions, expressly provide that instructions shall be given to the jury on their retirement.¹⁶ Under such statutes it is only such instructions as are requested to be given in writing before argument commences, which come within the terms of the statute.¹⁷ If the statute merely states that instructions "may" be sent out, the provision is construed as permissive and not mandatory.¹⁸ Instructions refused by the court should not be sent to the jury,¹⁹ but if such instructions were those submitted

as to amounts, etc., which the jury could not remember and for which they would want to make reference to the charge. We find this to be so, and as no objection was made by counsel to sending the charge out, we think it is no cause for a new trial. Indeed some of us regard it as a wholesome practice for every case." *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50, 12 S. E. 216.

[b] **Review.**—The exercise of the discretion of the trial court is not reviewable "upon writ of error except for such obvious abuse of discretion as might exist in permitting a jury to take instructions framed upon one assumption of facts proved, and refusing to permit them to take those framed on the converse assumption." *Garst v. United States*, 180 Fed. 339, 103 C. C. A. 469.

15. **Fla.**—*Holton v. State*, 2 Fla. 476. *Compare* *Dixon v. State*, 13 Fla. 636. **Ga.**—*Gholston v. Gholston*, 31 Ga. 625. But see *Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50, 12 S. E. 216. **Ind.**—*Hall v. State*, 8 Ind. 439; *Jones v. Austin*, 26 Ind. App. 399, 59 N. E. 1082. **Mich.**—*Hewitt v. Flint & P. M. R. Co.*, 67 Mich. 61, 34 N. W. 650.

[a] In a criminal case sending instructions to the jury has been held equivalent to recharging the jury at their room and in the absence of the defendant and his counsel. *Holton v. State*, 2 Fla. 476.

[b] **Additional instructions** should not be sent to the jury in writing but they should be called into court and receive them orally. *Low v. Freeman*, 117 Ind. 341, 20 N. E. 242; *Smith v. McMillen*, 19 Ind. 391. And see *supra*, IX, E.

[c] **The court should not inquire of counsel** in the presence of the jury whether they are willing that the instructions should go out. *Terry v. Bufington*, 11 Ga. 337, 56 Am. Dec. 423.

16. **Ala.**—*Wilson v. State*, 171 Ala.

25, 54 So. 572; *Ragland v. State*, 125 Ala. 12, 27 So. 983; *Orr v. State*, 117 Ala. 69, 23 So. 696; *Beard v. Ryan*, 78 Ala. 37; *Miller v. Hampton*, 37 Ala. 342. See *Green v. State*, 143 Ala. 2, 39 So. 362. **Idaho.**—*Hilbert v. Spokane International Ry. Co.*, 20 Idaho 54, 116 Pac. 1116. **Mo.**—*State v. Thompson*, 83 Mo. 257, *overruling* *State v. Phelps*, 74 Mo. 128; *State v. Butterfield*, 75 Mo. 297. *Compare* *State v. Tompkins*, 71 Mo. 613. **Ohio.**—*Cone v. E. Bright*, 68 Ohio St. 543, 68 N. E. 3; *Foy v. Toledo Consol. St. Ry. Co.*, 10 Ohio Cir. Ct. 151.

[a] **Failure to send them out** through inadvertence, no request being made by counsel, is not prejudicial error. *Grove v. Kansas*, 75 Mo. 672.

[b] **In Alabama** both the general charge and written charges asked for by either party and given must be sent out. *Ragland v. State*, 125 Ala. 12, 27 So. 983.

17. **Griffin v. State**, 34 Ohio St. 299; *Tucker v. Sherman*, 29 Ohio Cir. Ct. 368.

[a] **In Idaho**, written instructions should be sent out with the jury unless one party objects both to the giving of written instructions and also to their being taken out by the jury. *Hilbert v. Spokane International Ry. Co.*, 20 Idaho 54, 116 Pac. 1116.

18. **People v. Dunlop**, 27 Cal. App. 460, 150 Pac. 389 (unless, perhaps, where the jury request it); *State v. Grigg*, 25 Idaho 405, 137 Pac. 371, 138 Pac. 506.

19. **Cal.**—*People v. Cummings*, 57 Cal. 88. **Ind.**—*Wilds v. Bogan*, 57 Ind. 453. **Ia.**—*Carlin v. Chicago, R. I. & P. R. Co.*, 31 Iowa 370. **Me.**—*State v. Kimball*, 50 Me. 409. **Miss.**—*Goode v. Linecum*, 1 How. 281. **Neb.**—*Langworthy v. Connelly*, 14 Neb. 340, 15 N. W. 737, 45 Am. Rep. 117. **Tex.**—*Irvine v. State*, 18 Tex. App. 51.

[a] **In Alabama** (1) charges must be marked "given" or "refused,"

by the complaining party, no prejudice follows.²⁰ If any are sent out, all must go,²¹ but if by inadvertence, a portion of the instructions are left behind by the jury, this does not constitute error, where the court's attention was not called to the matter at the time.²² Annotations on the margins of instructions, of cases supporting them should be removed before the instructions are given to the jury.²³

5. Documentary Evidence. — a. *In General.* — It is largely within the discretion of the trial court whether documentary evidence, introduced at the trial, shall be permitted to be taken out by the jury for examination and consideration during their deliberations²⁴ on the

and both may be taken by the jury. *Miller v. Hampton*, 37 Ala. 342. (2) "It is often just as important for the jury to clearly understand what the law is *not* as to know what it is." *Beard v. Ryan*, 78 Ala. 37.

20. *People v. Cummings*, 57 Cal. 88.

21. *Dixon v. State*, 13 Fla. 636; *Hammond v. Foster*, 4 Mont. 421, 1 Pac. 757.

[a] Where some of the instructions were oral and some in writing, the court properly refused to send the written instructions to the jury. *Garst v. United States*, 180 Fed. 339, 103 C. C. A. 469.

22. *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625; *Thomason v. State*, 71 Tex. Crim. 439, 160 S. W. 359. Compare *Hammond v. Foster*, 4 Mont. 421, 1 Pac. 757.

23. *Sioux City & P. Ry. Co. v. Finlayson*, 16 Neb. 578, 20 N. W. 860, 49 Am. Rep. 724, but failure to do so does not require a reversal.

[a] Not prejudicial if the jury did not have access to the books. *Williams v. St. Louis & S. F. Ry. Co.*, 123 Mo. 573, 27 S. W. 387.

24. Ala.—*Harwell v. State*, 192 Ala. 689, 68 So. 1019; *Shirley v. State*, 144 Ala. 35, 40 So. 269. Ark.—*Harshaw v. State*, 94 Ark. 343, 127 S. W. 745; *Hickman v. Ford & Co.*, 43 Ark. 207; *Hurley v. State*, 29 Ark. 17; *Humphries v. McCraw*, 5 Ark. 61. Cal.—*Powley v. Swensen*, 146 Cal. 471, 80 Pac. 722. Conn.—*State v. Tucker*, 75 Conn. 201, 52 Atl. 741. Ill.—*Dunn v. People*, 172 Ill. 582, 50 N. E. 137. Ia.—*Miller v. Dickinson Co.*, 68 Iowa 102, 26 N. W. 31. Kan.—*Hairgrove v. Millington*, 8 Kan. 480. Ky.—*Watson's Exr. v. Watson*, 137 Ky. 25, 121 S. W. 626; *Taylor v. Com.*, 28 Ky. L. Rep. 1348, 92 S. W. 292. La.—*Littlefield v. Beamis*, 5 Rob. 145, it is not the duty of the jury to

take documents with them. Me.—*Sawyer v. Garcelon*, 63 Me. 25. Mass.—*Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; *Sibley v. Nason*, 196 Mass. 125, 81 N. E. 887, 124 Am. St. Rep. 520, 12 L. R. A. (N. S.) 1173; *Krauss v. Cope*, 180 Mass. 22, 61 N. E. 220; *Boston Dairy Co. v. Mulliken*, 175 Mass. 447, 56 N. E. 711; *Burghardt v. Van Deusen*, 4 Allen 374. Mich.—*Silverstone v. London Assur. Corp.*, 187 Mich. 333, 153 N. W. 802; *Farrell v. Haze*, 157 Mich. 374, 122 N. W. 197; *Canning v. Harlan*, 50 Mich. 320, 15 N. W. 492. But see *People v. Dowdigan*, 67 Mich. 92, 34 N. W. 411 (in criminal cases); *Bulen v. Granger*, 63 Mich. 311, 29 N. W. 718 (but compare *Tubbs v. Dwelling House Ins. Co.*, 84 Mich. 646, 48 N. W. 296); *Kalamazoo Novelty Mfg. Co. v. McAlister*, 36 Mich. 327. Mo.—*State v. Tompkins*, 71 Mo. 613; *Hanger v. Imboden*, 12 Mo. 85; *R. C. Stone Milling Co. v. McWilliams*, 121 Mo. App. 319, 98 S. W. 828. Neb.—*Suiter v. Chicago, R. I. & P. Ry. Co.*, 84 Neb. 256, 121 N. W. 113; *Mercer v. Harris*, 4 Neb. 77. N. Y.—*Schappner v. Second Ave. R. Co.*, 55 Barb. 497; *Paige v. Chedsey*, 4 Misc. 183, 23 N. Y. Supp. 879, 53 N. Y. St. 190. Ohio.—*Osburn v. State*, 7 Ohio 212 (pt. 1). Pa.—*Cavanaugh v. Buehler*, 120 Pa. 441, 14 Atl. 391; *Little Schuylkill Nav., etc. Co. v. Richards' Admr.*, 57 Pa. 142, 98 Am. Dec. 209; *O'Hara v. Richardson*, 46 Pa. 385; *Mullen v. Morris*, 2 Pa. 85; *Alexander v. Jameson*, 5 Binn. 238; *Com. v. Stanley*, 19 Pa. Super. 58. S. C.—*First Presbyterian Church v. Elliott*, 65 S. C. 251, 43 S. E. 674; *Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555; *Means v. Means*, 7 Rich. L. 533. Tex.—*Grayson v. State*, 40 Tex. Crim. 573, 51 S. W. 246; *Biard v. Tyler Bldg. & L. Assn. (Tex. Civ. App.)*, 147 S. W. 1168,

verdict, even against the objection of the adverse party.²⁵ Documents the authenticity of which is the principal issue of the case, may be taken out.²⁶ But instruments which have been altered during the trial by annotations should not be sent out, over the objection of a party,²⁷ and documents introduced to prove a fact which is clearly

held error to refuse to send out letters and telegrams in a fraud case. *Va.*—*Johnson v. Com.*, 102 Va. 927, 46 S. E. 789. *W. Va.*—*First Nat. Bank v. Barker*, 75 W. Va. 244, 83 S. E. 898. *Wis.*—*Starke v. Wolf*, 90 Wis. 434, 63 N. W. 755.

[a] **Duty of Jury.**—"We know of no law that makes it the duty of the jury to carry all the documents and papers submitted to them, into their consultation room. They have a right to do so, and, as a general rule, it is best to have them for reference, but if the jurors remember the contents, we see no more reason for taking them with them than there is for taking witnesses who have given parol evidence." *Littlefield v. Beamis*, 5 Rob. (La.) 145.

[b] **Papers relevant only to issues on which court has given binding instructions** should not be sent to the jury room. *Sweeney v. Darcy*, 21 Mont. 188, 53 Pac. 540.

[c] **If the contents of the document (1) were fully brought to the attention of the jury, it is seldom that prejudice is held to follow from a refusal to send them to the jury** (*Hraha v. Maple Block Coal Co.*, 154 Iowa 710, 135 N. W. 406; *Silverstone v. London Assur. Corp.*, 187 Mich. 333, 153 N. W. 802), (2) or from the action of the court in improperly sending them out. *Ark.*—*Swing v. Arkadelphia Lumb. Co.*, 90 Ark. 394, 119 S. W. 265. *Pa.*—*M'Cully v. Barr*, 17 Serg. & R. 445. *Tex.*—*Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702.

[d] **If irrelevant or incompetent documents be erroneously admitted in evidence, the fact that the court thereafter also allowed them to be sent out to the jury will not necessitate a new trial, unless prejudice is shown to have followed from the action of the court.** *Walker v. Liddell*, 103 Ga. 574, 30 S. E. 204; *Warden v. Warden's Est.*, 22 Vt. 563.

[e] **But if the evidence was material and is likely to have affected the result, the error will be held prejudicial.** *Stoudenmire v. Harper*, 81 Ala.

242, 1 So. 857; *Territory v. Jones*, 6 Dak. 85, 50 N. W. 528, judgment reversed.

[f] **Where the instrument is reroad to the jury instead of being sent to them at their request, no error is committed.** *Ruder v. National Council K. & L. of Sec.*, 124 Minn. 431, 145 N. W. 118.

[g] **In Illinois, the statute relating to practice in civil cases does not govern in criminal proceedings, which are controlled by the common law.** "The common-law rule in criminal cases was, that the jury, when they retired, to deliberate on their verdict, should take with them such books and papers which had been introduced in evidence as the judge presiding should direct." *Dunn v. People*, 172 Ill. 582, 50 N. E. 137.

Use of magnifying glass by jury to inspect documentary evidence, see *supra*, IX, I, 2, e.

25. *Taylor v. Com.*, 28 Ky. L. Rep. 1348, 92 S. W. 292; *Porter v. Mount*, 45 Barb. (N. Y.) 422.

[a] **"The true rule seems to be that where exhibits have been fully proven and admitted in evidence, and their authenticity is unquestioned, and there is no testimony to impeach their contents, it is within the discretion of the trial court to allow them to be taken to the juryroom although objection is made."** *Tubbs v. Dwelling House Ins. Co.*, 84 Mich. 646, 48 N. W. 296.

26. *Ark.*—*Harshaw v. State*, 94 Ark. 343, 127 S. W. 745. *Mich.*—*Adams v. Bowman*, 51 Mich. 189, 16 N. W. 373. *S. C.*—*Gable v. Rauch*, 50 S. C. 95, 27 S. E. 555.

[a] **Where all the evidence on the point is before the jury, a diagram may properly be allowed to go to the jury over the objection that it is incorrect.** *State v. Barwick*, 89 S. C. 153, 71 S. E. 888.

[b] **Writings, the authenticity of which is doubted, should not be sent out.** *Nicholson v. Eureka Lumb Co.*, 156 N. C. 59, 72 S. E. 86, 36 L. R. A. (N. S.) 162.

27. *Chicago & W. I. R. Co. v. Heid-*

established and not the principal issue, may be withheld from the jury room.²⁸

Within the general rule as to discretion fall contracts,²⁹ deeds,³⁰ leases,³¹ letters,³² bills of lading,³³ promissory notes,³⁴ a bond and mortgage,³⁵ due bill,³⁶ market reports or price lists,³⁷ an invoice of goods,³⁸ maps or plats,³⁹ diagrams,⁴⁰ surveyor's report with map attached,⁴¹ account books,⁴² memorandum book,⁴³ memoranda of accounts or measurements,⁴⁴ mortality and annuity tables and books,⁴⁵ a libelous publication which is the subject-matter of the action,⁴⁶ receipts,⁴⁷ written admissions,⁴⁸ confession of crime,⁴⁹ a written stipula-

enreich, 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C, 266, map.

[a] But identifying works may properly be placed after the entries, in books containing numerous entries, which are relevant to the issues. Davis v. State, 91 Ga. 167, 17 S. E. 292.

28. R. C. Stone Milling Co. v. McWilliams, 121 Mo. App. 319, 98 S. W. 828.

29. N. Y.—People v. Formosa, 61 Hun 272, 16 N. Y. Supp. 753, 40 N. Y. St. 861. Tex.—San Antonio & A. P. Ry. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139. Wis.—Starke v. Wolf, 90 Wis. 434, 63 N. W. 755.

30. Cavanaugh v. Buehler, 120 Pa. 441, 14 Atl. 391.

31. Steele v. Swayne, 4 Ky. L. Rep. 721.

32. U. S.—Winters v. United States, 201 Fed. 845, 120 C. C. A. 175. N. H.—Flanders v. Colby, 28 N. H. 34. Pa.—Udderzook v. Com., 76 Pa. 340, "letters, check, due bill and application for insurance." Tex.—Warren v. State, 67 Tex. Crim. 273, 149 S. W. 135. W. Va.—State v. Lewis, 69 W. Va. 472, 72 S. E. 475, Ann. Cas. 1913A, 1203; Cobb v. Dunlevie, 63 W. Va. 398, 60 S. E. 384.

33. Hovey v. Thompson, 37 Ill. 538.

34. Collins v. Frost, 54 Ind. 242; Nott v. Thomson, 35 S. C. 461, 14 S. E. 940.

35. Porter v. Mount, 45 Barb. (N. Y.) 422.

36. Bulen v. Granger, 63 Mich. 311, 29 N. W. 718; Udderzook v. Com., 76 Pa. 340.

37. Peterson v. Haugen, 34 Iowa 395.

38. Hickman v. Ford & Co., 43 Ark. 207.

39. Cal.—Carty v. Boeseke-Dawe Co., 2 Cal. App. 646, 84 Pac. 267, court refused to send out a map. Neb.—Sui-

ter v. Chicago, R. I. & P. Ry. Co., 84 Neb. 256, 121 N. W. 113. N. Y.—Lyceum v. Manhattan Ry. Co., 48 App. Div. 624, 62 N. Y. Supp. 848, refused. Vt.—Wood v. Willard, 36 Vt. 82, 84 Am. Dec. 659.

40. Ala.—Campbell v. State, 23 Ala. 44. Ga.—Western & Atlantic R. R. v. Stafford, 99 Ga. 187, 25 S. E. 656. N. H.—Brown v. Wiggins, 59 N. H. 327. S. C.—State v. Barwick, 89 S. C. 153, 71 S. E. 838. Vt.—State v. Shaw, 73 Vt. 149, 50 Atl. 863.

41. Wardlow v. Harmon (Tex. Civ. App.), 45 S. W. 828.

42. Mass.—Boston Dairy Co. v. Mulliken, 175 Mass. 447, 56 N. E. 711. Mich.—Wonderly v. Helmes Lumb. Co., 56 Mich. 412, 23 N. W. 79, statements of account. Pa.—Com. v. Stanley, 19 Pa. Super. 58, in a criminal case.

43. Davis v. State, 91 Ga. 167, 17 S. E. 292.

44. Hudspeth v. Mears, 92 Ga. 525, 17 S. E. 837; Standard Starch Co. v. McMullen, 100 Ill. App. 82, memoranda of measurements.

45. See Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622.

46. Sanderson v. Bowen, 4 Thomp. & C. (N. Y.) 675; Jackson v. Pittsburgh Times, 152 Pa. 406, 25 Atl. 613, 34 Am. St. Rep. 659, refused.

47. Canning v. Harlan, 50 Mich. 320, 15 N. W. 492 (refused); San Antonio & A. P. Ry. Co. v. Barnett, 12 Tex. Civ. App. 321, 34 S. W. 139.

48. Ia.—McMahon v. Iowa Ice Co., 137 Iowa 368, 114 N. W. 203. Ky.—Taylor v. Com., 28 Ky. L. Rep. 1348, 92 S. W. 292. Mass.—Sibley v. Nason, 196 Mass. 125, 81 N. E. 887, 124 Am. St. Rep. 520, 12 L. R. A. (N. S.) 1173. N. H.—Felch v. Weare, 66 N. H. 582, 27 Atl. 226; Rich v. Flanders, 39 N. H. 304, 339. Pa.—Kline v. First Nat. Bank, 2 Monag. 448, 15 Atl. 433.

49. State v. Knapp, 70 Ohio St. 380,

tion of facts,⁵⁰ former testimony of absent witnesses,⁵¹ a written statement of the pleadings in another suit between different parties but involving the same subject-matter, read in evidence by mutual consent,⁵² municipal ordinances,⁵³ auditor's reports which are made evidence by statute,⁵⁴ report of viewers in highway proceedings,⁵⁵ written proceedings of insanity inquest,⁵⁶ the sworn statement of an insured person as to the nature and extent of his loss, together with the certificate thereto,⁵⁷ sworn claims presented to railroads,⁵⁸ and a claim against the estate of a deceased person, which is the basis of the action.⁵⁹

In a few jurisdictions it is said to be the better practice not to send the evidence out with the jury,⁶⁰ and even error to do so without the consent of both parties,⁶¹ the practice being to bring the jury into court if they desire to examine papers, where their action can be taken in the presence of the trial judge, the parties, and counsel.⁶² A few authorities hold it to be error to refuse to send out documentary evidence.⁶³ Ordinarily where some of the written evidence is sent to the

71 N. E. 705, although confessions of other crimes are embodied in the same instrument.

50. *Carthage v. Buckner*, 8 Ill. App. 152.

51. *Harwell v. State*, 192 Ala. 689. 68 So. 1019; *Shirley v. State*, 144 Ala. 35, 40 So. 269.

52. *O'Neill v. Calhoun*, 67 Ill. 219.

53. *Carthage v. Buckner*, 8 Ill. App. 152.

54. *Krauss v. Cope*, 180 Mass. 22, 61 N. E. 220.

55. *McKaig v. Jordan*, 172 Ind. 84, 87 N. E. 974.

56. *State v. Champoux*, 33 Wash. 339, 74 Pac. 557.

57. *Clark v. Phoenix Ins. Co.*, 36 Cal. 168; *Tubbs v. Dwelling House Ins. Co.*, 84 Mich. 646, 48 N. W. 296.

58. *Houston, E. & W. T. Ry. Co. v. Wilson*, 37 Tex. Civ. App. 405, 84 S. W. 274.

59. *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596.

60. *Lotz v. Briggs*, 50 Ind. 346; *Eden v. Lingenfelter*, 39 Ind. 19. But see *McKaig v. Jordan*, 172 Ind. 84, 87 N. E. 974.

61. *Ind.*—*Nichols v. State*, 65 Ind. 512; *Chance v. Indianapolis & W. Gravel Road Co.*, 32 Ind. 472. *Md.*—*Moore v. McDonald*, 68 Md. 321, 12 Atl. 117. *N. C.*—*Williams v. Thomas*, 78 N. C. 47; *Watson v. Davis*, 52 N. C. 178.

[a] The court "has no more right to send by the hands of the jurors themselves into the jury room, a piece

of documentary evidence, which he believed important to the case, than he would a living witness." *Moore v. McDonald*, 68 Md. 321, 12 Atl. 117.

62. *Ark.*—See *Swing v. Arkadelphia Lumb Co.*, 90 Ark. 394, 119 S. W. 265. *Ky.*—*Watson's Exr. v. Watson*, 137 Ky. 25, 121 S. W. 626. *Mich.*—In *Matter of Foster's Will*, 34 Mich. 21. *N. Y.* *Farmers & Manufacturers Bank v. Whinfield*, 24 Wend. 419.

[a] In *Kentucky* only written evidence which is the foundation of the action or defense should be taken out by the jury. *Louisville, H. & St. L. R. Co. v. Morgan*, 110 Ky. 740, 62 S. W. 736.

63. *Ga.*—*Western & Atlantic R. R. v. Stafford*, 99 Ga. 187, 25 S. E. 656, a diagram. *N. J.*—*State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328. *Pa.*—*Hendel v. Berks & Dauphin Tpk. Road*, 16 Serg. & R. 92.

[a] "The common law and statutory rule thus established was evidently designed for the benefit of litigants, and can bear no other reasonable meaning than to confer on each party the right to have the jury take into their private deliberations the papers read in evidence. Such a course is dictated by the principle which entitles the parties to have their controversy decided according to the testimony; for an actual reference to such papers by the jury keeps the testimony before their minds more clearly than

jury, it should all go,⁶⁴ but this has also been held to be a matter within the discretion of the court.⁶⁵

b. *Statutory Provisions Generally.*—In some states, statutes have been enacted governing the practice of taking papers to the jury room.⁶⁶ A statute which provides that enumerated papers “may” be taken to the jury room, is permissive only, and the court in the first instance need not send out such papers,⁶⁷ but when requested by either party,⁶⁸ or the jury,⁶⁹ the papers must be sent out and a failure to do so constitutes error.⁷⁰

c. *Documents Used for Impeachment or Corroboration.*—Written statements,⁷¹ or affidavits,⁷² introduced in evidence for the sole purpose of impeachment by showing the contradictory statements of a witness, should not be taken out by the jury, even where a statute authorizes papers introduced in evidence to be carried out by them;⁷³ though according to some authorities the court may permit it in its discretion.⁷⁴

could the mere memory of their contents from a reading during the trial.” *State v. Raymond*, 53 N. J. L. 260, 21 Atl. 328.

64. *Rainforth v. People*, 61 Ill. 365; *Com. v. Ware*, 137 Pa. 465, 20 Atl. 806. And see *English v. State*, 31 Fla. 340, 12 So. 689.

65. *Cobb v. Dunlevie*, 63 W. Va. 298, 60 S. E. 384.

66. See *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661, and the statutes.

[a] “Photographs, pictures, diagrams, and like fixed representations to the eye, the details of which would otherwise be properly presentable to the ear in oral testimony, have been held to come fairly within the meaning of the word ‘papers’ used in section 1137 of the Penal Code.” *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661.

67. Cal.—*People v. Cochran*, 61 Cal. 548. Idaho.—*State v. Grigg*, 25 Idaho 405, 137 Pac. 371, 138 Pac. 506, instructions. Ia.—*McMahon v. Iowa Ice Co.*, 137 Iowa 368, 114 N. W. 203; *State v. Young*, 134 Iowa 505, 110 N. W. 292, it may if it so desires. Tex.—*Hick v. State*, 75 Tex. Crim. 461, 171 S. W. 755; *Schultz v. State*, 15 Tex. App. 258, 49 Am. Rep. 194.

68. *McMahon v. Iowa Ice Co.*, 137 Iowa 368, 114 N. W. 203; *State v. Young*, 134 Iowa 505, 110 N. W. 292.

69. See *People v. Dunlop*, 27 Cal. App. 460, 150 Pac. 389 (instructions); *Howard v. State*, 72 Tex. Crim. 624, 163 S. W. 429; *Wragg v. State*, 65 Tex. Crim. 131, 145 S. W. 342.

70. See cases in preceding notes.

[a] Such error will be held prejudicial, however, only where on the entire record, injury can be seen to have followed from the refusal of the court. *McMahon v. Iowa Ice Co.*, 137 Iowa 368, 114 N. W. 203. Compare *State v. Young*, 134 Iowa 505, 110 N. W. 292, presumed prejudicial.

71. *Nelson v. Northwestern El. R. Co.*, 170 Ill. App. 119; *Johnson v. N. K. Fairbank Co.*, 156 Ill. App. 381.

[a] “The purpose of the motion that this written statement of Mrs. Grant be taken to the jury room, doubtless was that it might receive from the jury a special, particular or more careful consideration beyond that received by other evidence, of the same nature or character which was not reduced to writing, and therefore, was not or could not be sent to the jury-room. Had the paper been permitted to go to the jury-room and had it served any such purpose, the unfairness to the plaintiff of such procedure is obvious and clear.” *Johnson v. N. K. Fairbank Co.*, 156 Ill. App. 381.

[b] Where only a portion of an instrument is used for purposes of impeachment, the court may properly refuse to send out the entire document. *Hraha v. Maple Block Coal Co.*, 154 Iowa 710, 135 N. W. 406. See *infra* IX, K, 5, k.

72. *Fein v. Covenant Mut. Ben. Assn.*, 60 Ill. App. 274.

73. *Johnson v. N. K. Fairbank Co.*, 156 Ill. App. 381.

74. *Stallins v. Southern Ry. Co.*, 140 Ga. 55, 78 S. E. 421; *Tabor v. Judd*,

It is discretionary with the court to refuse to send to the jury memoranda or other writings introduced in evidence and used for the purpose of corroborating the testimony of witnesses.⁷⁵

d. *Statement of What Absent Witness Would Testify.*—Statements of what an absent witness would testify to, if present in court, made to avoid a continuance, or for other reasons, are usually held to be more properly kept from the jury room.⁷⁶

e. *Memoranda Used To Refresh Memory.*—Memoranda used by witnesses to refresh their memory should not be sent to the jury room.⁷⁷

f. *Dying Declarations.*—A dying declaration which has been reduced to writing should not go to the jury room.⁷⁸

g. *Writings Used for Comparison of Handwriting.*—A writing which is not evidence of itself, but is used for a comparison of handwriting, by consent of the parties may properly be kept from the jury room,⁷⁹ though in some courts the practice is otherwise.⁸⁰

h. *Calculations and Memoranda To Aid Jury.*—The court may in its discretion properly refuse to allow parties to send out with the jury, statements or calculations of the amounts claimed to be due,⁸¹

62 N. H. 288. See *Hraha v. Maple Block Coal Co.*, 154 Iowa 710, 135 N. W. 406.

75. *Farrell v. Haze*, 157 Mich. 374, 122 N. W. 197.

76. *Ala.*—*Talley v. State*, 174 Ala. 101, 57 So. 445; *Anderson v. State*, 160 Ala. 79, 49 So. 460. *Ill.*—*Smith v. Wise*, 58 Ill. 141. *La.*—*State v. Colbert*, 29 La. Ann. 715. *Tex.*—See *Hall v. Cook* (Tex. Civ. App.), 117 S. W. 449.

[a] "This paper was equivalent to the deposition of Mrs. Smith and could not properly be taken by the jury in their retirement." *Smith v. Wise*, 58 Ill. 141. As to depositions, see *infra*, IX, K, 6.

77. *Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337; *Faver v. Bowers* (Tex. Civ. App.), 33 S. W. 131. See *Appeal of Hine*, 68 Conn. 551, 37 Atl. 384.

78. *Ill.*—*Dunn v. People*, 172 Ill. 582, 50 N. E. 137. *N. M.*—*Territory v. Eagle*, 15 N. M. 609, 110 Pac. 862. *Wash.*—*State v. Moody*, 18 Wash. 165, 51 Pac. 356.

[a] "It gives undue prominence and weight to the evidence of the deceased." *Territory v. Eagle*, 15 N. M. 609, 110 Pac. 862. See also *Dunn v. People*, 172 Ill. 582, 589, 50 N. E. 137.

79. *U. S.*—*Howell v. Hartford Fire Ins. Co.*, 6 Biss. 163, 12 Fed. Cas. No. 6,779. *Ill.*—*Cox v. Straisser*, 62 Ill. 383, "it was not a paper read in evi-

dence in view of the statute." *Mich.* See *Matter of Foster's Will*, 34 Mich. 21. *N. C.*—*Outlaw v. Hurdle*, 46 N. C. 150; *Watson v. Davis*, 52 N. C. 173, dictum.

[a] The comparison should be made by the jury during the trial, "for this reason: that the counsel and the court would have had the privilege of pointing out a resemblance or want of resemblance in the two writings and calling the attention of the jury to such facts in regard to the writing as bore upon the question of the genuineness or want of genuineness of the paper in question." *Howell v. Hartford Fire Ins. Co.*, 6 Biss. 163, 12 Fed. Cas. No. 6,779.

80. *S. C.*—*Bird v. Millar*, 1 McMull. L. 123. *Tex.*—*Webb v. State*, 69 Tex. Crim. 413, 154 S. W. 1013; *Ferguson v. State*, 61 Tex. Crim. 152, 136 S. W. 465; *Bailey v. State* (Tex. Crim.), 38 S. W. 992. Compare *Chester v. State*, 28 Tex. App. 577, 5 S. W. 125. *Vt.* *State v. Wetherell*, 70 Vt. 274, 40 Atl. 728. *Va.*—*Johnson v. Com.*, 102 Va. 927, 46 S. E. 789.

81. *D. C.*—*Adriaans v. Reilly*, 27 App. Cas. 167. *Mich.*—*Millar v. Cuddy*, 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181, criticized in *Tubbs v. Dwelling-House Ins. Co.*, 84 Mich. 646, 48 N. W. 296. *N. J.*—*Rorer v. Rorer*, 48 N. J. L. 50, 3 Atl. 67. *Pa.*—*Ott v. Oyer's Exrx.*, 106 Pa. 6.

or it may, if it sees fit send them to the jury.⁸² In many cases where the rights of the parties can only be ascertained as a result of mathematical computation the practice is highly commended,⁸³ and by some courts it is held to be prejudicial error to refuse to allow such papers to go to the jury.⁸⁴

The jury should in such cases be cautioned that the statement is not to be considered by them as evidence in the case.⁸⁵ It is error, however, to send out such a paper where there is no evidence to support some of the items contained therein.⁸⁶

Right of jurors to take notes of testimony, see *supra* IX, G, 4.

82. *Ala.*—Snodgrass *v.* Coulson, 90 Ala. 347, 7 So. 736; Mooncey *v.* Hough, 84 Ala. 80, 4 So. 19; Hirschfelder *v.* Levy & Co., 69 Ala. 351; Robinson's Admr. *v.* Allison, 36 Ala. 525, practice is not encouraged. *Ind.*—Alexander *v.* Dunn, 5 Ind. 122, practice not commended. *Ky.*—See Moore *v.* Beale, 20 Ky. L. Rep. 2029, 50 S. W. 850. *Md.*—Cahill *v.* Baltimore, 129 Md. 17, 98 Atl. 235. *Pa.*—Armstrong *v.* City of Philadelphia, 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917B, 1082; Little Schuylkill Nav., etc. Co. *v.* Richards' Adr., 57 Pa. 142, 98 Am. Dec. 209.

[a] "It is always customary to permit parties to send out statements of their claims, accounts, and papers which serve simply to preserve those things in the recollection, which the memory cannot be expected to retain. A party may orally inform a jury that he claims by certain courses and distances as defining its limits, but in many cases, and this is one, where numerous drafts are read in evidence, it may often puzzle a jury to remember the lines, when they come to examine the drafts." O'Hara *v.* Richardson, 46 Pa. 385.

83. *U. S.*—New York Life Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229. *Mich.*—Millar *v.* Cuddy, 43 Mich. 273, 5 N. W. 316, 38 Am. Rep. 181. *N. J.*—Rorer *v.* Rorer, 48 N. J. L. 50, 3 Atl. 67. *Pa.*—Pittsburgh *v.* Pittsburgh Rys. Co., 234 Pa. 223, 83 Atl. 273, Ann. Cas. 1913C, 933; Person & Riegel Co. *v.* Lipps, 219 Pa. 99, 67 Atl. 1081.

[a] "With reasonable caution on the part of the court, no unfairness can be practised in sending out a paper such as this; of its consequences no test is so good as experience, and that proves not only its fairness, but its great utility. Indeed, where accounts

are submitted to a jury, it would be impossible to get along without it. It originated with mutual convenience and the agreement of parties, but it has prevailed so long and so uninterruptedly, as to have grown to be a rule of practice, and as such we are not bound to disturb it." Frazier *v.* Funk, 15 Serg. & R. (Pa.) 26.

[b] "The articles in controversy were so numerous that, without the schedule to refer to, it would have been impracticable for the jury to render an intelligent verdict. The course adopted by the trial judge in having a schedule prepared for and left with the jury, and in directing them to find specifically as to each article and as to its value, was judicious." New York Life Ins. Co. *v.* Allison, 107 Fed. 179.

[c] Withdrawal of such a calculation which has gone to the jury with the consent of both parties cannot be required by either party. National Bank *v.* Ragland (Tex. Civ. App.), 51 S. W. 661.

84. *Koosa & Co. v. Warten*, 158 Ala. 496, 48 So. 544; *Foster v. Smith*, 104 Ala. 248, 16 So. 61.

85. *Ala.*—Robinson's Admr. *v.* Allison, 36 Ala. 525. *N. J.*—Rorer *v.* Rorer, 48 N. J. L. 50, 3 Atl. 67. *Pa.*—Armstrong *v.* City of Philadelphia, 249 Pa. 39, 94 Atl. 455, Ann. Cas. 1917B, 1082; Person & Riegel Co. *v.* Lipps, 219 Pa. 99, 67 Atl. 1081.

86. *Fowler Waste Mfg. Co. v. Otto Gas. Eng. Wks.*, 227 Pa. 314, 76 Atl. 20; *Hall v. Rupley*, 10 Pa. 231; *Morrison v. Moreland*, 15 Serg. & R. (Pa.) 61.

[a] Such error is not cured by a statement of the court that the jury is not to consider the statement as evidence but only as argument of counsel. *Fowler Waste Mfg. Co. v. Otto Gas. Eng. Wks.*, 227 Pa. 314, 76 Atl. 20.

Memoranda of the statements of witnesses, as to accounts containing numerous items, may be given to the jury.⁸⁷ A calculation of interest due may be given to them,⁸⁸ but a calculation of the damages sustained should not be delivered to the jury where no complicated mathematical computation was necessary to determine the amount due,⁸⁹ even where a statute provides that the jury may take with them "written evidence" introduced at the trial.⁹⁰

i. *Statutes and Law Treatises.*—Neither statutes,⁹¹ nor law treatises should be sent out with the jury.⁹² And the court may refuse to allow books of foreign law put in evidence, to go to the jury room.⁹³ It has been held, however, in some cases that a jury is entitled to

[b] "When the plaintiff offers to send out his calculation or statement, if there is any objection, it must be submitted to the court who will see that it contains no item which is not supported by evidence. It is not the duty of the court, however to say that the evidence is not sufficient to support any item, but only to see that there is evidence which if believed by the jury will sustain the item. If the opposite party has any objection to the statement it is his duty to call the attention of the court to the disputed items and ask that they be stricken out, and if he fails to do so and only files a general objection to the statement, we will not reverse." *Pittsburgh v. Pittsburgh Rys. Co.*, 234 Pa. 223, 234, 83 Atl. 273, Ann. Cas. 1913C, 933.

87. *Ala.*—*Foster v. Smith*, 104 Ala. 248, 16 So. 61; *Mooney v. Hough*, 84 Ala. 80, 4 So. 19; *Hirschfelder v. Levy & Co.*, 69 Atl. 351. *Ind.*—*Waltz v. Robertson*, 7 Blackf. 499. *Pa.*—*Frazier v. Funk*, 15 Serg. & R. 26.

88. *Ind.*—*Alexander v. Dunn*, 5 Ind. 122. *Ohio.*—*Admx. of Tracy v. Admr. of Card*, 2 Ohio St. 431, 451. *Pa.*—*Anderson v. Snyder*, 14 Pa. Super. 424. *S. C.*—*Nott v. Thomson*, 35 S. C. 461, 14 S. E. 940.

Compare Hatfield v. Cheaney, 76 Ill. 488; *Burton v. Wilkes*, 66 N. C. 604.

89. *Himes v. Kiehl*, 154 Pa. 190, 25 Atl. 632.

[a] In a tort action a statement of damages claimed should not be sent out. *Welliver v. Pennsylvania Coal Co.*, 23 Pa. Super. 79.

90. *Wiggs v. Southwestern Tel. & Tel. Co. (Tex. Civ. App.)*, 110 S. W. 179.

91. *Ia.*—*State v. Kirk*, 168 Iowa 244,

150 N. W. 91. *Me.*—*State v. Kimball*, 50 Me. 409. *Mass.*—*Merrill v. Nary*, 10 Allen 416. *Mo.*—*Harrison v. Hance*, 37 Mo. 185. *N. H.*—*Griffin v. Bartlett*, 58 N. H. 141. *N. Y.*—*People v. Hartung*, 17 How. Pr. 85, held not prejudicial. *R. I.*—*State v. Smith*, 6 R. I. 33. *Tenn.*—*Henson v. State*, 110 Tenn. 47, 72 S. W. 960. *Vt.*—*State v. Patterson*, 45 Vt. 368, 12 Am. Rep. 200.

[a] The practice tends "directly to confound the proper provinces of the court and jury, which ought, in the trial of civil cases, to be kept carefully distinct, and it also practically deprived the parties of the right of knowing the principles of law on which the jury acted in the rendition of their verdict." *Merrill v. Nary*, 10 Allen (Mass.) 416.

[b] Consent of counsel is a waiver of the error. *State v. Layman*, 22 Idaho 387, 125 Pac. 1042.

92. *Johnson v. State*, 27 Fla. 245, 9 So. 208; *Gibson v. Lair*, 37 Mo. 188; *Hardy v. State*, 7 Mo. 607; *Barker v. Pool*, 6 Mo. 260.

[a] A new trial was granted because the jury had received from the bailiff a volume of Bishop's Criminal Law. "If the jury disagree as to the charge of the court, or upon any question of law arising in the case, they may ask for further instructions to be given by the judge in open court, but they cannot be furnished with common law authorities for their own perusal." *Newkirk v. State*, 27 Ind. 1.

Effect of presence in the jury room of such books, see *supra*, IX, B, 4, a.

Reading of statutes or legal works as misconduct by jurors, see *supra*, IX, G, 7.

93. *Farnum v. Pitcher*, 151 Mass. 470, 476, 24 N. E. 590.

read the statutory law governing the case.⁹⁴ The presence of such books in the jury room, which are not read, does not require a reversal of the judgment.⁹⁵

j. *Scientific Books*.—Scientific books, used by counsel, should not be taken to the jury room, at least where the passages read are not specially marked.⁹⁶

k. *Documents Excluded in Part*.—Where a portion of a document only has been received in evidence, the remainder being incompetent, as evidence, the document should not be taken out by the jury,⁹⁷ unless the irrelevant portion be detached or completely obliterated;⁹⁸ but if taken out, the irregularity is not usually sufficient to vitiate the verdict.⁹⁹ If it be desired to limit the jury's attention to a portion only of a document or book, counsel must request the court to give such an instruction,¹ but even this is held insufficient by some courts, to justify sending out the entire instrument.² The party who introduces in evidence a portion of a document containing incompetent matter or memoranda, cannot complain that it is sent to the jury if he has not taken steps to erase or conceal the incompetent portion.³

94. Mich.—Findley v. People, 1 Mich. 234. Ohio.—Gandolfo v. State, 11 Ohio St. 114. Wash.—Edwards v. Washington Territory, 1 Wash. Ter. 195. Wis.—Loew v. State, 60 Wis. 559, 19 N. W. 437.

95. Lovett v. State, 60 Ga. 257.

[a] "If the jury had already concluded their deliberations and decided upon the verdict they were to render to the court, their examination of a law-book subsequently did not in any manner affect, or impair it." State v. Wilson, 40 La. Ann. 751, 5 So. 52.

96. State v. Howard, 10 Iowa 101.

[a] Dictionary should not be sent to jury room. Corpus Christi St. & I. Ry. Co. v. Kjellberg (Tex. Civ. App.), 185 S. W. 430.

97. Ala.—Harwell v. State, 192 Ala. 689, 68 So. 1019. See Shirley v. State, 144 Ala. 35, 40 So. 269, where the court erased the incompetent portion. Ga.—Way v. Arnold, 18 Ga. 181. Me. See Sawyer v. Garcelon, 63 Me. 25. Mich.—Kalamazoo Novelty Mfg. Co. v. McAlister, 36 Mich. 327. N. J.—State v. Kysilka, 84 N. J. L. 6, 87 Atl. 79. Ohio.—Moravec v. Buckley, 9 Ohio Dec. 226. Tex.—See Hall v. Cook (Tex. Civ. App.), 117 S. W. 449.

Compare Shomo v. Zeigler, 10 Phila. (Pa.) 611.

98. Rich v. Hayes, 97 Me. 293, 54 Atl. 724; Parker v. State, 43 Tex. Crim. 526, 67 S. W. 121.

99. U. S.—Lonsdale v. Brown, 4

Wash. C. C. 148, 15 Fed. Cas. No. 8,494, deposition. Ga.—Bryant v. Booze, 55 Ga. 438; Exrs. of Riggins v. Brown, 12 Ga. 271. N. H.—Gardner v. Kimball, 58 N. H. 202, a deposition from which some words had been excluded. N. J.—State v. Kysilka, 84 N. J. L. 6, 87 Atl. 79. Tex.—West v. Houston Oil Co., 56 Tex. Civ. App. 341, 120 S. W. 228.

1. State v. Tucker, 75 Conn. 201, 52 Atl. 741; Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622; Jackson v. State, 76 Ga. 551.

2. Harwell v. State, 192 Ala. 689, 68 So. 1019.

[a] "This error was not cured by the instructions to the jury not to examine any part of the book except what was put in evidence. Such instructions might have healed the error, if the contents of the book had been unimportant. But the objectionable portions in this case were such as were likely to attract the eye of the jury, and accident or curiosity would be likely to lead them, despite the admonition of the court, to read the plaintiff's comments upon the defendants and her private meditations, which had no proper place in their deliberations." Bates v. Preble, 151 U. S. 149, 158, 14 Sup. Ct. 277, 38 L. ed. 106.

3. Ill.—Warth v. Loewenstein & Sons, 219 Ill. 222, 76 N. E. 379. Mass. Clapp v. Clapp, 137 Mass. 183. N. H. See Tabor v. Judd, 62 N. H. 288.

1. *Documents Not Admitted in Evidence.*—Documents which have not been placed in evidence, should of course not be sent to the jury.⁴ Even where the due execution of instruments is admitted by the pleadings, they should not be taken to the jury room unless they have been introduced in evidence.⁵ But papers which have been treated by the parties as in evidence, though they were not in fact offered,⁶ or to the sending out of which both parties have consented,⁷ may properly go to the jury room.

In general, prejudicial error does not follow from the mere fact that documents not introduced in evidence were taken out by the jury,⁸ unless the document contained material and damaging evidence,⁹ and it appears that it was read and considered by the jury.¹⁰

[a] **Failure of counsel to erase a memorandum** made by him on a document, as he had promised to do, does not require a new trial where it appears that the irregularity was harmless. *Bryant v. Booze*, 55 Ga. 438.

4. **Ga.**—*Golden Georgia v. McManus*, 113 Ga. 982, 39 S. E. 476, stenographic report of plaintiff's testimony on a former trial. **Ia.**—*De Wulf v. Dix*, 110 Iowa 553, 81 N. W. 779, map. **Me.**—*Rich v. Hayes*, 97 Me. 293, 54 Atl. 724. **Mass.**—*Chase v. Perley*, 148 Mass. 289, 19 N. E. 398; *Alger v. Thompson*, 1 Allen 453. **Mo.**—*Buster Brown Co. v. North-Mehornay Furniture Co.*, 140 Mo. App. 707, 126 S. W. 988, a contract. **N. Y.**—See *Howland v. Willetts*, 9 N. Y. 170, Seld. Notes 178. **N. C.**—*Watson v. Davis*, 52 N. C. 178. **Ore.**—*State v. Baker*, 23 Ore. 441, 32 Pac. 161. **Tenn.**—*East Tennessee, N. & G. Ry. Co. v. Lee*, 95 Tenn. 388, 32 S. W. 249. **Tex.**—*Goar v. Thompson*, 19 Tex. Civ. App. 330, 47 S. W. 61. **Vt.**—*In re Barney's Will*, 71 Vt. 217, 44 Atl. 75.

5. *State Bank v. Brewer*, 100 Iowa 576, 69 N. W. 1011, error in doing so is not prejudicial.

6. *Boyer v. Shenandoah*, 16 Pa. Co. Ct. 75.

7. *People v. Mahoney*, 77 Cal. 529, 70 Pac. 73.

8. **Ga.**—*Southern Ry. Co. v. Coursey*, 115 Ga. 602, 41 S. E. 1013. **Ill.**—*Avery v. Moore*, 133 Ill. 74, 24 N. E. 606. **Ind.**—*Medler v. State*, 26 Ind. 171, instructions; *Ball v. Carley*, 3 Ind. 577, counsel's minutes of testimony. **Kan.**—*State v. Taylor*, 20 Kan. 643. **La.**—*Flower v. Jones*, 7 Mart. (N. S.) 140. **Me.**—*Harriman v. Wilkins*, 20 Me. 93, a former verdict. **N. H.**—*Glidden v. Towle*, 31 N. H. 147. **N. J.**—*Nordsick v. Baxter*, 64 N. J. L. 530, 45 Atl. 915.

N. Y.—*Schappner v. Second Ave. R. Co.*, 55 Barb. 497. **Ohio.**—*Admx. of Tracy v. Admr. of Card*, 2 Ohio St. 431, 451, a computation of interest made by counsel. **Tex.**—*Compare Goar v. Thompson*, 19 Tex. Civ. App. 330, 47 S. W. 61. **Vt.**—*Winslow v. Campbell*, 46 Vt. 746; *Town of Peacham v. Carter*, 21 Vt. 515. **W. Va.**—*State v. Stover*, 64 W. Va. 668, 63 S. E. 315.

[a] "In order to grant a new trial for such a cause, the paper should have conveyed some information to the jury, which might, by some reasonable intendment, have had an influence upon their verdict." *Peacham v. Carter*, 21 Vt. 515, 519.

[b] A mere suspicion or conjecture that the jury had in its possession documents not introduced in evidence, will not affect the verdict. *McWhorter v. Haigler Merc. Co.*, 4 Ala. App. 296, 58 So. 790.

[c] The refusal to grant a new trial on this ground will not be reviewed in the absence of an abuse of discretion. *Buckeye Powder Co. v. Du Pont De Nemours Powder Co.*, 223 Fed. 881, 139 C. C. A. 319. *Compare Stewart v. Burlington & M. R. Co.*, 11 Iowa 62.

9. **U. S.**—*Alaska Commercial Co. v. Dinkelspiel*, 121 Fed. 318, 57 C. C. A. 14. **Ia.**—*McLeod v. Humeston & S. Ry. Co.*, 71 Iowa 138, 32 N. W. 246. **Me.**—*Rich v. Hayes*, 97 Me. 293, 54 Atl. 724. **Mass.**—*Alger v. Thompson*, 1 Allen 453.

[a] Where the court is unable to determine how much the document, which had not been introduced in evidence, influenced the verdict, a reversal will follow. *Alaska Commercial Co. v. Dinkelspiel*, 121 Fed. 318, 57 C. C. A. 14.

10. **U. S.**—*Hutchinson v. Decatur*, 3

If, however, a paper, not in evidence is delivered to the jury by a party by design, a new trial may be granted, even though it be immaterial as evidence, as a proper punishment for a party's misconduct.¹¹

m. *Documents Improperly in the Jury Room.*—While it is irregular for a jury to take documents with them without a prior order of the court, such conduct does not ordinarily vitiate the verdict,¹² unless prejudice is shown to have followed from their action.¹³ If papers or documents be inadvertently left in or taken to the jury room and the jury do not consult them, no prejudice will follow,¹⁴ even though a statute expressly prohibits such documents from being taken out by the jury,¹⁵ unless some artifice of the opposing counsel is shown.¹⁶ By some authorities, however, it is held that where the paper is read

Cranch 291, 12 Fed. Cas. No. 6,956. **Ga.**—Walker v. Hunter, 17 Ga. 364, 415. **Ia.**—Kruidenier Bros. v. Shields, 77 Iowa 504, 42 N. W. 432; McLeod v. Humeston & S. Ry. Co., 71 Iowa 138, 32 N. W. 246; Coffin v. Gephart, 18 Iowa 256; Stewart v. Burlington & M. R. Co., 11 Iowa 62. **Kan.**—State v. Lantz, 23 Kan. 728, 33 Am. Rep. 215, atlas. **Me.**—Benson v. Fish, 6 Greenl. 141, even though it was not considered by the jury as evidence. **Mass.**—Munde v. Lambie, 125 Mass. 367. **Miss.**—Taylor v. Sorsby, Walk. 97, a deposition. **N. H.**—See Flanders v. Davis, 19 N. H. 139. **Wis.**—State v. Hartmann, 46 Wis. 248, 50 N. W. 193, map.

11. **Ga.**—Killen v. Sistrunk, 7 Ga. 283; Griffin v. State, 5 Ga. App. 43, 62 S. E. 685. **Mass.**—Hix v. Drury, 5 Pick. 296. **Miss.**—Fielder Offitt v. Vick, 1 Walk. 99. **N. H.**—State v. Hascall, 6 N. H. 352. **N. J.**—Jessup v. Eldridge, 1 N. J. L. 401. *Compare* Wright v. Rogers, 3 N. J. L. 547, the contents of the paper not appearing. **Pa.**—Sheaff v. Gray, 2 Yeates 273.

[a] A printed pamphlet containing statements affecting the character of a party, handed to a juror by the other party, is ground for a new trial. *Hamilton v. Pease*, 38 Conn. 115.

[b] Printed copy of the evidence given at a former trial, given to a juror by a party, requires a new trial. *Heffron v. Gallupe*, 55 Me. 563.

12. **U. S.**—Cudahy Packing Co. v. Skoumal, 125 Fed. 470, 60 C. C. A. 306. **Ga.**—Andrews v. Tinsley, 19 Ga. 303. **Ind.**—Bersch v. State, 13 Ind. 434, 74 Am. Dec. 263. **Ia.**—State v. Williams, 34 La. Ann. 959, pleadings. **Miss.**—Fielder Offitt v. Vick, 1 Walk. 99.

N. Y.—Howland v. Willetts, 9 N. Y. 170, Seld. Notes 178. **S. C.**—Lott's Exr. v. Macon, 2 Strobb. L. 178. **Tex.**—Fields v. Haley (Tex. Civ. App.), 52 S. W. 115.

13. *Sanderson v. Bowen*, 4 Thomp. & C. (N. Y.) 675.

14. **U. S.**—United States v. Wilson, 69 Fed. 584. **Ala.**—Birmingham Ry. & Elec. Co. v. Mason, 144 Ala. 387, 39 So. 590; Louisville & N. R. Co. v. Sides, 129 Ala. 399, 29 So. 798. **Ga.**—Southern Ry. Co. v. Coursey, 115 Ga. 602, 41 S. E. 1013; Falvey v. Richmond, 87 Ga. 99, 13 S. E. 261; Schmertz & Co. v. Johnson, 72 Ga. 472; Wilkins v. Maddrey, 67 Ga. 766. **Ind.**—Wilds v. Bogan, 57 Ind. 453; Ball v. Carley, 3 Ind. 577; Ohio & M. Ry. Co. v. Hill, 7 Ind. App. 255, 34 N. E. 646. **Kan.**—State v. Stevenson, 74 Kan. 193, 85 Pac. 797, statute. **Mass.**—Com. v. Nash, 135 Mass. 541; Hix v. Drury, 5 Pick. 296. **Miss.**—Goode v. Linecum, 1 How. 281. **Neb.**—Morris v. Miller, 83 Neb. 218, 119 N. W. 458, 131 Am. St. Rep. 636, 20 L. R. A. (N. S.) 907 (a hat); Langworthy v. Connelly, 14 Neb. 340, 15 N. W. 737, 45 Am. Rep. 117. **N. Y.**—Hackley v. Hastie, 3 Johns. 252; New York & N. J. Ice Lines v. Howell, 19 App. Div. 341, 46 N. Y. Supp. 493, attorney's trial brief. **S. C.**—State v. Tindall, 10 Rich. L. 212. **Tex.**—Western Union Tel. Co. v. Shaw, 33 Tex. Civ. App. 395, 77 S. W. 433. **Wash.**—State v. Webster, 21 Wash. 63, 57 Pac. 361.

15. *Wintermute v. Standard Furn. Co.*, 53 Wash. 539, 102 Pac. 443.

16. *Sanderson v. Bowen*, 2 Hun (N. Y.) 153. See *Ball v. Carley*, 3 Ind. 577; *Tabor v. Judd*, 62 N. H. 288.

and considered by the jury the verdict will be set aside,¹⁷ even though no intention to improperly influence the jury is shown.¹⁸

There must be some direct, positive evidence that papers inadvertently left in the jury room were perused by the jurors or came to their attention and knowledge,¹⁹ and it has been held that it must be made to appear that the jury were improperly influenced by the objectionable document,²⁰ since it is the duty of counsel to examine the papers sent to the jury and see that none are sent out which should not properly go to them.²¹

6. Depositions.—The practice of allowing depositions to be taken to the jury room is also largely committed to the discretion of the trial court.²² In some states, depositions are not allowed to be taken out by the jury,²³ except by consent of both parties,²⁴ it being considered that this would afford one party an undue advantage;²⁵ a further reason being that they frequently contain much irrelevant

17. Cal.—*People v. Thornton*, 74 Cal. 482, 16 Pac. 244. **Conn.**—*Clark v. Whitaker*, 18 Conn. 543, 46 Am. Dec. 337. **Ind.**—*Toohy v. Sarris*, 78 Ind. 474. **Kan.**—*State v. Clark*, 34 Kan. 289, 8 Pac. 528. **Me.**—*Rich v. Hayes*, 97 Me. 293, 54 Atl. 724. **Mass.**—*Whitney v. Whitman*, 5 Mass. 405. See *Hix v. Drury*, 5 Pick. 296. **Neb.**—*La Bonty v. Lundgren*, 41 Neb. 312, 59 N. W. 904. **N. Y.**—*O'Brien v. Merchants' Ins. Co.*, 48 How. Pr. 448; *Elliott v. Luengene*, 17 Misc. 78, 39 N. Y. Supp. 850. **Tenn.**—*Crisman v. McMurray*, 107 Tenn. 469, 64 S. W. 711.

18. O'Brien v. Merchants Ins. Co., 48 How. Pr. (N. Y.) 448; *Elliott v. Luengene*, 17 Misc. 78, 39 N. Y. Supp. 850; *Crisman v. McMurray*, 107 Tenn. 469, 64 S. W. 711.

19. People v. Williams, 24 Cal. 31; *State v. Harris*, 34 La. Ann. 118.

Testimony or affidavit of juror, see 3 ENCY. OF EV. 220, et seq; 8 ENCY. OF EV. 961, et seq.

20. Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104.

21. Leonard v. Schall, 125 Minn. 291, 146 N. W. 1104; *Gardner v. Kimball*, 58 N. H. 202; *Flanders v. Davis*, 19 N. H. 139.

[a] "It should appear that the counsel used due care, that none but proper papers were passed to the jury; and that the paper in question was sent to the jury . . . through some trick or artifice of the opposite counsel." *Maynard v. Fellows*, 43 N. H. 255, 259.

[b] **Failure of counsel to object to papers being sent out** is a waiver of

any irregularity and he is presumed to know what papers are delivered to the jury. *State v. Nichols*, 29 Minn. 357, 13 N. W. 153.

22. Ala.—*Koosa & Co. v. Warten*, 158 Ala. 496, 48 So. 544; *Smith v. State*, 142 Ala. 14, 39 So. 329. **Ark.**—*Hurley v. State*, 29 Ark. 17. **Ky.**—*Newport News & M. V. Co. v. Mendell*, 17 Ky. L. Rep. 1400, 34 S. W. 1081; *Baker v. Com.*, 13 Ky. L. Rep. 571, 17 S. W. 625. **Mass.**—*Whithead v. Keyes*, 3 Allen 495. **N. Y.**—*Howland v. Willetts*, 9 N. Y. 170, Seld. Notes 178. **N. C.**—*Lafoon v. Shearin*, 95 N. C. 391. **W. Va.**—See *State v. Stover*, 64 W. Va. 668, 63 S. E. 315; *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384; *Graham v. Citizens' Nat. Bank*, 45 W. Va. 701, 32 S. E. 245; *Welch v. Franklin Ins. Co.*, 23 W. Va. 288.

23. Ga.—*Shedden v. Stiles*, 121 Ga. 637, 49 S. E. 719. **Ill.**—*Rawson v. Curtiss*, 19 Ill. 456. **Ia.**—*Miller v. Dickinson Co.*, 68 Iowa 102, 26 N. W. 31. See *Coffin v. Gephart*, 18 Iowa 256. **Pa.**—*Spence v. Spence*, 4 Watts 165.

[a] **In criminal cases** in West Virginia, the practice varies from that in civil cases, and depositions should not be sent to the jury. *State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

24. Oskaloosa College v. Western Union Fuel Co., 90 Iowa 380, 54 N. W. 152, 57 N. W. 903; *Jerry v. Townsend*, 9 Md. 145.

25. Ill.—*Rawson v. Curtiss*, 19 Ill. 456. **La.**—See *Wakeman v. Marquand*, 5 Mart. (N. S.) 265. **Pa.**—*Spence v. Spence*, 4 Watts 165; *Hendel v. Berks & Dauphin Tpk. Road*, 16 Serg. & R.

matter.²⁶ In a few jurisdictions the practice is favored and it is held error to refuse to send a deposition out.²⁷ In many states statutes prohibit the court from allowing the jury to take depositions with them.²⁸ A statute which authorizes "papers read in evidence" to be carried out by the jury, does not include depositions.²⁹

Exhibits attached to a deposition may be sent out with the deposition, when that is allowed to go to the jury,³⁰ and papers which, though originally attached to depositions, have been detached and admitted in evidence, independently of the deposition, are not covered by statutes prohibiting the taking of depositions to the jury room,³¹

92. *Tex.*—*Chamberlain v. Pybas*, 81 *Tex.* 511, 17 S. W. 50. *W. Va.*—*Welch v. Franklin Ins. Co.*, 23 *W. Va.* 288.

26. *Higgins v. Los Angeles Gas & El. Co.*, 159 *Cal.* 651, 115 *Pac.* 313; *State v. Cain*, 20 *W. Va.* 679.

27. *Stites v. Admr. of McKibben*, 2 *Ohio St.* 588; *Greene & Co. v. Davis*, 2 *Ohio Cir. Dec.* 433, 4 *Ohio Cir. Ct.* 84 (error to refuse to send out if all of deposition is competent); *Hansbrough v. Stinnett*, 25 *Gratt.* (66 *Va.*) 495.

28. *Cal.*—See *Cockrill v. Hall*, 76 *Cal.* 192, 18 *Pac.* 318. *Ill.*—*Pittsburgh C. C. & St. L. R. Co. v. Dahlin*, 67 *Ill. App.* 99. *N. M.*—See *Territory v. Eagle*, 15 *N. M.* 609, 110 *Pac.* 862. *Tex.*—*Frugia v. Trueheart*, 48 *Tex. Civ. App.* 513, 106 *S. W.* 736.

[a] Transcript of stenographer's notes (1) of former testimony, has been held to be within the statute relating to depositions. *Hraha v. Maple Block Coal Co.*, 154 *Iowa* 710, 135 *N. W.* 406. (2) But where statements of witnesses on a former trial were read in evidence from the record, with the consent of the parties, it was held that, "Consent that they might be read to the jury, did not assimilate the record to a deposition." *O'Neill v. Calhoun*, 67 *Ill.* 219.

[b] An affidavit used as evidence is within such a statutory rule. *Green v. Gresham*, 21 *Tex. Civ. App.* 601, 53 *S. W.* 382.

[c] Report of proceedings at insanity inquest is not a deposition. *State v. Champoux*, 33 *Wash.* 339, 74 *Pac.* 557.

[d] A sworn claim of loss presented to a railroad is not a "deposition" within such a statute. *Houston E. & W. T. Ry. Co. v. Wilson*, 37 *Tex. Civ. App.* 405, 84 *S. W.* 274.

[e] A dying declaration reduced to writing, is in substance a deposition.

Ter. v. Eagle, 15 *N. M.* 609, 110 *Pac.* 862; *State v. Moody*, 18 *Wash.* 165, 51 *Pac.* 356.

[f] In *Iowa*, the statute provides that depositions shall not be sent to the jury unless all the testimony is in writing and none of it has been stricken out by the court. See *Hraha v. Maple Block Coal Co.*, 154 *Iowa* 710, 135 *N. W.* 406.

29. *Rawson v. Curtiss*, 19 *Ill.* 456; *Welch v. Franklin Ins. Co.*, 23 *W. Va.* 288; *State v. Greer*, 22 *W. Va.* 800; *State v. Cain*, 20 *W. Va.* 679.

[a] "This section evidently refers to documentary evidence and not to depositions. If depositions had been by the legislature intended to be included among 'papers' that might be carried from the bar by the jury, a different designation would have been made. Depositions in legal parlance are not known as 'papers.'" *State v. Cain*, 20 *W. Va.* 679, 707.

30. *K. B. Koosa & Co. v. Warten*, 158 *Ala.* 496, 48 *So.* 544.

31. *Cal.*—*Cockrill v. Hall*, 76 *Cal.* 192, 18 *Pac.* 318. *Ill.*—*Standard Starch Co. v. McMullen*, 100 *Ill. App.* 82. *Mass.*—*Blackburn v. Boston & M. St. Ry.*, 201 *Mass.* 186, 87 *N. E.* 579. *Pa.*—*McKelvey v. De Wolfe*, 20 *Pa.* 374. *Tex.*—*Frugia v. Trueheart*, 48 *Tex. Civ. App.* 513, 106 *S. W.* 736; *Davis v. Missouri, K. & T. Ry. Co.*, 17 *Tex. Civ. App.* 199, 43 *S. W.* 44; *Sargent v. Lawrence*, 16 *Tex. Civ. App.* 540, 40 *S. W.* 1075.

[a] Basis of the Rule.—Notes were identified and authenticated by a deposition. In holding that they could be detached and sent to the jury the court said: "If the witness had been produced and had identified the notes, and proved their execution and given their history, and they were thereupon admitted in evidence, it could

but unless so admitted in evidence they cannot be detached and sent out.³²

A deposition containing a large amount of incompetent matter should not be given to the jury, without first removing the incompetent portion,³³ or at least instructing the jury to disregard this portion;³⁴ but error by the court in this particular is usually not prejudicial in character,³⁵ particularly where it occurs as the result of a mistake and the matter is not material.³⁶

7. Demonstrative Evidence.—Articles constituting demonstrative or real evidence may be sent to the jury room whenever that practice seems desirable to the court,³⁷ especially where the jury requests that

not be contended that they were part of the testimony of the witness. They could in such case be taken by the jury upon retiring. And similarly, we think that they are not parts of the deposition although it proved certain matters concerning them." *Cockrill v. Hall*, 76 Cal. 102, 18 Pac. 318.

32. *Oskaloosa College v. Western Union Fuel Co.*, 90 Iowa 380, 54 N. W. 152, 57 N. W. 903; *Chamberlain v. Pybas*, 81 Tex. 511, 17 S. W. 50; *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673; *Gulf, C. & S. F. Ry. Co. v. Hughes* (Tex. Civ. App.), 31 S. W. 411.

[a] "The map made by the witness in response to interrogatories, and illustrative of his answers, was as much a part of the deposition as the words written down by the officer, and subscribed by him." *Snow v. Starr*, 75 Tex. 411, 12 S. W. 673.

[b] When no Prejudice Results. If the facts contained in exhibits improperly detached and sent out were established by other evidence, no prejudice follows. *Texas & P. Ry. Co. v. Robertson* (Tex. Civ. App.), 35 S. W. 505.

33. Ala.—*Smith v. State*, 142 Ala. 14, 39 So. 329. Ky.—*Louisville, H. & St. L. R. Co. v. Morgan*, 110 Ky. 740, 62 S. W. 736. N. H.—*Shute v. Robinson*, 41 N. H. 308; *Smith v. Nashua & L. R. Co.*, 27 N. H. 86, 59 Am. Dec. 364.

[a] "Parts of the depositions incapable of separation from the balance without mutilation, contained incompetent evidence, which was ruled out by the court. In such case, it would be plainly improper to send the rejected evidence where it might be perused by the jury." *Stiles v. Admr. of McKibben*, 2 Ohio St. 588.

[b] It is insufficient to merely mark the incompetent portions. See *Dunn v. People*, 172 Ill. 582, 50 N. E. 137.

34. *Wakeman v. Marquand*, 5 Mart. N. S. (La.) 265.

35. Mo.—*Foster v. McO'Brien*, 18 Mo. 88. R. I.—*Fottori v. Vesella*, 27 R. I. 177, 61 Atl. 143. Vt.—*Admr. of Hopkinson v. Steel*, 12 Vt. 582.

36. *Morris v. Howe*, 36 Iowa 490; *Kent v. Tyson*, 20 N. H. 121; *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717; *Page v. Wheeler*, 5 N. H. 91.

[a] By Act of Party.—But if a deposition containing improper matter gets to a jury through the action of a party, however, the verdict will be set aside. *Shepherd v. Thompson*, 4 N. H. 213.

37. Cal.—*People v. Rial*, 23 Cal. App. 713, 139 Pac. 661; *People v. Barrett*, 22 Cal. App. 730, 136 Pac. 520. Ill.—*People v. Morris*, 254 Ill. 559, 98 N. E. 975. La.—*State v. Wooten*, 136 La. 560, 67 So. 366, strongly condemning the practice but holding that no prejudice followed. Mich.—See *Walker v. Newton*, 130 Mich. 576, 90 N. W. 328. Minn.—*State v. Olson*, 95 Minn. 104, 103 N. W. 727. Mont.—See *State v. Allen*, 23 Mont. 118, 57 Pac. 725. Neb.—*Russell v. State*, 66 Neb. 497, 92 N. W. 751. Utah.—*State v. Riley*, 41 Utah 225, 126 Pac. 294. Vt.—*State v. Shaw*, 73 Vt. 149, 50 Atl. 863. Wash.—*State v. Simmons*, 52 Wash. 132, 100 Pac. 269; *State v. Webster*, 21 Wash. 63, 57 Pac. 361.

[a] Use To Be Made of the Evidence.—"The court may permit the jury to take with them and use in their deliberations any exhibit where the circumstances call for it, observing the proper precaution of instructing the jury in the nature of the use which they shall make of the exhibit.

the articles be submitted to their inspection,³⁸ or with the consent of both parties.³⁹ This does not amount to receiving evidence out of court.⁴⁰

In criminal cases, the statute sometimes provides that exhibits shall be sent to the jury only with the consent of both the state and the accused.⁴¹ If a statute enumerates certain papers which may be taken out by the jury, this does not prevent the court, in its discretion from sending out exhibits, not writings.⁴²

Shoes, claimed to have been worn by the defendant,⁴³ the skull of a decedent, to show the exact location of a wound,⁴⁴ clothing⁴⁵ worn

It is a fundamental rule that all evidence shall be taken in open court,

. . . . It is this fundamental rule which is to govern the use of such exhibits by the jury. They may use the exhibit according to its nature to aid them in weighing the evidence which has been given and in reaching a conclusion upon a controverted matter." *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313.

[b] Articles not admitted in evidence cannot be taken out. *Yates v. People*, 38 Ill. 527.

38. *Hopkins v. State*, 9 Okla. Crim. 104, 130 Pac. 1101.

[a] "Where the jury in open court request permission to take with them to the jury room, to inspect during their deliberations, articles introduced in evidence, the granting or refusal of the request is within the discretion of the trial court, but, if the defendant consents, the request should be granted. The practice at best is not a safe one, as cases might arise where the jury during its deliberations might use, or attempt experiments in a manner not consistent with the evidence; and it is strongly urged upon trial courts to avoid possible prejudicial error by refusing such requests, except in cases where the trial court is convinced that an inspection of such articles may be of assistance to the jury in considering some controverted question involved in the evidence." *Hopkins v. State*, 9 Okla. Crim. 104, 130 Pac. 1101, *overruling Hensing v. Ter.*, 4 Okla. 443, 46 Pac. 509.

39. *State v. Allen*, 23 Mont. 118, 57 Pac. 725; *Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965.

40. *Hopkins v. State*, 9 Okla. Crim. 104, 130 Pac. 1101; *Jack v. Territory*, 2 Wash. Ter. 101, 3 Pac. 832. And see *Jackson v. State*, 28 Tex. App. 370, 13

S. W. 451. But compare, *State v. Wooten*, 136 La. 560, 67 So. 366.

41. See *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092; *People v. Gallagher*, 75 App. Div. 39, 78 N. Y. Supp. 5, 11 N. Y. Ann. Cas. 348, 17 N. Y. Crim. 18.

[a] Exhibits.—Where the court asked if the jury were to take the "exhibits," such question included articles in evidence as well as documents. *People v. Hughson*, 154 N. Y. 153, 47 N. E. 1092.

42. Okla.—*Hopkins v. State*, 9 Okla. Crim. 104, 130 Pac. 1101, *overruling Hensing v. Territory*, 4 Okla. 443, 46 Pac. 509. Utah.—*State v. Riley*, 41 Utah 225, 126 Pac. 294. Wash.—*State v. Webster*, 21 Wash. 63, 57 Pac. 361; *Doctor Jack v. Territory*, 2 Wash. Ter. 101, 3 Pac. 832.

Contra, *State v. Crea*, 10 Idaho 88, 76 Pac. 1013.

[a] A statute authorizing "papers" to be taken out by the jury "is not to be construed as a limitation of the power of the court in the matter of other exhibits, but as a modification and extension of the common-law rule touching exhibits containing writings." *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313.

43. *Russell v. State*, 66 Neb. 497, 92 N. W. 751; *Gresser v. State* (Tex. Crim.), 40 S. W. 595.

44. *State v. Teale*, 154 Iowa 677, 135 N. W. 408. See *Martin v. Com.*, 30 Ky. L. Rep. 1196, 100 S. W. 872.

45. Cal.—*People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520. See *People v. Mahoney*, 77 Cal. 529, 20 Pac. 73. Ill. *People v. Morris*, 254 Ill. 559, 98 N. E. 975. La.—*Compare State v. Wooten*, 136 La. 560, 67 So. 366. Okla.—*Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965. Pa.—See *Udderzook v. Com.*, 76 Pa. 340. Tex.—*Puryear v. State*, 50

by a murdered person at the time of the homicide, or stolen,⁴⁶ even though it be covered with bloodstains;⁴⁷ shells, shot, or a bullet removed from the body of a murdered man;⁴⁸ a pistol or gun;⁴⁹ the bottle alleged to have contained liquor, in a prosecution for unlawfully selling liquor;⁵⁰ a bottle containing liquor which was shown to be the same as other bottles seized;⁵¹ a portion of a stolen animal;⁵² a sack, the identity of which was in issue;⁵³ tools which caused an injury;⁵⁴ books or magazines;⁵⁵ photographs;⁵⁶ x-ray photographs;⁵⁷ a magnifying glass used by witnesses to examine handwriting;⁵⁸ articles which have been the subject-matter of expert testimony, the issue being as to their quality or character;⁵⁹ all these have been under varying conditions, sent to the jury room for examination and inspection by the jurors. The fact that the articles would tend to influence the jury and raise their prejudices and passions is to be considered by the court, in passing on a request that they be sent to the jury room,⁶⁰ but it has been held insufficient to call for keeping the articles from the jury, save in extreme cases.⁶¹

Tex. Crim. 454, 98 S. W. 258; Chalk v. State, 35 Tex. Crim. 116, 32 S. W. 534; Spencer v. State, 34 Tex. Crim. 238, 30 S. W. 46, 32 S. W. 690; Bell v. State, 32 Tex. Crim. 436, 24 S. W. 418. **Utah.** State v. Riley, 41 Utah 225, 126 Pac. 294. **Wash.**—Jack v. Territory, 2 Wash. Ter. 101, 3 Pac. 832.

[a] **Inspection of such clothing by the jury is not a reception of evidence out of court.** Bell v. State, 32 Tex. Crim. 436, 24 S. W. 418, *overruling* Bouldin v. State, 8 Tex. App. 332.

46. Adams v. State, 93 Ga. 166, 18 S. E. 553.

47. People v. Morris, 254 Ill. 559, 98 N. E. 975.

48. McCoy v. People, 175 Ill. 224, 51 N. E. 777; Hopkins v. State, 9 Okla. Crim. 104, 130 Pac. 1101.

49. **Cal.**—People v. Rial, 23 Cal. App. 713, 139 Pac. 661; People v. Barrett, 22 Cal. App. 780, 136 Pac. 520. **Ga.**—Wynne v. State, 56 Ga. 113. **Ill.** McCoy v. People, 175 Ill. 224, 51 N. E. 777. **Okla.**—Hopkins v. State, 9 Okla. Crim. 104, 130 Pac. 1101. **Utah.** State v. Riley, 41 Utah 225, 126 Pac. 294.

Compare State v. Wooten, 136 La. 560, 67 So. 366

50. Phillips v. State, 156 Ala. 140, 47 So. 245; State v. Lindquist, 110 Minn. 12, 124 N. W. 215; State v. Olson, 95 Minn. 104, 103 N. W. 727.

51. State v. McCafferty, 63 Me. 223; State v. Lindquist, 110 Minn. 12, 124 N. W. 215. *Compare* Reed v. Ter., 1 Okla. Crim. 481, 98 Pac. 583.

52. Powell v. State, 61 Miss. 319.

53. Jackson v. State, 28 Tex. App. 370, 13 S. W. 451.

54. Cudahy Packing Co. v. Skoumal, 125 Fed. 470, 60 C. C. A. 306.

55. State v. Wetherell, 70 Vt. 274, 40 Atl. 728.

56. **U. S.**—Toledo Traction Co. v. Cameron, 137 Fed. 48, 69 C. C. A. 28. **Conn.**—State v. Wallace, 78 Conn. 677, 63 Atl. 448. **Ill.**—Williams v. Carterville, 97 Ill. App. 160, refused. **Ia.** Barker v. Perry, 67 Iowa 146, 25 N. W. 100. **Vt.**—State v. Shaw, 73 Vt. 149, 50 Atl. 863.

[a] **Photographs Showing the Condition of a Murdered Man.**—People v. Rial, 23 Cal. App. 713, 139 Pac. 661.

57. Chicago & Elec. Ry. Co. v. Spence, 213 Ill. 220, 72 N. E. 796, 104 Am. St. Rep. 213; Brookman v. Chicago Gt. W. R. Co., 116 Minn. 409, 133 N. W. 969.

[a] **"Papers in evidence"** as used in a statute clearly embrace photographs or skiographs offered and received in evidence. Chicago & J. Elec. Ry. Co. v. Spence, 213 Ill. 220, 72 N. E. 796, 104 Am. St. Rep. 213.

58. Grand Lodge A. O. U. W. v. Young, 123 Ill. App. 628.

Use by the jury during their deliberations, see *supra*, IX, 1, 2, e.

59. State v. Young, 134 Iowa 505, 110 N. W. 292.

60. Puryear v. State, 50 Tex. Crim. 454, 98 S. W. 258.

61. People v. Rial, 23 Cal. App. 713, 139 Pac. 661.

The articles should be sent to the jury in the same condition in which they are introduced in evidence.⁶²

Articles taken to the jury room may be used by the jury as evidence only for the purpose for which they were introduced.⁶³ There is no presumption that improper use was made of the articles.⁶⁴ The fact that exhibits regularly introduced were taken to the jury room without the order or knowledge of the court will not affect the verdict if inspection by the jury would show only what there was other evidence of.⁶⁵

8. Models.—A model used at the trial may properly be taken by the jury to their room.⁶⁶

9. Diagrams.—A diagram used to illustrate the testimony of a witness may properly, in the discretion of the court, be kept from the jury,⁶⁷ though by many courts the practice of sending them to

[a] "The objection that the presence of these photographs in the jury room might tend to unbalance the jury in their deliberations is no stronger than the same objection to their original admission in evidence, especially in view of our conclusion that the evidence in the case was in itself sufficient to justify the verdict." *People v. Rial*, 23 Cal. App. 713, 139 Pac. 661.

62. *State v. Stebbins*, 29 Conn. 463, 79 Am. Dec. 223.

63. *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 Pac. 313; *Puryear v. State*, 50 Tex. Crim. 454, 98 S. W. 258; *Spencer v. State*, 34 Tex. Crim. 238, 30 S. W. 46, 32 S. W. 690.

[a] A coat taken to the jury room may be put on by a juror for the purpose of ascertaining the exact location of a bullet hole in reference to the person's body. *Saunders v. State*, 4 Okla. Crim. 264, 111 Pac. 965.

Experiments by jury, see *supra*, IX, I.

64. Cal.—*People v. Hower*, 151 Cal. 668, 91 Pac. 507. Okla.—*Hopkins v. State*, 9 Okla. Crim. 104, 130 Pac. 1101. Utah.—*State v. Riley*, 41 Utah 225, 126 Pac. 294.

[a] "Before a case will be reversed because the jury were permitted by the court to take with them some article introduced in evidence, it must appear that such article was used by the jury in some manner inconsistent with and outside of the testimony, and to the prejudice of the defendant." *Gresser v. State* (Tex. Crim.), 40 S. W. 595.

65. Cal.—*People v. Hower*, 151 Cal.

638, 91 Pac. 507; *People v. Barrett*, 22 Cal. App. 780, 136 Pac. 520. N. Y. *People v. Gallagher*, 75 App. Div. 39, 78 N. Y. Supp. 5, 11 N. Y. Ann. Cas. 348, 17 N. Y. Crim. 18. Tex.—*Hendricks v. State*, 28 Tex. App. 416, 13 S. W. 672. Utah.—*State v. Riley*, 41 Utah 225, 126 Pac. 294.

But see *McCoy v. State*, 78 Ga. 490, 3 S. E. 768.

66. Ky.—*Louisville & N. R. Co. v. Berry*, 96 Ky. 604, 29 S. W. 449, not error even if taken without permission of the court. N. M.—*Illinois S. M. & M. Co. v. Raff*, 7 N. M. 336, 34 Pac. 544, model of mine used to explain testimony of witnesses. Wis.—*Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947.

[a] "The model became a necessary part of the witnesses' testimony, to go to the jury as such. It was not used as independent testimony of the real construction of the scaffold, but only to explain the testimony of the witnesses." *Blazinski v. Perkins*, 77 Wis. 9, 45 N. W. 947.

[b] Model not received in evidence was inadvertently left in the jury room but not seen by jury until after they had agreed on a verdict. Held not prejudicial error. *Lewis v. Crane & Sons*, 78 Vt. 216, 62 Atl. 60.

67. Cal.—*Carty v. Boeseke-Dawe Co.*, 2 Cal. App. 646, 84 Pac. 267. Mont. *Carman v. Montana Cent. Ry. Co.*, 32 Mont. 137, 79 Pac. 690, a map. Pa. Com. v. Philadelphia R. & P. R. Co., 23 Pa. Super. 235, 255, where it was shown to be not entirely accurate.

[a] The statute providing for sub-

the jury is approved,⁶⁵ and it has even been held error to refuse to do so.⁶⁹

10. Stenographer's Transcription of Testimony.—The report of testimony transcribed by the court reporter from his notes taken at the trial should not be sent to the jury without the consent of both parties.⁷⁰

11. Objections and Exceptions.—If no objection is made to the action of the court in sending out papers to the jury, the error, if any, in such action cannot be urged.⁷¹ An objection to the refusal of the court to allow documents to be taken out by the jurors,⁷² or against allowing the jury to take out a deposition,⁷³ or exhibits attached thereto,⁷⁴ or a former verdict attached to an indictment,⁷⁵ or a request that exhibits attached to pleadings be detached or concealed,⁷⁶ or that counts which have been eliminated from the case by the action of the court should be detached,⁷⁷ should be made at the time the action is taken by the court, and comes too late when made

mitting to the jury papers received in evidence does not cover a diagram that is used merely to illustrate the testimony of a witness. *People v. Cochran*, 61 Cal. 548.

Diagrams admitted in evidence should ordinarily be sent out to the jury, if requested. See *supra*, IX, K, 5, a.

68. *Campbell v. State*, 23 Ala. 44 (but see *Burton v. State*, 115 Ala. 1, 22 So. 585); *Wood v. Willard*, 36 Vt. 82, 84 Am. Dec. 659.

69. *Burton v. State*, 115 Ala. 1, 22 So. 585.

[a] "Having been exhibited to the jury and used by the witnesses in explanation or elucidation of their testimony, the map or diagram would not have served all its purposes as an instrument of evidence, if the jury had not been permitted to take it with them on their retirement." *Burton v. State*, 115 Ala. 1, 22 So. 585.

70. *Louisville, C. & L. R. Co. v. Caven's Admr.*, 2 Bush (Ky.) 559; *Crisman v. McMurray*, 107 Tenn. 469, 64 S. W. 711.

Rereading testimony, see *infra*, IX, L, 2.

71. **U. S.**—*Welsing v. United States*, 218 Fed. 369, 134 C. C. A. 177. **Ark.** *St. Louis I. M. & S. Ry. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 653. **Colo.** *Howard v. People*, 27 Colo. 396, 61 Pac. 595. **Fla.**—*Vasquez v. State*, 54 Fla. 127, 44 So. 739. **Ga.**—*Chattahoochee Brick Co. v. Sullivan*, 86 Ga. 50, 12 S. E. 216 (instructions); *Jackson v. State*, 76 Ga. 551; *Bass v. Winfrey*, 20 Ga. 631. **Ill.**—*Smith v. Wise*,

58 Ill. 141. See *Wilson v. Genseal*, 113 Ill. 403, 1 N. E. 905. **Kan.**—*State v. Taylor*, 36 Kan. 329, 13 Pac. 550, testimony given by defendant at a coroner's inquest. **Mass.**—*Anthony v. Travis*, 148 Mass. 53, 19 N. E. 8; *Clapp v. Norton*, 106 Mass. 33. **Mich.**—*Chadwick v. Chadwick*, 52 Mich. 545, 18 N. W. 350, taking of testimony to the jury room by jury. **Minn.**—*State v. Nichols*, 29 Minn. 357, 13 N. W. 153. **N. Y.**—*Lippus v. Columbus Watch Co.*, 59 Hun 623, 13 N. Y. Supp. 319. **N. C.** *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625 (instructions); *Posey v. Patton*, 109 N. C. 455, 14 S. E. 64. **S. C.** *Groesbeck v. Marshall*, 44 S. C. 538, 22 S. E. 743. **Tex.**—*Davis v. McCabe* (Tex. Civ. App.), 46 S. W. 837; *Anschicks v. State*, 6 Tex. App. 524.

72. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399; *Lowenstein v. Holmes*, 40 Okla. 33, 135 Pac. 727, instructions.

73. *Davenport v. Cummings*, 15 Iowa 219; *Shields v. Guffey*, 9 Iowa 322; *Kent v. Tyson*, 20 N. H. 121.

74. *Texas & P. Ry. Co. v. Robertson* (Tex. Civ. App.), 35 S. W. 505.

75. **Ga.**—*Russell v. Brunswick Groc. Co.*, 120 Ga. 38, 47 S. E. 528. **La.** *State v. Gonzales*, 107 La. 216, 31 So. 626. **Va.**—*Forbes v. Com.*, 90 Va. 550, 19 S. E. 164. **W. Va.**—*State v. Stover*, 64 W. Va. 668, 63 S. E. 315.

76. *Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349.

77. *Chicago City Ry. Co. v. Reddick*, 139 Ill. App. 160.

for the first time on motion for a new trial. The objection must point out specifically the point sought to be raised.⁷⁸

L. REHEARING WITNESSES AND TESTIMONY. — 1. Recalling Witnesses. — In case the jury, after retirement disagrees as to the testimony given by a witness, he may, in the discretion of the court be recalled and re-examined, in open court,⁷⁹ but a private examination of the witness by jurors is improper.⁸⁰ Express statutory provisions, in some jurisdictions, recognize and reaffirm this common-law right.⁸¹ A juror may interrogate the witness,⁸² but counsel for either party should not be allowed to do so.⁸³ New or additional testimony cannot be given by the witness recalled but his testimony is limited to a repetition of that he has already given;⁸⁴ not every slight and im-

78. *West Chicago St. R. Co. v. Buckley*, 200 Ill. 260, 65 N. E. 708.

[a] **A specific request that irrelevant portions of a document be covered or detached is required.** *Continental Ins. Co. v. Ins. Co. of Pennsylvania*, 51 Fed. 884, 2 C. C. A. 535.

[b] **An objection to the admission (1) in evidence of the document or article is insufficient as an objection to its being sent out to the jury** (*People v. Rial*, 23 Cal. App. 713, 139 Pac. 661), (2) though an exception to the court's instructions in which it was stated that he intended to send out the pleadings was held an exception to the act of sending them out. *Kansas City, Ft. S. & M. R. Co. v. Eagan*, 64 Kan. 421, 67 Pac. 887.

79. *Ark.*—*Bennefield v. State*, 62 Ark. 365, 35 S. W. 790. *Ga.*—*Strickland v. State*, 115 Ga. 222, 41 S. E. 713; *Mormon v. State*, 110 Ga. 311, 35 S. E. 152; *Dozier v. State*, 26 Ga. 156. *N. Y.*—*Blackley v. Sheldon*, 7 Johns. 32. But see *Neil v. Abel*, 24 Wend. 185. *Okla.*—*Williams v. State*, 4 Okla. Crim. 523, 114 Pac. 1114.

[a] **When counsel in their argument disagree as to the testimony given, a witness may properly be recalled.** *Palmer v. State*, 114 Ga. 517, 40 S. E. 717.

[b] **The following practice should be observed:** "First. It seems the jury should indicate to the court the statement of the witness about which they disagree. Second. The witness shall be brought upon the stand, and directed to detail his testimony in respect to this particular point and no other. Third. The court shall further instruct him to make his statements in the language used upon his original examination, as nearly as he can."

Campbell v. State, 42 Tex. 591.

80. *Smith v. Graves*, 1 Brev. (S. C.) 16, new trial granted.

[a] **"The effect produced, by a re-examination of a witness in the jury room, it is impossible in any case to determine. The jurors in the re-examination of the witness may not confine themselves to legal questions but matters may be inquired into by them which they may suppose to be proper and pertinent and which may have weight and influence with them in making up their verdict, but which, in reality, are irrelevant and illegal."** *Luttrell v. Maysville & L. R. R. Co.*, 18 B. Mon. (Ky.) 291, 295.

81. *Jack v. State* (Tex. Crim.), 117 S. W. 139; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Barton v. State*, 9 Tex. App. 261; *Edmondson v. State*, 7 Tex. App. 116. See *San Antonio Tr. Co. v. Badgett* (Tex. Civ. App.), 158 S. W. 803.

[a] **A witness should only be recalled at the request of the jury.** *Vaughn v. State*, 51 Tex. Crim. 180, 101 S. W. 445.

82. *Herring v. State*, 1 Iowa 205; *Fulton Towboat Co. v. Pendergrass*, 15 Ky. L. Rep. 208.

83. *Herring v. State*, 1 Iowa 205.

84. *Ga.*—*Strickland v. State*, 115 Ga. 222, 41 S. E. 713. *Mont.*—*Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20. *Tex.* *Tarver v. State*, 43 Tex. 564; *Vaughn v. State*, 51 Tex. Crim. 180, 101 S. W. 445; *Edmondson v. State*, 7 Tex. App. 116.

Contra, *Parish v. Fite*, 6 N. C. 258, 1 Car. Law Repos. 238.

[a] **Counsel for the adverse party should see or know the question to be**

material departure from this rule, however, requires a reversal of the judgment.⁵⁵

2. Reading Testimony to Jury.—The court may, in its discretion of its own motion,⁵⁶ or, on the request of the jury, which reports an inability to agree on what testimony was given by a witness, require the court reporter to read to the jury from his notes testimony theretofore given in the case.⁵⁷ This practice is sometimes authorized by statute.⁵⁸ In some jurisdictions, however, it is held to be erro-

asked the witness before it is propounded, though failure to inform counsel does not constitute prejudicial error. *Jack v. State* (Tex. Crim.), 117 S. W. 139.

85. *Campbell v. State*, 42 Tex. 591.

86. *Morman v. State*, 110 Ga. 311, 35 S. E. 152.

87. *Cal.*—*People v. Warren*, 130 Cal. 678, 63 Pac. 87. *Colo.*—*Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741. *D. C.*—*Smith v. Ross*, 31 App. Cas. 348. *Ga.*—*Green v. State*, 122 Ga. 169, 50 S. E. 53; *Strickland v. State*, 115 Ga. 222, 41 S. E. 713; *Roberts v. Atlanta Con. St. Ry. Co.*, 104 Ga. 805, 30 S. E. 966. *Ia.*—*State v. Perkins*, 143 Iowa 55, 120 N. W. 62, 21 L. R. A. (N. S.) 931; *State v. Hunt*, 112 Iowa 509, 84 N. W. 525. *Kan.*—*Cannon v. Griffith*, 3 Kan. App. 506, 43 Pac. 829. *Mass.*—*Merritt v. New York, N. H. & H. R. R. Co.*, 164 Mass. 440, 41 N. E. 667. *Neb.*—*Darner v. Daggett*, 35 Neb. 695, 53 N. W. 608, practice is not favored. *Pa.*—*Com. v. Bolger*, 229 Pa. 597, 79 Atl. 113. See *Miller v. Royal Flint Glass Wks.*, 172 Pa. 70, 33 Atl. 350. *Okla.*—*Williams v. State*, 4 Okla. Crim. 523, 114 Pac. 1114. *Tex.* *Moore v. State*, 52 Tex. Crim. 364, 107 S. W. 355. But see *San Antonio Traction Co. v. Badgett* (Tex. Civ. App.), 158 S. W. 803, the court may refuse to allow it. *Vt.*—*Comstock's Admr. v. Jacobs*, 86 Vt. 182, 84 Atl. 568; *State v. Manning*, 75 Vt. 185, 54 Atl. 181.

[a] Where there is an honest doubt in the mind of a juror as to what was said by a witness, it cannot be prejudicial to anyone to have such doubt removed by a rehearing of such testimony. *State v. Perkins*, 143 Iowa 55, 120 N. W. 62, 21 L. R. A. (N. S.) 931.

[b] Reading testimony is not "a second testifying of the witness, without cross-examination." *Jameson v. State*, 25 Neb. 185, 41 N. W. 138.

[c] The reporter's notes are not secondary evidence to the testimony of the witness himself, but are presumed correct until the contrary is shown, since the reporter is a sworn officer of the court. *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20.

[d] Preferable to Recalling Witness.—*Green v. State*, 122 Ga. 169, 50 S. E. 53.

[e] Correction by Court.—"If the stenographer has not taken the testimony correctly the judge can then correct it, and the chances of getting the testimony exactly correct are tenfold greater than when one must rely upon the recollection of any person." *Cannon v. Griffith*, 3 Kan. App. 506, 43 Pac. 829.

[f] Effect.—"The report [of the stenographer], whenever read cannot control but only refresh the recollection of the jury." *Alexander Bros. v. Gardiner*, 14 R. I. 15. To the same effect, *State v. Rubaka*, 82 Conn. 59, 72 Atl. 566.

[g] The court may infer a disagreement among the jurors as to the testimony of a witness from their statement that if they could hear the testimony read, they would be able to reach an agreement. *Cannon v. Griffith*, 3 Kan. App. 506, 43 Pac. 829.

[h] When counsel or the court and counsel disagree (1) during the argument, as to the evidence, the court may require the reporter's notes to be read to the jury (*Palmer v. State*, 114 Ga. 517, 40 S. E. 717; *Vann v. State*, 83 Ga. 44, 9 S. E. 945), (2) though it is not required to do so. *Dozier v. State*, 26 Ga. 156.

88. *Alexander Bros. v. Gardiner*, 14 R. I. 15.

[a] Under a statute authorizing the court to state to the jury his recollection of the testimony. *Merritt v. New York, N. H. & H. R. R. Co.*, 164 Mass. 440, 41 N. E. 667; *Darner v. Daggett*, 35 Neb. 695, 53 N. W. 608.

neous.⁸⁹ on the theory that this would give undue importance to the testimony thus reread.⁹⁰ If both parties consent, the request of the jury may, of course, be granted.⁹¹

Documentary evidence,⁹² or a portion of a deposition may also be read to them.⁹³ The amount and portions of the testimony which shall be read to the jury is left largely to the discretion of the court,⁹⁴ though, in general, it is the better practice to read all the testimony

[b] Under a statute authorizing information to be given a jury in case of their disagreement. *Freezer v. Sweeney*, 8 Mont. 508, 21 Pac. 20.

[c] Where the statute authorizes a witness to be recalled it is improper to read the notes of his testimony. *Vaughn v. State*, 51 Tex. Crim. 180, 101 S. W. 445.

89. Colo.—*Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854. Compare *Slack v. Stephens*, 19 Colo. App. 538, 76 Pac. 741. Ill.—*Westgate v. Aschenbrenner*, 39 Ill. App. 263. Mo.—*Padgitt v. Moll*, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854. Neb.—*Bartell v. State*, 40 Neb. 232, 58 N. W. 716. Compare *Hair v. State*, 16 Neb. 601, 21 N. W. 464.

[a] Basis of This Rule.—“The introduction of the official stenographer to take down the evidence in every case is of very recent date and so far as concerns his official duties we must look to the statute creating the office to learn what they are. . . . He is not made the umpire to decide disputed questions as to what the evidence was. . . . The juror has a right and it is his duty to base his verdict on the evidence as he heard it, and he is not required and should not be compelled to yield his own memory and his own understanding of the evidence to that of another, even though that other professed to have taken notes. A juror’s memory of the evidence at that stage of the case is as trustworthy as the stenographer’s notes.” *Padgitt v. Moll*, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854.

[b] It violates the constitutional right of the accused to confront the witnesses. *Bartell v. State*, 40 Neb. 232, 58 N. W. 716. See generally the title “Trial.”

90. *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854; *Fleming v. Shenandoah*, 67 Iowa 505, 25 N. W. 752, 56 Am. Rep. 354.

91. Ia.—See *Fleming v. Shenandoah*, 67 Iowa 505, 25 N. W. 752, 56 Am. Rep. 354; *Hahn v. Miller*, 60 Iowa 96, 14 N. W. 119. Mo.—*Quinn v. Metropolitan St. Ry. Co.*, 218 Mo. 545, 118 S. W. 46. See *Padgitt v. Moll*, 159 Mo. 143, 60 S. W. 121, 81 Am. St. Rep. 347, 52 L. R. A. 854. Neb.—*Jameson v. State*, 25 Neb. 185, 41 N. W. 138.

[a] Where the parties had agreed that all of the plaintiff’s testimony might be read, the fact that the jury stopped the reading after it had heard only a portion of it was not prejudicial error. *Quinn v. Metropolitan St. Ry. Co.*, 218 Mo. 545, 118 S. W. 46.

[b] There is a presumption that reading of the reporter’s notes was by consent of counsel. *Hair v. State*, 16 Neb. 601, 21 N. W. 464.

92. *State v. Collens*, 37 La. Ann. 607.

93. Ky.—*Westerfield v. Baldwin & Co.*, 16 Ky. L. Rep. 318. Minn.—See *Coit v. Waples*, 1 Minn. 134. Tex.—*San Antonio Tr. Co. v. Badgett* (Tex. Civ. App.), 158 S. W. 803; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817. W. Va.—*State v. Lowry*, 42 W. Va. 205, 24 S. E. 561.

94. Cal.—*People v. Anthony*, 20 Cal. App. 586, 129 Pac. 968. Conn.—*State v. Rubaka*, 82 Conn. 59, 72 Atl. 566. Pa.—*Milner v. Royal Flint Glass Wks.*, 172 Pa. 70, 33 Atl. 350. R. I.—*Alexander Bros. v. Gardiner*, 14 R. I. 15.

[a] Matters Within the Court’s Discretion.—“The entire matter of causing the stenographer’s notes to be so read and of submitting copies of the whole or portions of them to the jury, must rest, to a great extent, in the discretion of the trial judge. Whether there is reasonable ground for the jury’s request for the evidence, whether the transcript made contains matter which ought not to be submitted to the jury, or is of doubtful accuracy, whether certain parts of

on the particular point involved.⁹⁵ The court may have the testimony of other witnesses read, although no request for this was made by the jury,⁹⁶ and also more testimony of the same witness than was asked for by the jury.⁹⁷ Where circumstances call for it the court may properly postpone reading of the testimony until a later time.⁹⁸ It has also been held to be proper, when desirable, to submit a type-written transcript of the notes of the testimony to the jury for use in their deliberations.⁹⁹

3. Restatement of Testimony by Court.—On the request of the jury and counsel, the court should bring in the jury and state to them his remembrance of the testimony of any particular witness.¹ In restating the testimony the court may refer to minutes of the testimony taken by himself,² or by a person not an officer of the court,³ and the fact that he misstates an immaterial fact does not constitute prejudicial error.⁴ The court should not, however, allow the jury to take out the notes he has made during the trial.⁵ The

the testimony can be read or copies of it submitted without too great inconvenience or loss of time in the trial of the case, and in such a manner as will, with fairness to all parties, furnish the desired information to the jury, are questions for the determination of the trial judge." *State v. Rubaka*, 82 Conn. 59, 68, 72 Atl. 566.

[b] "The respondent had no legal right to have more read than the jury requested." *State v. Manning*, 75 Vt. 185, 54 Atl. 181.

[c] Some of the testimony may be read and the court may state the substance of other testimony. *Salladay v. Dodgeville*, 85 Wis. 318, 55 N. W. 696, 20 L. R. A. 541.

95. *Byrne v. Smith*, 24 Wis. 68.

96. *Comstock's Admr. v. Jacobs*, 86 Vt. 182, 84 Atl. 568.

97. *Smith v. Ross*, 31 App. Cas. (D. C.) 348; *Merritt v. New York, N. H. & H. R. R. Co.*, 164 Mass. 440, 41 N. E. 667.

98. *People v. Warren*, 130 Cal. 678, 63 Pac. 87.

[a] The fact that a verdict is returned before the time set for the reading of the testimony does not show a coercion of the verdict by the court. *Auld v. Cathro*, 20 N. D. 461, 128 N. W. 1025. And see *People v. Warren*, 130 Cal. 678, 63 Pac. 87; *Moore v. State*, 52 Tex. Crim. 364, 107 S. W. 355.

99. *State v. Rubaka*, 82 Conn. 59, 72 Atl. 566.

Right of jurors to make notes of the

testimony of jurors, see *supra*, IX, G, 4.

1. Cal.—*People v. Ybarra*, 17 Cal. 166. See *People v. Perry*, 65 Cal. 568, 4 Pac. 572. Kan.—*Cannon v. Griffith*, 3 Kan. App. 506, 43 Pac. 829. Mass. *Merritt v. New York, N. H. & H. R. R. Co.*, 164 Mass. 440, 41 N. E. 667. Neb. *Bonawitz v. De Kalb*, 2 Neb. (Unof.) 534, 89 N. W. 379, practice is not favored. N. Y.—*Maurer v. People*, 43 N. Y. 1; *Drew v. Andrews*, 8 Hun 23. Ohio.—*Hulse v. State*, 35 Ohio St. 421. Tenn.—*Atchison v. State*, 13 Lea 275. Wis.—*Byrne v. Smith*, 24 Wis. 68.

[a] A further instruction, given at the request of the jury, and amounting to a recapitulation of items testified to by witnesses is proper. *Wallrath v. Bohnenkamp*, 97 Mo. App. 242, 70 S. W. 1112.

[b] Counsel for either party cannot be heard to give his version of the testimony. *Atchison v. State*, 13 Lea (Tenn.) 275.

2. *People v. Soule*, 142 N. Y. Supp. 876.

3. *People v. Boggs*, 20 Cal. 432; *Green v. State*, 43 Ga. 368.

4. *People v. Boggs*, 20 Cal. 432.

5. *Neil v. Abel*, 24 Wend. (N. Y.) 185.

[a] But if the court's minutes (1) of the evidence come inadvertently to the attention of the jury during their deliberations a new trial is not required (*Chapman v. Chicago & N. W. R. Co.*, 26 Wis. 295, 309, 7 Am. Rep. 81), (2) unless it is seen that prejudice followed from this fact. *Mitchell v.*

amount of the testimony which shall be restated is left to the court's discretion.⁶

4. Presence of Counsel and Parties.—Testimony should ordinarily be read to the jury in open court and in the presence of the judge and of the parties and their counsel;⁷ but in civil cases the absence of counsel is not ground for a new trial.⁸ In criminal cases, however, a reading of testimony or restatement of the evidence by the court is a part of the trial and it is error to act without the defendant being present.⁹ The court stenographer should not be sent to the jury room to read any or all testimony requested by the jury,¹⁰ unless by consent of both parties;¹¹ and information as to the testimony of a witness cannot be given by the judge by a written answer to a written inquiry from the jury.¹² Nor should the judge visit the jury room for the purpose of stating the testimony to the jury.¹³ Where a witness is re-examined, this must be done in open court or at least in the presence of both court and counsel.¹⁴

5. Objections and Exceptions.—An objection to an order of the court requiring a witness to be recalled or testimony read to the jury must be interposed,¹⁵ as soon as the order of the court is known,¹⁶ or it will be waived. So too, counsel must object if he desires to raise the point that the court did not read a sufficient portion of the testi-

Carter, 14 Hun (N. Y.) 448.

6. Whitney v. Crim, 1 Hill (N. Y.) 61; Byrne v. Smith, 24 Wis. 68.

7. Ark.—Bennetfield v. State, 62 Ark. 365, 35 S. W. 790. Ga.—Roberts v. Atlanta Con. St. Ry. Co., 104 Ga. 805, 30 S. E. 966. Ia.—State v. Hunt, 112 Iowa 509, 84 N. W. 525. Ky.—Westerfield v. Baldwin & Co., 16 Ky. L. Rep. 318.

8. Colo.—Slack v. Stephens, 19 Colo. App. 538, 76 Pac. 741. Ga.—Roberts v. Atlanta Con. St. Ry. Co., 104 Ga. 805, 30 S. E. 966. Mass.—Merritt v. New York, N. H. & H. R. R. Co., 164 Mass. 440, 41 N. E. 667.

[a] The sending for counsel is a favor or courtesy, not a duty, and therefore an omission to send for him is no ground for new trial. Alexander Bros. v. Gardiner, 14 R. I. 15.

9. Ga.—Wade v. State, 12 Ga. 25. N. Y.—Maurer v. People, 43 N. Y. 1, "the presence of his counsel at the time and his failure to object was no waiver." Ohio.—Hulse v. State, 35 Ohio St. 421. Tex.—Barton v. State, 9 Tex. App. 261, in case of a felony. Va.—Jackson v. Com., 19 Gratt. (60 Va.) 656.

10. Fleming v. Shenandoah, 67 Iowa 505, 25 N. W. 752, 56 Am. Rep. 354.

[a] "The stenographer may not be absolutely accurate in essential points, or may have omitted some of the testimony, or he may give intonations or read his notes in such a way as not to fairly represent the testimony of the witness." Otto v. Young, 43 Misc. 628, 88 N. Y. Supp. 188.

11. Quinn v. Metropolitan St. Ry. Co., 218 Mo. 545, 118 S. W. 46.

12. See *supra*, IX, E.

13. State v. George, 8 Rob. (La.) 535; Watertown Bank & Loan Co. v. Mix, 51 N. Y. 558. And see *supra*, IX, E, 2.

14. Ky.—Luttrell v. Maysville & L. R. Co., 18 B. Mon. 291; Fulton Towboat Co. v. Pendergrass, 15 Ky. L. Rep. 208. S. C.—Smith v. Graves, 1 Brev. 16; Thompson v. Mallet, 2 Bay 94. W. Va.—Van Meter v. Kitzmiller, 5 W. Va. 380.

See also Brown v. Cowell, 12 Johns. (N. Y.) 384.

15. Smith v. Ross, 31 App. Cas. (D. C.) 348; Byrnes v. New York, L. E. & W. R. Co., 47 Hun 637, 14 N. Y. St. 554. See generally the title "Objections and Exceptions."

16. Roberts v. Atlanta Con. St. Ry. Co., 104 Ga. 805, 30 S. E. 966.

mony.¹⁷ The bill of exceptions must contain a statement of the testimony claimed to have been irregularly received or the point will not be considered on appeal.¹⁸

M. METHOD OF REACHING AGREEMENT.—1. In General.—Nothing but a free and deliberate finding made upon a conscientious conviction of the judgment of all the jurors will satisfy the law and render a verdict valid.¹⁹ While jurors should never surrender their convictions in order to reach an agreement with their fellow jurors, yet it is their duty to harmonize their views, where possible, and to make such reasonable concessions as will enable all to conscientiously agree upon a verdict.²⁰

2. By Chance.—*a. In General.*—Verdicts arrived at by a resort to chance or lot and not as a result of the deliberative action of the entire jury are illegal,²¹ though the improper action of the juror in resorting to chance may be cured by a subsequent reconsideration and determination of the case on its merits before rendering the verdict;²²

17. *Miller v. Royal Flint Glass Wks.*, 172 Pa. 70, 33 Atl. 350.

18. *Vaughn v. State*, 51 Tex. Crim. 180, 101 S. W. 445. See generally the title "Bills of Exceptions."

19. *Ga.*—*Merseve v. Shine*, 37 Iowa 253. *Okla.*—*Williams v. Pressler*, 11 Okla. 122, 65 Pac. 934. *Tex.*—*Woodall v. State*, 58 Tex. Crim. 513, 126 S. W. 591.

[a] **Verdict Agreed Upon by a Committee.**—A jury being unable to agree decided to leave the matter to two selected jurors who if they could not agree were to call a third. The verdict determined on by these three was returned but later set aside. *Ryerson v. Kitchell's Exrs.*, 3 N. J. L. 998. And see *Memphis & C. R. R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248.

[b] **An agreement to alter a verdict in a specified way if it is not accepted by the court will not invalidate it.** *Apthorp v. Backus, Kirby (Conn.)* 407, 1 Am. Dec. 26.

20. *Conn.*—*Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046. *Mass.*—*Com. v. Tuey*, 8 Cush. 1. *Tex.*—*Henderson v. State*, 12 Tex. 525. *Va.*—*Thompson v. Com.*, 8 Gratt. (49 Va.) 637.

[a] **Principle Stated.**—"While jurymen must not go contrary to their convictions, they properly ought to give great heed to the opinions of their fellows, and by reasonable concessions reach a conclusion which, although not that originally entertained by any of them, nevertheless may be one to which all can scrupulously adhere." *Sim-*

mons v. Fish, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588.

Power and duty of court to urge an agreement and compromise of differences of opinion, see *infra*, IX, N.

21. *Cal.*—*Levy v. Brannon*, 39 Cal. 485 (drawing lots); *Donner v. Palmer*, 23 Cal. 40. *Ga.*—*Obear v. Gray*, 68 Ga. 182. *Idaho.*—*Beakley v. Optimist Pr. Co.*, 28 Idaho 67, 152 Pac. 212, tossing coin. *Mass.*—*Dorr v. Fenno*, 12 Pick. 520. *N. Y.*—*Mitchell v. Ehle*, 10 Wend. 595; *Smith v. Cheetham*, 3 Caines 57.

[a] "'Chance' may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces." *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698.

[b] **Drawing From Hat.**—*Merseve v. Shine*, 37 Iowa 253; *State v. Cowell*, 125 Mo. App. 348, 102 S. W. 573.

[c] **Agreement To Abide by Majority Vote.**—*Houk v. Allen*, 126 Ind. 568, 25 N. E. 897, 11 L. R. A. 706.

[d] **In criminal cases, a verdict is not arrived at by lot merely because ballots are taken to determine the guilt or innocence of the accused.** *Young v. Com.*, 19 Ky. L. Rep. 929, 42 S. W. 1141.

[e] **Fixing the term of a defendant's imprisonment by lot is improper.** *Walker v. State*, 91 Ark. 497, 121 S. W. 925; *Witty v. State*, 75 Tex. Crim. 440, 171 S. W. 229.

22. *Thompson v. Perkins*, 26 Iowa 486.

[a] **Effect of Further Consideration**

and it has been held that where the amount of the verdict is determined by lot the error may be cured by the court's compelling a remission of a part of the damages to make the verdict no greater than the smallest amount favored by any juror.²³

b. Average Verdicts.—(I.) **In General.**—After the fact of a party's right to a recovery in some amount has been determined by the jury, but the jurors are unable to agree upon the amount of that recovery, they may properly resort to the expedient of obtaining the average amount favored by all, from the various amounts which in the opinion of the several jurors should be awarded to the successful party; and if they thereafter adopt the average thus obtained as the proper amount of their verdict, after due consideration and deliberation and without having entered into a prior agreement to be bound by the average, the verdict will be upheld.²⁴ Where the amount

of the Verdict.—If such a verdict is agreed to only after further and honest consideration it will stand, "but having found such illegal verdict, the evidence of its repudiation and the subsequent proper finding of a sufficient verdict should be very clear and satisfactory." *Thompson v. Perkins*, 26 Iowa 486.

23. *St. Louis S. W. Ry. Co. v. Gentry* (Tex. Civ. App.), 98 S. W. 226.

24. **U. S.**—*Cowperthwaite v. Jones*, 2 Dall. 55, 11 L. ed. 287; *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.*, 57 Fed. 898; *Johnson v. Northern Pac. Ry. Co.*, 46 Fed. 347; *Parshall v. Minneapolis & St. L. Ry. Co.*, 35 Fed. 649. **Ala.**—*Birmingham, Ry. L. & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024; *Birmingham, Ry. L. & P. Co. v. Clemons*, 142 Ala. 160, 37 So. 925; *Eufaula v. Speight*, 121 Ala. 613, 25 So. 1009. **Cal.**—*McDonnell v. Pescadero & S. M. Stage Co.*, 120 Cal. 476, 52 Pac. 725; *Hunt v. Elliott*, 77 Cal. 588, 20 Pac. 132. **Colo.**—*Florence & C. C. R. Co. v. Kerr*, 59 Colo. 539, 151 Pac. 439; *Greeley Irr. Co. v. Von Trotha*, 48 Colo. 12, 108 Pac. 985; *Empson Packing Co. v. Vaughn*, 27 Colo. 66, 59 Pac. 749; *Schoolfield v. Brunton*, 20 Colo. 139, 36 Pac. 1103; *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78; *City of Colorado Springs v. Duff*, 15 Colo. App. 437, 62 Pac. 959. **Conn.**—*Warner v. Robinson*, 1 Root 194, 1 Am. Dec. 38. **Del.**—*Chandler v. Barker*, 2 Har. 387. **Fla.**—*Orange Belt Ry. Co. v. Craver*, 32 Fla. 28, 13 So. 444. **Ga.**—*Columbus v. Oglethorpe*, 102 Ga. 293, 29 S. E. 749. **Idaho.**—*Newman v. Great Shoshone & Twin Falls Water P. Co.*,

28 Idaho 764, 156 Pac. 111; *Giffen v. Lewiston*, 6 Idaho 231, 55 Pac. 545, of doubtful propriety. **Ill.**—*Groves & S. R. R. Co. v. Herman*, 206 Ill. 34, 69 N. E. 36; *Pekin v. Winkel*, 77 Ill. 56. **Ind.**—*Batterson v. State*, 63 Ind. 531; *St. Louis & S. E. Ry. Co. v. Myrtle*, 51 Ind. 566; *Alexander v. Thomas*, 25 Ind. 268; *Guard v. Risk*, 1 Ind. 155. **Ind. Ter.**—*Davis v. Pryor*, 3 Ind. Ter. 396, 58 S. W. 660. **Ia.**—*McElhone v. Wilkinson*, 121 Iowa 429, 96 N. W. 868; *Hoover v. Mapleton*, 110 Iowa 571, 81 N. W. 776; *Owen v. Christensen*, 106 Iowa 394, 76 N. W. 1003; *Sullens v. Chicago, R. I. & P. R. Co.*, 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501; *Deppe v. Chicago, R. I. & P. R. Co.*, 38 Iowa 592; *Hamilton v. Des Moines Valley Ry. Co.*, 36 Iowa 31; *Barton v. Holmes*, 16 Iowa 252. **Kan.**—*Hamilton v. Atchison, T. & S. F. Ry. Co.*, 95 Kan. 353, 148 Pac. 648; *Sims v. Williamsburg Tp.*, 92 Kan. 636, 141 Pac. 581; *Rambo v. Empire Dist. Elec. Co.*, 90 Kan. 390, 133 Pac. 553; *Campbell v. Brown*, 85 Kan. 527, 117 Pac. 1010; *Taylor v. Abbott*, 85 Kan. 198, 115 Pac. 979; *Kinsley v. Morse*, 40 Kan. 588, 20 Pac. 222; *Bailey v. Beck*, 21 Kan. 462. **Me.**—*Wiley v. Inhab. of Belfast*, 61 Me. 569. **Mass.**—*Dorr v. Fenno*, 12 Pick. 520. **Mich.**—*Battle Creek v. Haak*, 139 Mich. 514, 102 N. W. 1005. **Minn.**—*Reick v. Great Northern Ry. Co.*, 129 Minn. 14, 151 N. W. 408; *St. Martin v. Desnoyer*, 1 Minn. 156. **Mo.**—*Hagan v. Gibson Min. Co.*, 131 Mo. App. 386, 111 S. W. 608; *State v. Cowell*, 125 Mo. App. 348, 102 S. W. 573; *Kolb v. St. Louis Transit Co.*, 102 Mo. App. 143, 76 S. W. 1050;

each individual juror thinks should be awarded is known to the others, it is not improper for an average to be made in order that an agreement may be reached.²⁵ A similar method may be resorted to by the jury in determining the length of the term of imprisonment²⁶ to be im-

- Moore *v.* Southwest Missouri El. Ry. Co., 100 Mo. App. 665, 75 S. W. 176; Jobe's Admr. *v.* Weaver, 77 Mo. App. 665; St. Clair *v.* Missouri Pac. R. Co., 29 Mo. App. 76, 88; McMurdock *v.* Kimberlin, 23 Mo. App. 523; Miller *v.* St. Louis R. Co., 5 Mo. App. 471. **Mont.**—Great Northern Ry. Co. *v.* Benjamin, 51 Mont. 167, 149 Pac. 968; Gordon *v.* Trevarthan, 13 Mont. 387, 34 Pac. 185, 40 Am. St. Rep. 452. **Neb.**—Cortelyou *v.* McCarthy, 37 Neb. 742, 56 N. W. 620; Ponca *v.* Crawford, 23 Neb. 662, 37 N. W. 609, 8 Am. St. Rep. 144. **Nev.**—See Lee *v.* Clute, 10 Nev. 149. **N. H.**—Dodge *v.* Carroll, 59 N. H. 237. **N. J.**—Pusheart *v.* New York Shipbuilding Co., 85 N. J. L. 525, 89 Atl. 980; Kennedy *v.* Kennedy, 18 N. J. L. 450. **N. Y.**—Conklin *v.* Hill, 2 How. Pr. 6; Driscoll *v.* Nelligan, 46 App. Div. 324, 61 N. Y. Supp. 692; Moses *v.* Central Park, etc. R. R. Co., 3 Misc. 322, 23 N. Y. Supp. 23, 52 N. Y. St. Rep. 213. **N. D.**—Great Northern Ry. Co. *v.* Lenton, 31 N. D. 555, 154 N. W. 275. **Okla.**—St. Louis & S. F. R. Co. *v.* Brown, 45 Okla. 143, 144 Pac. 1075. **Pa.**—Cleveland *v.* Carlisle, 186 Pa. 110, 40 Atl. 288; White *v.* White, 5 Rawle 61; Kunkel *v.* Hughes, 6 Pa. Dist. 356. **R. I.**—Luft *v.* Lingane, 17 R. I. 420, 22 Atl. 942; Forbes *v.* Howard, 4 R. I. 364. **S. D.**—Sales *v.* Maupin, 35 S. D. 176, 151 N. W. 427. **Tenn.**—Tinkle *v.* Dunivant, 16 Lea 503; Harvey *v.* Jones, 3 Humph. 157; Bennett *v.* Baker, 1 Humph. 399. **Tex.** Kalteyer *v.* Mitchell, 102 Tex. 390, 117 S. W. 792, 132 Am. St. Rep. 889; Handley *v.* Leigh, 8 Tex. 129; Weatherford, M. W. & N. W. Ry. Co. *v.* Thomas (Tex. Civ. App.), 175 S. W. 822; International & G. N. Ry. Co. *v.* Jones (Tex. Civ. App.), 175 S. W. 488 (not commended); San Antonio Traction Co. *v.* Crisp (Tex. Civ. App.), 162 S. W. 422; Northern Texas Traction Co. *v.* Evans (Tex. Civ. App.), 152 S. W. 707; Armstrong Packing Co. *v.* Clem (Tex. Civ. App.), 151 S. W. 576; Eastern Railway Co. *v.* Montgomery (Tex. Civ. App.), 139 S. W. 885; Chicago, R. L. & G. R. Co. *v.* Swann, 60 Tex. Civ. App. 427, 127 S. W. 1164; Chicago, R. I. & G. R. Co. *v.* Trippett, 50 Tex. Civ. App. 279, 111 S. W. 761; Missouri, K. & T. Ry. Co. *v.* Hawkins (Tex. Civ. App.), 109 S. W. 221; Missouri, etc. R. Co. *v.* Light, 54 Tex. Civ. App. 481, 117 S. W. 1058; Gulf, C. & S. F. Ry. Co. *v.* Blue, 46 Tex. Civ. App. 239, 102 S. W. 128. **Utah.** Midgley *v.* Bergerman, 30 Utah 17, 83 Pac. 466; Pence *v.* California Min. Co., 27 Utah 378, 75 Pac. 934. **Vt.**—Cheney *v.* Holgate, Brayt. 171. **Va.**—Shobe *v.* Bell, 1 Rand. (22 Va.) 39. **Wash.** Loy *v.* Northern Pac. Ry. Co., 77 Wash. 25, 137 Pac. 446; Wiles *v.* Northern Pac. Ry. Co., 66 Wash. 343, 119 Pac. 810; Conover *v.* Neher-Ross Co., 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841; Bell *v.* Butler, 34 Wash. 131, 75 Pac. 130; Stanley *v.* Stanley, 32 Wash. 489, 493, 73 Pac. 596; Watson *v.* Reed, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899. **Wis.**—Birchard *v.* Booth, 4 Wis. 67. See Giese *v.* Schultz, 69 Wis. 521, 34 N. W. 913. [a] "A quotient verdict is one where the jury take the sum of each estimate submitted by the jurors and divide it by the number of jurors." Pusheart *v.* New York Shipbuilding Co., 85 N. J. L. 525, 89 Atl. 980. [b] An instruction that the jury may resort to this method of ascertaining the damage should not be given. Burke *v.* Magee, 27 Neb. 156, 42 N. W. 890. 25. Marquette, H. & O. R. R. Co. *v.* Probate Judge, 53 Mich. 217, 18 N. W. 788. 26. Ind.—Batterson *v.* State, 63 Ind. 531; Dooley *v.* State, 28 Ind. 239. **Tenn.**—Glidewell *v.* State, 15 Lea 133. **Tex.**—Ingram *v.* State (Tex. Crim.), 182 S. W. 290; Luna *v.* State (Tex. Crim.), 179 S. W. 1152; Hicks *v.* State, 75 Tex. Crim. 461, 171 S. W. 755; Lamb *v.* State, 75 Tex. Crim. 75, 169 S. W. 1158; Dawson *v.* State, 72 Tex. Crim. 68, 161 S. W. 469; Cravens *v.* State, 55 Tex. Crim. 519, 117 S. W. 156; Holt *v.* State, 51 Tex. Crim. 15, 100 S. W. 156; Wallace *v.* State (Tex. Crim.), 97 S. W. 1050; Goodman *v.* State, 49 Tex. Crim. 185, 91 S. W. 795; Hill *v.* State, 43 Tex. Crim. 583, 67

posed in a criminal case, or the amount of the fine to be assessed.²⁷ It is sometimes said that such verdicts are not to be encouraged,²⁸ though other courts look upon them with manifest approval and will interfere with them only when convinced that a miscarriage of justice has resulted.²⁹

(II.) *Effect of a Prior Agreement.*—When it can be shown that the jury agreed, prior to so ascertaining the average amount, to be bound by the sum so obtained, in all events, verdicts so obtained are universally condemned,³⁰ and a verdict will be set aside if some, though

S. W. 506; *McAnally v. State* (Tex. Crim.), 57 S. W. 832; *Keith v. State* (Tex. Crim.), 56 S. W. 628; *Gaines v. State* (Tex. Crim.), 37 S. W. 331; *Barton v. State*, 34 Tex. Crim. 613, 31 S. W. 671; *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773; *Leverett v. State*, 3 Tex. App. 213. Va.—*Thompson v. Com.*, 8 Gratt. (49 Va.) 637.

27. See *Smith v. Com.*, 98 Ky. 437, 33 S. W. 419; *Good v. State* (Tex. Crim.), 67 S. W. 102.

28. Conn.—*Haight v. Hoyt*, 50 Conn. 583. Ia.—*Hamilton v. Des Moines Valley R. Co.*, 36 Iowa 31. Kan.—*Campbell v. Brown*, 85 Kan. 527, 117 Pac. 1010. N. D.—*Great Northern Ry. Co. v. Lenton*, 31 N. D. 555, 154 N. W. 275. S. D.—*Long v. Collins*, 12 S. D. 621, 82 N. W. 95.

[a] Where such a method is resorted to before any discussion of the evidence takes place the "facts are suggestive of such an absence of that deliberation which should characterize the conduct of juries when passing upon the property rights of litigants, as to subject to close scrutiny the evidence upon which their finding is made to rest." *Missouri, K. & T. Ry. Co. v. Light*, 54 Tex. Civ. App. 481, 117 S. W. 1058.

29. *Cleland v. Carlisle*, 186 Pa. 110, 40 Atl. 288.

[a] Where a difference of opinion exists as to the amount the plaintiff is entitled to recover, "if each juror marks down the sum which he thinks is correct and right, the result would fairly express the average judgment of the jury, and this mode of harmonizing upon the verdict would be just as pure and innocent as if effected 'by word of mouth.'" *Lee v. Clute*, 10 Nev. 149.

[b] "We have to choose between the alternatives of tolerating the practice resorted to by the jury in this case, and the indefinite postponement

of a verdict. If every jurymen is to adhere pertinaciously to his own judgment regardless of the opinions of his fellows, especially upon the question of measure of damage or degree of guilt or quantum of punishment; if jurors are denied the privilege of harmonizing, discarding and reconciling extreme opinions by concession and compromise, and meeting on middle ground, a failure of justice, or what is tantamount, indefinite delay, is the inevitable consequence." *Thompson v. Com.*, 8 Gratt. (49 Va.) 637, 652.

30. Ala.—*International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L. R. A. (N. S.) 415; *Southern R. Co. v. Williams*, 113 Ala. 620, 21 So. 328. Cal.—*Dixon v. Plums*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180, 20 L. R. A. 698 (*overruling Turner v. Tuolumne County Water Co.*, 25 Cal. 397); *Wilson v. Berryman*, 5 Cal. 44, 63 Am. Dec. 78. Colo.—*Pawnee Ditch & Imp. Co. v. Adams*, 1 Colo. App. 250, 28 Pac. 662. Conn.—*Haight v. Hoyt*, 50 Conn. 583. Idaho.—*Flood v. McClure*, 3 Idaho 587, 32 Pac. 254. Ill.—*Roy v. Goings*, 112 Ill. 656; *Illinois Cent. R. Co. v. Able*, 59 Ill. 131. Ind.—*Chicago & I. Coal Ry. Co. v. McDaniel*, 134 Ind. 166, 32 N. E. 728, 33 N. E. 769; *Dunn v. Hall*, 8 Blackf. 32. Ia.—*Williams v. Dean*, 134 Ia. 216, 111 N. W. 931, 11 L. R. A. (N. S.) 410; *Ward v. Marshalltown Light, P. & R. Co.*, 132 Iowa 578, 108 N. W. 323; *Sylvester v. Town*, 110 Iowa 256, 81 N. W. 455; *Denton v. Lewis*, 15 Iowa 301; *Manix v. Malony*, 7 Iowa 81; *Schanler v. Porter*, 7 Iowa 482. Kan.—*Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232; *Werner v. Edmiston*, 24 Kan. 147; *Johnson v. Husband*, 22 Kan. 277; *Clark v. Ford*, 10 Kan. App. 579, 62 Pac. 543. Ky.—*But see Heath v. Conway*, 1 Bibb 398. Miss.—*Parham v. Harney*, 6 Smed. & M. 55. Mo.—*Sharp v. Kansas City*

not all of the jurors understood that the amount so ascertained would be binding on them and would constitute their verdict.³¹ Verdicts so obtained are in fact but one species of "chance" verdicts.³²

In criminal cases the same principle applies and a prior agreement will vitiate the verdict.³³ That the jury, in order to make the verdict

Cable Ry. Co., 114 Mo. 94, 20 S. W. 93; Kansas City, St. J. & C. B. R. Co. v. Campbell, 62 Mo. 585; Sawyer v. Hannibal & St. J. R. Co., 37 Mo. 240, 90 Am. Dec. 382; Milbourne v. Robison, 132 Mo. App. 198, 110 S. W. 598. **Neb.**—Burke v. Magee, 27 Neb. 156, 42 N. W. 890. **N. H.**—Boynton v. Trumbull, 45 N. H. 408. **N. Y.** Roberts v. Failis, 1 Cow. 238; Harvey v. Rickett, 15 Johns. 87; Smith v. Cheetham, 3 Caines 57; Hamilton v. Owego Water Works, 22 App. Div. 573, 48 N. Y. Supp. 106, affirmed, 163 N. Y. 562, 57 N. E. 1111. **S. D.**—Long v. Collins, 12 S. D. 621, 82 N. W. 95. **Tenn.**—East Tennessee & W. N. C. R. Co. v. Winters, 85 Tenn. 240, 1 S. W. 790; Elledge v. Todd, 1 Humph. 43, 34 Am. Dec. 616. **Tex.**—Hovey v. Weaver (Tex. Civ. App.), 175 S. W. 1089; Whisenant v. Schawe (Tex. Civ. App.), 141 S. W. 146; Missouri, K. & T. Ry. Co. v. Bounds (Tex. Civ. App.), 136 S. W. 269; International & G. N. R. Co. v. Lane (Tex. Civ. App.), 127 S. W. 1066; Texas Midland Ry. Co. v. Atherton (Tex. Civ. App.), 123 S. W. 704. **Utah.**—Lambourne v. Halfn, 23 Utah 489, 65 Pac. 206; Wright v. Union Pac. R. Co., 22 Utah 338, 62 Pac. 317. **Va.**—Washington Luna Park Co. v. Goodrich, 110 Va. 692, 66 S. E. 977. **Wash.**—Goodman v. Cody, 1 Wash. Ter. 329, 34 Am. Rep. 808.

[a] "The impropriety consists in the agreement to be bound by the result." *Dorr v. Fenno*, 12 Pick. (Mass.) 521.

[b] "If the jurors previously agree to a particular mode of arriving at a verdict, and to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting, such a proceeding would be improper; but if the means is adopted merely for the sake of arriving at a reasonable measure of damages, without binding the jurors by the result, it is no objection to the verdict." *Dana v. Tucker*, 4 Johns. (N. Y.) 487.

[c] **Objections to the Practice.** Such a verdict "would enable any one juror, by marking a very large sum

to produce an average which would be unreasonably high and contrary to the opinion of the other eleven jurors." *Dorr v. Fenno*, 12 Pick. (Mass.) 521. And see *Goodman v. Cody*, 1 Wash. Ter. 329, 34 Am. Rep. 808.

[d] **Maximum and minimum restriction** on the amounts to be set down by each juror does not render the verdict legal. *Sylvester v. Casey*, 110 Iowa 256, 81 N. W. 455; *Magill v. State* (Tex. Crim.), 67 S. W. 1018; *Wood v. State*, 13 Tex. App. 135, 44 Am. Rep. 701.

31. **Ia.**—*Sylvester v. Casey*, 110 Iowa 256, 81 N. W. 455. **Kan.**—*Johnson v. Husband*, 22 Kan. 277. **Tex.**—*Galveston, H. & S. A. Ry. Co. v. Brassell* (Tex. Civ. App.), 173 S. W. 522.

32. *Goodman v. Cody*, 1 Wash. Ter. 329, 336, 34 Am. Rep. 808.

[a] "If the estimate of each juror is before the eyes of the others when the agreement is made, then no element of chance will be found in the result, for it would be a mere matter of mathematical computation; but without a knowledge of these estimates, the character of the verdict will be as entirely unknown to the jurors as though the whole matter were decided by the casting of a die, or the tossing of a coin." *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 35 Am. St. Rep. 180.

33. **Ark.**—*Williams v. State*, 66 Ark. 264, 50 S. W. 517. **Ky.**—*Paducah & E. R. Co. v. Com.*, 3 Ky. L. Rep. 688. **Mo.**—*State v. Branstetter*, 65 Mo. 149. **Tenn.**—*Williams v. State*, 15 Lea 129, 54 Am. Rep. 404; *Crabtree v. State*, 3 Sneed 302. **Tex.**—*Brookman v. State*, 50 Tex. Crim. 277, 96 S. W. 928; *Sanders v. State*, 45 Tex. Crim. 518, 78 S. W. 518, 108 Am. St. Rep. 973; *Magill v. State* (Tex. Crim.), 67 S. W. 1018; *Good v. State* (Tex. Crim.), 67 S. W. 102; *White v. State*, 37 Tex. Crim. 651, 40 S. W. 789; *Driver v. State*, 37 Tex. Crim. 160, 38 S. W. 1020; *Wood v. State*, 13 Tex. App. 135, 44 Am. Rep. 701; *Hunter v. State*, 8 Tex. App. 75.

even or in round numbers, after obtaining the quotient, raises or lowers it in a small amount, does not cure the error;³⁴ but if the original agreement to abide by the average thus obtained is broken and further deliberation by the jury takes place, resulting in a verdict for a different sum, it will stand.³⁵ A subsequent assent to the verdict is by some courts held to be enough to purge it of illegality.³⁶ The burden of proving the making of an illegal agreement to be bound by the result is on the party attacking the verdict,³⁷ and the mere fact that after the verdict was returned, a paper was found in the jury room on which, in the handwriting of a juror, appeared two columns of figures each containing twelve amounts which had been added together and divided by twelve, and the quotient so obtained was the exact amount of the verdict is not sufficient to prove the existence of such an illegal, prior agreement.³⁸ Nor is the fact that a verdict is

[a] **Instructions.**—The jury may be instructed that they cannot fix the punishment by obtaining an average term based on the opinion of the several jurors. *Witty v. State*, 75 Tex. Crim. 440, 171 S. W. 229.

[b] **Remission** of so much of the penalty assessed as exceeds the minimum punishment fixed by law will cure the error. *Williams v. State*, 66 Ark. 264, 50 S. W. 517.

34. Ala.—*International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549, 49 L. R. A. (N. S.) 415. **Kan.**—*Ottawa v. Gilliland*, 63 Kan. 165, 65 Pac. 252, 88 Am. St. Rep. 232. **Tenn.**—*Williams v. State*, 15 Lea 129, 54 Am. Rep. 404. **Tex.**—*Brookman v. State*, 50 Tex. Crim. 277, 96 S. W. 928; *Sanders v. State*, 45 Tex. Crim. 518, 78 S. W. 518, 108 Am. St. Rep. 973; *Whisenant v. Schawe* (Tex. Civ. App.), 141 S. W. 146; *Texas Midland R. Co. v. Atherton* (Tex. Civ. App.), 123 S. W. 704.

Compare Moore v. Southwest Missouri El. Ry. Co., 100 Mo. App. 665, 75 S. W. 176; *Barton v. State*, 34 Tex. Crim. 613, 31 S. W. 671.

35. Ala.—*Western Union Tel. Co. v. Hill*, 163 Ala. 18, 50 So. 248, 23 L. R. A. (N. S.) 648. **Ill.**—*Cochlin v. People*, 93 Ill. 410. **Ind. Ter.**—*Davis v. Pryor*, 3 Ind. Ter. 396, 58 S. W. 660. **Mo.** *Moore v. Southwest Missouri El. Ry. Co.*, 100 Mo. App. 665, 75 S. W. 176. **N. J.**—*Pusheart v. New York Shipbuilding Co.*, 85 N. J. L. 525, 89 Atl. 980. **Tenn.**—*Johnson v. Perry*, 2 Hamm. 569. **Tex.**—*Reineke v. State* (Tex. Crim.), 23 S. W. 684; *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773. **Utah.** *Pence v. California Min. Co.*, 27 Utah

378, 75 Pac. 934. **Wash.**—*Bell v. Butler*, 34 Wash. 131, 75 Pac. 130. See *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. Rep. 841.

36. Ill.—*Roy v. Goings*, 112 Ill. 656; *Pekin v. Winkel*, 77 Ill. 56. **N. Y.** *Dana v. Tucker*, 4 Johns. 487; *Moses v. Central Park, etc. R. R. Co.*, 3 Misc. 322, 23 N. Y. Supp. 23, 52 N. Y. St. Rep. 213. **N. C.**—*State v. Harper*, 101 N. C. 761, 7 S. E. 730, 9 Am. St. Rep. 46.

Contra, Sylvester v. Casey, 110 Iowa 256, 81 N. W. 455; *Thompson v. Perkins*, 26 Iowa 486.

37. Mo.—*State v. Cowell*, 125 Mo. App. 348, 102 S. W. 573. **S. C.**—*Finch v. Finch*, 21 S. C. 342. **Utah.**—*Midgley v. Bergerman*, 30 Utah 17, 83 Pac. 466; *Pence v. California Min. Co.*, 27 Utah 378, 75 Pac. 934. **Wash.**—*Wiles v. Northern Pac. Ry. Co.*, 66 Wash. 337, 119 Pac. 810.

As to use of jurors' affidavits, see 3 ENCY. OF EV. 222, 233.

38. Ala.—*Birmingham Ry., L. & P. Co. v. Turner*, 154 Ala. 542, 45 So. 671. *Compare International Agr. Corp. v. Abercrombie*, 184 Ala. 244, 63 So. 549; *Southern Ry. Co. v. Williams*, 113 Ala. 620, 21 So. 328. **Ark.**—*Hydrick v. State*, 103 Ark. 4, 145 S. W. 542. **Ga.**—*Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749. **Ill.**—*John Spry Lumb. Co. v. Duggan*, 182 Ill. 218, 54 N. E. 1002. **Ind.**—*Batterson v. State*, 63 Ind. 531. **Me.**—*Wiley v. Inhab. of Belfast*, 61 Me. 569. **Minn.**—*Reick v. Great Northern Ry. Co.*, 129 Minn. 14, 151 N. W. 408. **Mo.**—*Jobe's Admr. v. Weaver*, 77 Mo. App. 665; *St. Clair*

for an odd or fractional amount enough in itself to authorize the conclusion that it was the result of a prior agreement or was not arrived at in a legitimate way.⁴⁰

3. By Compromise.—Verdicts are often and properly the result of mutual concessions on the part of the jurors, especially as to their amount, in actions for unliquidated damages,⁴¹ and this of itself is no reason for refusing to accept them.⁴² In criminal cases the term of imprisonment or amount of the fine,⁴² or even the degree of the crime,⁴³ may be arrived at by mutual concessions on the part of the jurors.

But a verdict arrived at by compromise on the part of a juror involving a surrender of conscientious convictions as to the right of the successful litigant to recover anything will not be allowed to stand.⁴⁴ The line separating a valid verdict reached by a harmonizing of previously diverse views, from an invalid compromise verdict, is often

v. Missouri Pac. R. Co., 29 Mo. App. 76, 88; *McMurdock v. Kimberlin*, 23 Mo. App. 523. **N. J.**—*Kennedy v. Kennedy*, 18 N. J. L. 450. **N. Y.**—*Driscoll v. Nelligan*, 46 App. Div. 324, 61 N. Y. Supp. 692. **Va.**—*Washington Luna Park Co. v. Goodrich*, 110 Va. 692, 66 S. E. 977.

39. *Cobb v. Hand*, 12 Ala. App. 461, 68 So. 541. *Compare Haight v. Hoyt*, 50 Conn. 583.

[a] **Illustration.**—"That the verdict should have been for \$720.80 in a case like this [personal injuries] furnishes an indication that the amount was reached by some trick of figures, but the mode of calculation may not have been agreed on beforehand . . . and this would, therefore, not authorize the court to conclude that such prior agreement had been made." *City of Eufaula v. Speight*, 121 Ala. 613, 25 So. 1009.

40. **Ind.**—*St. Louis & S. E. Ry. Co. v. Myrtle*, 51 Ind. 566. **N. Y.**—*Wolf v. Goodhue Fire Ins. Co.*, 43 Barb. (N. Y.) 400, *affirmed* in 41 N. Y. 620; *Hamilton v. Owego Water Works*, 22 App. Div. 573, 48 N. Y. Supp. 106, *affirmed* in 163 N. Y. 562, 57 N. E. 1111. **Tex.**—*Owens v. Missouri Pac. Ry. Co.*, 67 Tex. 679, 4 S. W. 593; *Galveston, H. & S. A. Ry. Co. v. Boshier* (Tex. Civ. App.), 165 S. W. 93.

[a] "Without something of this kind, twelve men can hardly be expected to come to a unanimous conclusion upon any computation of unliquidated damages in an action of tort." *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 23, 40 Atl. 1046.

41. *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Coyle v. Gorman*, 1 Phila. (Pa.) 326.

[a] "The mere fact that jurors vote for different amounts, some high, and some low, and then compromise on an intermediate amount, does not show misconduct." *Galveston, H. & S. A. Ry. Co. v. Boshier* (Tex. Civ. App.), 165 S. W. 93.

42. *Alexander v. State*, 69 Tex. Crim. 23, 152 S. W. 436.

43. *Burrows v. State* (Tex. Crim.), 72 S. W. 848.

[a] Where under the law applicable to the case and the evidence a defendant is either guilty of a crime of higher degree or entirely innocent, the verdict will be set aside as an evident compromise. *Reed v. State*, 2 Ga. App. 153, 58 S. E. 312; *People v. Saitta*, 156 N. Y. Supp. 675. But see *State v. Furbeck*, 29 Kan. 532.

44. **Mass.**—*Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588. **Mich.**—*Benedict v. Michigan Beef & Provision Co.*, 115 Mich. 527, 73 N. W. 802. **N. Y.**—*McCormick v. Rochester R. Co.*, 133 App. Div. 760, 117 N. Y. Supp. 1110, *affirmed*, 198 N. Y. 510, 92 N. E. 1090. **Tex.**—*Pecos & N. T. Ry. Co. v. Finklea* (Tex. Civ. App.), 155 S. W. 612.

[a] **Basis for Setting Aside a Compromise Verdict.**—"The wrong, however, in such a verdict, rests in the fact that it does not express the real judgment of the jurors, and not alone that it is too large or too small. A defendant cannot object that a verdict is too small if it is actually the expression of the judgment of the

shadowy and ill defined.⁴⁵ A compromise by the jurors for the mere purpose of reaching an agreement, vitiates a verdict.⁴⁶ Frequently the character of the verdict itself is such as to reasonably indicate that it could only have been the result of an improper compromise,⁴⁷ as where it is manifestly inadequate;⁴⁸ and the conduct of the jury

jurors. Nor will a court set aside a verdict as being the result of a compromise, unless it clearly appears that it actually was such a result." *Stretch v. Stretch* (Mich.), 158 N. W. 185.

45. *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588.

[a] "A verdict which is the result of real harmony of thought growing out of open-minded discussion between jurors with a willingness to be convinced, with a proper regard for opinions of others and with a reasonable distrust of individual views not shared by their fellows and a fair yielding of one reason to a stronger one, each having in mind the great desirability of unanimity both for the parties and for the public, is not open to criticism. But a verdict which is reached only by the surrender of conscientious convictions upon one material issue by some jurors in return for a relinquishment by others of their like settled opinion upon another issue and the result is one which does not command the approval of the whole panel, is a compromise verdict founded upon conduct subversive of the soundness of trial by jury." *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588.

46. *Curry v. J. V. Brinkman Co. Bank*, 7 Kan. App. 807, 54 Pac. 1; *Goodsell v. Seeley*, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

[a] **The Principle Stated.**—"It is no doubt true that juries often compromise in the way here suggested and that by 'splitting differences' they sometimes return verdicts with which the judgment of no one of them is satisfied. But this is an abuse. The law contemplates that they shall, by their discussions, harmonize their views if possible, but not that they shall compromise, divide and yield for the mere purpose of an agreement. The sentiment or notion which permits this tends to bring jury trial into discredit and to convert it into a lottery." *Goodsell v. Seeley*, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

[b] **Agreement to find a verdict against the convictions of the dissenting jurors** with the understanding that it shall not exceed, in amount, a specified sum, is improper. *Wiegand v. Fee Bros. Co.*, 73 App. Div. 139, 76 N. Y. Supp. 872, 11 N. Y. Ann. Cas. 117.

[c] **In a criminal case a juror** should not surrender his conscientious convictions as to the degree of the crime established by the evidence in order that an agreement may be reached. *People v. Koerner*, 117 App. Div. 40, 102 N. Y. Supp. 93.

47. *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588.

[a] **That a verdict was for just one-half the sum demanded in the complaint** "may be cause for surmise" that it was the result of a compromise but "is no evidence of it." *Hamilton v. Owego Water Works*, 22 App. Div. 573, 48 N. Y. Supp. 106, affirmed, 163 N. Y. 562, 57 N. E. 1111. *Compare Metcalf v. Bockoven*, 62 Neb. 877, 87 N. W. 1055.

[b] **A verdict not authorized by the pleadings** will be considered to be a compromise verdict. *Wootan v. Partridge*, 39 Tex. Civ. App. 346, 87 S. W. 356.

[c] **Uneven amount of the verdict** does not prove it a compromise verdict. *St. Louis & S. E. Ry. Co. v. Myrtle*, 51 Ind. 566.

48. See cases following.

[a] **An inadequate verdict** in an action for personal injuries in which contributory negligence was pleaded is indicative of a compromise. *Miller v. Barker, Rose & Clinton Co.*, 158 N. Y. Supp. 865.

[b] **Verdict for \$200 for loss of an eye** by a young boy was held to be an almost conclusive demonstration that it was the result, not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588.

will also sometimes point conclusively to the same end.⁴⁹ Where the issues are so framed that if the plaintiff is entitled to recover anything, he is entitled to recover a specified, ascertained amount as liquidated damages, a verdict for less than this amount will be set aside as based upon an evident compromise,⁵⁰ but where the inference of a compromise is not a necessary one the verdict will be allowed to stand.⁵¹ Where the testimony as to a fact which is not capable of

49. *Sohlman v. Cluny Art Embroidery Co.*, 129 N. Y. Supp. 106.

[a] **Illustration.**—"They first returned and announced a disagreement. They were sent out to consider the case further, and again returned and the foreman announced: 'We agree to half the amount for the plaintiff, that he claims.' When polled, however, the sixth juror stated that 'it is not entirely settled.' The trial justice sent them out again and they returned and announced that their verdict was, 'Half of the wages for plaintiff.' In view of these facts, as well as the unsatisfactory nature of the testimony, a new trial seems required." *Sohlman v. Cluny Art Embroidery Co.*, 129 N. Y. Supp. 106.

50. **Mich.**—See *Benedict v. Michigan Beef & Provision Co.*, 115 Mich. 527, 73 N. W. 802; *Morley v. Liverpool & London, etc. Ins. Co.*, 85 Mich. 210, 48 N. W. 502. **Minn.**—*Doyle v. Wagner*, 108 Minn. 443, 122 N. W. 316. **Mo.** *Huff v. Thurman*, 78 Mo. App. 635. **Neb.**—*Meyer v. Shamp*, 51 Neb. 424, 71 N. W. 57. **N. Y.**—*Myers v. Myers*, 86 App. Div. 73, 83 N. Y. Supp. 236; *Bigelow v. Garwitz*, 61 Hun 624, 15 N. Y. Supp. 940, 40 N. Y. St. 580; *Feinblatt v. Unterberg*, 84 Misc. 459, 146 N. Y. Supp. 188; *Scheuer v. Manashaw*, 77 Misc. 208, 137 N. Y. Supp. 534; *Heller v. Goldberg*, 148 N. Y. Supp. 261; *Goldberg v. Shapiro*, 140 N. Y. Supp. 1016; *Seligman v. Linder*, 117 N. Y. Supp. 192; *Meyers v. Zucker*, 91 N. Y. Supp. 358. See *Hatch v. Attrill*, 118 N. Y. 383, 23 N. E. 549; *Cowles v. Watson*, 14 Hun 41.

[a] "In order to come within the rule condemning verdicts brought about by a compromise, it must appear that no case for a quantum meruit was made out and there must be an issue as to the specific sum which was to be paid as part of the contract. In other words, where the damages are liquidated and the plaintiff gives testimony to the effect that it was agreed. . . . He should receive upon its per-

formance a specified sum and the defendant on the other hand, testifies that a smaller sum was to be paid, or where it appears from his evidence that the plaintiff is not entitled to anything, and the jury renders a verdict in favor of the latter in a sum not claimed by either party as being the stipulated price or sum, if any, such verdict is clearly the result of a compromise and will be set aside." *Lawson v. Wells, Fargo & Co.*, 113 N. Y. Supp. 647.

51. **Ga.**—*Godwin v. Albany Fertilizer Co.*, 99 Ga. 180, 25 S. E. 181. **Mich.**—*Stretch v. Stretch* (Mich.), 158 N. W. 185 (verdict for principal only of the note without the interest sued on, not regarded as a compromise where it appears that the payee had received other benefits from the maker); *Crawl v. Dancer*, 180 Mich. 607, 147 N. W. 495; *Alexander v. Mud Lake Lumber Co.*, 153 Mich. 70, 116 N. W. 539; *Whalen v. Grant*, 129 Mich. 178, 88 N. W. 401; *Big Rapids Nat. Bank v. Peters*, 120 Mich. 518, 79 N. W. 891; *Benedict v. Michigan Beef & Provision Co.*, 115 Mich. 527, 73 N. W. 802. **N. J.**—*Hart v. Denise*, 75 N. J. L. 82, 66 Atl. 1085. **N. Y.**—*Hamilton v. Owego Water Works*, 22 App. Div. 573, 48 N. Y. Supp. 106, *affirmed*, 163 N. Y. 562, 57 N. E. 1111; *Lawson v. Wells, Fargo & Co.*, 113 N. Y. Supp. 647; *Hogan v. Rosenthal*, 127 App. Div. 312, 111 N. Y. Supp. 676. **Okla.**—*St. Louis & S. F. R. Co. v. Model Laundry*, 42 Okla. 501, 525, 141 Pac. 970.

[a] "The verdict for the less amount may have been the result of a mistake in computation, or it may have been that the jury on their own judgment considered portions of plaintiff's testimony inherently improbable." *Benedict v. Michigan Beef & Provision Co.*, 115 Mich. 527, 73 N. W. 802.

[b] Fact that if plaintiff's witnesses had been believed a larger verdict would have been warranted does not indicate a compromise. *Central*

exact ascertainment is conflicting the jury may determine the matter by taking an average of the amounts in evidence.⁵²

N. URGING AGREEMENT.⁵³ — 1. **In General.** — The court may within reasonable limits and within the bounds of its judicial discretion urge upon the jury the desirability of their reaching an agreement and returning a verdict,⁵⁴ especially where they have been out for

Trust Co. v. Kuglin, 194 Ill. App. 294.

[c] **A defendant cannot complain** that a verdict in favor of plaintiff was not for as large an amount as it should have been. *Martin v. McLeod*, 148 Ala. 509, 42 So. 622; *Terrell Coal Co. v. Lacey* (Ala.), 31 So. 109.

52. **Ga.**—*Harvey v. Boswell*, 65 Ga. 550; *Western & A. R. R. v. Brown*, 58 Ga. 534; *Harrison v. Powell*, 24 Ga. 530. **La.**—*Succession of Roth*, 33 La. Ann. 540. **Md.**—*Barnum v. McLaughlin*, 42 Md. 251, 319.

But see *Illinois, I. & M. R. Co. v. Freeman*, 210 Ill. 270, 71 N. E. 444.

[a] **Where the testimony was conflicting** as to the weight of a cubic yard of gravel, the jury was justified in taking an average. *Richard Coker & Co. v. New Era Gravel & Dev. Co.* (Tex. Civ. App.), 168 S. W. 988.

[b] **How This Rule Is Applied.** Where the testimony of several witnesses in regard to the amount of rent which ought to be paid was of such a nature as to require it to be averaged, the aggregate amount ought to be ascertained by adding together the estimate of each and every witness who testified thereto and dividing the sum thus obtained by the entire number of witnesses; concurring witnesses are each to be counted. *Jones v. Jones*, 4 Gill (Md.) 87.

53. **Additional instructions after retirement**, see 13 STANDARD PROC. 966, et seq.

54. **Ala.**—*State v. Blackwell*, 9 Ala. 79. **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. Carter*, 111 Ark. 272, 164 S. W. 715; *St. Louis, I. M. & S. R. Co. v. Devaney*, 98 Ark. 83, 135 S. W. 802; *Bell v. State*, 81 Ark. 16, 98 S. W. 705. **Conn.**—*Doty v. Smith*, 80 Conn. 245, 67 Atl. 885; *Wheeler v. Thomas*, 67 Conn. 577, 35 Atl. 499. **Idaho.** *People v. Stock*, 1 Idaho 218. **Ia.** *State v. Mulhollen*, 173 Iowa 242, 155 N. W. 252 (practice of urging agreement is tolerated rather than approved); *Niles v. Sprague*, 13 Iowa 198, 203. **Kan.**—*Karner v. Kansas City El. R. R. Co.*, 82 Kan. 842, 109 Pac. 676;

State v. Garrett, 57 Kan. 132, 45 Pac. 93; *State v. Rogers*, 56 Kan. 362, 43 Pac. 256, practice of lecturing the jury is not to be commended. **Ky.**—*Quinlan v. Com.*, 149 Ky. 476, 149 S. W. 892; *Monroe v. Brann*, 14 Ky. L. Rep. 764. **Me.**—*Cowan v. Umbagog Pulp Co.*, 91 Me. 26, 39 Atl. 340; *State v. Rollins*, 77 Me. 380; *Emery v. Estes*, 31 Me. 155. **Mich.**—*Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795; *Pierce v. Rehfuess*, 35 Mich. 53. **Minn.**—*Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551, 55 N. W. 742; *McNulty v. Stewart*, 12 Minn. 434. See *Doyle v. Wagner*, 108 Minn. 443, 122 N. W. 316. **Mo.**—*State v. Pierce*, 136 Mo. 34, 37 S. W. 815. *Compare State v. Campbell*, 166 Mo. App. 589, 149 S. W. 1173. **Ore.**—*State v. Hawkins*, 18 Ore. 476, 23 Pac. 475; *State v. Saunders*, 14 Ore. 300, 12 Pac. 441. **Pa.**—*Knickerbocker Ice Co. v. Pennsylvania R. Co.*, 253 Pa. 54, 97 Atl. 1051. **S. C.**—*Dover v. Lockhart Mills*, 86 S. C. 229, 68 S. E. 525; *State v. Jones*, 86 S. C. 17, 67 S. E. 160; *State v. Gallman*, 79 S. C. 229, 60 S. E. 682. **S. D.**—*State v. Price*, 30 S. D. 299, 138 N. W. 14. **Tenn.**—*Frady v. State*, 8 Baxt. 349. **Tex.**—*Muckleroy v. State* (Tex. Crim.), 42 S. W. 383; *Dow v. State*, 31 Tex. Crim. 278, 20 S. W. 583; *Missouri, K. & T. Ry. Co. v. Barber* (Tex. Civ. App.), 163 S. W. 116. **Vt.**—*Covey v. Rogers*, 85 Vt. 308, 81 Atl. 1130. **Va.**—*Smith v. Stanley*, 114 Va. 117, 75 S. E. 742, especially where there have been prior mistrials. **Wis.**—*Seivert v. Galvin*, 133 Wis. 391, 113 N. W. 680; *Giese v. Schultz*, 69 Wis. 521, 34 N. W. 913.

[a] **Remarks Held Proper.**—The statement, "this case is submitted to you for decision, and not for disagreement" held proper. *German Sav. Bank v. Citizens' Nat. Bank*, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399.

[b] "I expect verdicts in this court and I have been in the habit of getting verdicts," held not improper. *State v. Price*, 30 S. D. 299, 138 N. W. 14.

[c] Jury were told "to go back to

some time and are unable to agree.⁵⁵ But neither the clerk,⁵⁶ nor the bailiff have any authority to speak to the jury in regard to such matters.⁵⁷ After a disagreement has been reported the jury may be told that the case is one in which they ought to be able to reach an agreement and then sent back for further deliberations,⁵⁸ but any intimation by the court as to the party for whom the verdict should be returned,⁵⁹ or that failure to agree was necessarily due to sympathy, prejudice, improper motives,⁶⁰ or ignorance⁶¹ on the part of the jurors, is improper. Much latitude is allowed the court in its remarks in cases where, from the nature of the issues and the evidence, the jury should have little difficulty in reaching an agreement,⁶² but in cases where a verdict for either party would, upon the evidence produced be permitted to stand, great care and caution should be exercised by the court.⁶³ So where the jury has been out for a considerable period without reaching an agreement and is fatigued and weary especial care should be exercised by the court in its remarks.⁶⁴

their room and figure it out and not allow the lawyers to tangle them." *Asher Lumber Co. v. Lunsford*, 17 Ky. L. Rep. 559, 32 S. W. 166.

[d] That the court told the jury to consider the case "in as mechanical a way as you fairly and conscientiously" can was not prejudicial error. *Scarlotta v. Ash*, 95 Minn. 240, 103 N. W. 1025.

[e] The language: "I want you to go and decide this case for me," disapproved but held not to be prejudicial. *Sandefur v. Com.*, 143 Ky. 655, 137 S. W. 504.

55. *Ia.*—*State v. Richardson*, 137 Iowa 591, 115 N. W. 220. *Mich.* *Baker v. Mohl*, 158 N. W. 187. *Tex.* *Tyrone v. State* (Tex. Crim.), 180 S. W. 125.

56. *Cullifer v. Atlantic Coast L. R. Co.*, 168 N. C. 309, 84 S. E. 400.

57. See *supra*, IX, B, 4, c.

58. *Ark.*—*Whitley v. State*, 114 Ark. 243, 169 S. W. 952; *St. Louis, I. M. & S. R. Co. v. Devaney*, 98 Ark. 83, 135 S. W. 802. *Cal.*—*People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935. *Ga.*

Wooten v. Solomon, 139 Ga. 433, 77 S. E. 375; *Golatt v. State*, 130 Ga. 18, 60 S. E. 107. *Ill.*—*Brown v. Walker*, 32 Ill. App. 199. *Ia.*—*Parks v. Town of Laurens*, 153 Iowa 567, 133 N. W. 1054. *S. D.*—See *State v. Price*, 30 S. D. 299, 138 N. W. 14.

But see *People v. Mayer*, 132 App. Div. 646, 117 N. Y. Supp. 520.

[a] Remark of judge that he was "going to put a stop to hung juries,"

made in the hearing of the jury, was not prejudicial. *Carlisle v. State* (Tex. Crim.), 56 S. W. 365.

59. *Cal.*—*People v. Kindleberger*, 100 Cal. 367, 34 Pac. 852; *People v. Conboy*, 15 Cal. App. 97, 113 Pac. 703. *Idaho.*—*State v. Chambers*, 9 Idaho 673, 75 Pac. 274. *Mont.*—*State v. Fisher*, 23 Mont. 540, 59 Pac. 919. *Nev.* *State v. Clark*, 38 Nev. 304, 149 Pac. 185, *reversing s. c.*, 36 Nev. 472, 135 Pac. 1083.

60. *People v. Mayer*, 114 N. Y. Supp. 25.

[a] It was improper for the court to state "that he must have a verdict in the case, that it was one of a peculiar character, and that 'he had reason to believe from information received that some of the jury had been approached and tampered with previously to the trial of the cause.'" *State v. Ladd*, 10 La. Ann. 271.

61. *State v. Tulip*, 9 Kan. App. 454, 60 Pac. 659.

62. *Fairgrieve v. Moberly*, 29 Mo. App. 141.

63. *Ga.*—*Peavy v. Clemons*, 10 Ga. App. 507, 73 S. E. 756. *Miss.*—*May v. State*, 98 Miss. 584, 54 So. 70. *Nev.* See *State v. Clark*, 38 Nev. 304, 149 Pac. 185, *reversing s. c.*, 36 Nev. 472, 135 Pac. 1083. *Tex.*—*Pecos & N. T. Ry. Co. v. Finklea* (Tex. Civ. App.), 155 S. W. 612.

64. *Highland Foundry Co. v. New York, N. H. & H. R. Co.*, 199 Mass. 403, 85 N. E. 437.

Whatever statements are made by the court to the jury it is well to add that no effort is being made to coerce any juror into surrendering his honest, deliberate judgment,⁶⁵ and that jurors should, under no circumstances, surrender their personal convictions in order to reach an agreement.⁶⁶ Admonitions to the jury of the character here under discussion are not, strictly speaking, to be considered as instructions.⁶⁷

2. Limitations on Discretion of Court.—While a broad discretion is confided to the court, this discretion must not be abused. Statements to the jury calculated to coerce them into reaching an agreement, unsupported by their honest convictions will constitute prejudicial error,⁶⁸ even though such statements are directed toward a single juror.⁶⁹

3. Inquiries by Court.—The court may, in its discretion recall the jury at any time for the purpose of making inquiries pertinent to the case on which they are deliberating.⁷⁰ No criticism of the jury

65. *Streprey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822.

66. *Peterson v. United States*, 213 Fed. 920, 130 C. C. A. 398; *Hodges v. O'Brien*, 113 Wis. 97, 88 N. W. 901.

67. *Frady v. State*, 8 Baxt. (Tenn.) 349. See 13 STANDARD PROC. 709, 755, et seq.

[a] **May Be Given Orally.**—*Frady v. State*, 8 Baxt. (Tenn.) 349. See 13 STANDARD PROC. 755, 757, note 85.

Necessity for presence of parties and counsel, see 13 STANDARD PROC. 978, 982.

68. **U. S.**—*Peterson v. United States*, 213 Fed. 920, 130 C. C. A. 398. **Ala.**—*Meadows v. State*, 182 Ala. 51, 62 So. 737, Ann. Cas. 1915D, 663. **Cal.**—*People v. Watson*, 165 Cal. 645, 133 Pac. 298. **Ga.**—*Alabama Great Southern R. Co. v. Daffron*, 136 Ga. 555, 71 S. E. 799. **Idaho.**—*State v. Chambers*, 9 Idaho 673, 75 Pac. 274. **Ky.**—*Louisville & N. R. Co. v. Coniff's Admr.*, 90 Ky. 560, 14 S. W. 543. **Mo.**—*State v. Nelson*, 181 Mo. 340, 80 S. W. 947, 103 Am. St. Rep. 602; *McCombs v. Foster*, 64 Mo. App. 613. **N. Y.**—*People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644; *Twiss v. Lehigh Valley R. Co.*, 61 App. Div. 286, 70 N. Y. Supp. 241, 10 N. Y. Ann. Cas. 88; *People v. Dixon*, 118 App. Div. 593, 103 N. Y. Supp. 186. **Ore.**—*State v. Ivanhoe*, 35 Ore. 150, 57 Pac. 317.

[a] **Illustrations.**—(1) The jury had returned as a verdict: "We agree to disagree." It was held error for the

court to say: "Gentlemen, return to your room and resume your deliberations and don't come back any more with anything like that." *Meadows v. State*, 182 Ala. 51, 62 So. 737, Ann. Cas. 1915D, 663. (2) It is improper to tell the jury that "to vote time after time in accordance with the first ballot cast and not try to arrive at a verdict is to deliberately set aside the oath you took on being accepted as jurors." *People v. Watson*, 165 Cal. 645, 133 Pac. 298.

[b] **Emphasizing the difference between civil and criminal cases** in a civil action is improper as tending to minimize the importance of the case and to induce a surrender of convictions on the part of the jurors. *Texas Central R. Co. v. Driver* (Tex. Civ. App.), 187 S. W. 981.

69. *Lively v. Sexton*, 35 Ill. App. 417.

[a] **"The Authority of the Judge Does Not Extend to the Coercion of a Single Juror.**—By the well defined limit of his powers he is denied all discretion in that respect. It is apparent that if he may by threats, influence one juror, the largest minority may be treated likewise." *Lively v. Sexton*, 35 Ill. App. 417.

70. *Allis v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. ed. 91. And see *supra*, IX, E.

[a] **"It is a familiar practice** to recall a jury after they have been in deliberation for any length of time for the purpose of ascertaining what difficulties they have in the consideration

nor implication of urgency is involved in inquiries by the court of the jury as to whether he can be of aid to them by giving further instructions,⁷¹ or as to the likelihood of their reaching an agreement within a short time.⁷² It has been held that the court may properly inquire as to the reason for their non-agreement,⁷³ and as to whether it is a question of law or of fact on which they disagree;⁷⁴ but it is improper for it to ask in what proportion the jury is divided.⁷⁵ The foreman of the jury should not indicate what jurors were refusing to agree to a verdict.⁷⁶

4. Matters to Which the Court May Refer.—*a. Duty of Jurors To Harmonize Their Views.*—The jurors' attention may properly be called to their duty to harmonize their views, if possible.⁷⁷ and in this connection they may be told that a difference of opinion between a small minority and the majority should induce the former to doubt the correctness of their own judgments and lead them to a careful re-examination of the facts in the case for the purpose of revising their preconceived opinions;⁷⁸ at the same time they should also be informed

of the case, and of making proper efforts to assist them in the solution of those difficulties. . . . The time at which such a recall shall be made, if at all, must be left to the sound discretion of the trial court." *Allis v. United States*, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. ed. 91.

71. *Hardt v. Chicago, M. & St. P. R. Co.*, 130 Wis. 512, 110 N. W. 427.

72. *Ga.*—*Jones v. State*, 117 Ga. 710, 44 S. E. 877. *Ohio.*—*Straub v. State*, 27 Ohio Cir. Ct. 50. *Wis.*—*Hardt v. Chicago, M. & St. P. R. Co.*, 130 Wis. 512, 522, 110 N. W. 427.

73. *Houston v. Ladies Union Branch Assn.*, 87 Ga. 203, 13 S. E. 634; *Rawlings v. Anheuser-Busch Brewing Assn.*, 1 Neb. (Unof.) 555, 95 N. W. 792.

74. *Central R. & Bkg. Co. v. Neighbors*, 83 Ga. 444, 10 S. E. 115.

75. *U. S.*—*Peterson v. United States*, 213 Fed. 920, 130 C. C. A. 398; *St. Louis & S. F. R. Co. v. Bishard*, 147 Fed. 496, 78 C. C. A. 62. *Ga.*—*Flahive v. State*, 10 Ga. App. 401, 73 S. E. 536 (not prejudicial error); *Ball v. State*, 9 Ga. App. 162, 70 S. E. 888. *Nev.*—*State v. Clark*, 38 Nev. 304, 149 Pac. 185, *reversing s. c.*, 36 Nev. 472, 135 Pac. 1083.

[a] "Such a practice is not to be commended, because we cannot see how it may be material for the court to understand the proportion of division of opinion among the jury." *Burton v. United States*, 196 U. S. 283, 307, 25 Sup. Ct. 243, 49 L. ed. 482.

[b] But the fact that the foreman

inadvertently states how many are for conviction is harmless. *Poling v. State (Okla.)*, 151 Pac. 895.

76. *Com. v. Poisson*, 157 Mass. 510, 32 N. E. 906, refusing to reverse order refusing new trial.

77. *Ala.*—*Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108. *Idaho.*—*People v. Stock*, 1 Idaho 218. *Kan.*—*Moore v. Cass*, 10 Kan. 288. *Ky.*—*Quinlan v. Com.*, 149 Ky. 476, 149 S. W. 892. *S. C.*—*Caldwell v. Duncan*, 87 S. C. 331, 69 S. E. 660; *Nickles v. Seaboard Air Line Ry. Co.*, 74 S. C. 102, 54 S. E. 255. *Tex.*—*Houston & T. C. R. Co. v. Darwin*, 47 Tex. Civ. App. 219, 105 S. W. 825. *Va.*—*Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

78. *U. S.*—*Burton v. United States*, 196 U. S. 283, 25 Sup. Ct. 243, 49 L. ed. 482; *Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. ed. 528; *United States v. Reid*, 210 Fed. 486; *United States v. Kenney*, 90 Fed. 257; *United States v. Allis*, 73 Fed. 165. *Ark.*—*Simonson v. Lovewell*, 118 Ark. 81, 175 S. W. 407. *Compare St. Louis, I. M. & S. Ry. Co. v. Carter*, 111 Ark. 272, 164 S. W. 715. *Conn.*—*State v. Smith*, 49 Conn. 376. *Ia.*—*Armstrong v. James & Co.*, 155 Iowa 562, 136 N. W. 686; *State v. Richardson*, 137 Iowa 591, 115 N. W. 220. *Me.*—*State v. Pike*, 65 Me. 111. *Mass.*—*Com. v. Poisson*, 157 Mass. 510, 32 N. E. 906; *Com. v. Whalen*, 16 Gray 25; *Com. v. Tuey*, 8 Cush. 1. *Minn.*—*Gibson v. Minneapolis, etc. R. Co.*, 55 Minn. 177, 56 N. W. 686, 43 Am. St.

that their verdict should be the result of their own convictions and not a mere acquiescence in the conclusions of their fellow jurors.⁷⁹ The line is very close between such statements and statements which are improper as tending to indicate that a compromise of the views of individual jurors might be valid,⁸⁰ as that more weight should be given to the opinion of the majority than to the views of a minority of the jurors,⁸¹ or that a minority should yield or surrender its views to those of the majority.⁸²

Rep. 482. **N. H.**—Whitman v. Morey, 63 N. H. 448, 2 Atl. 899; Ahearn v. Mann, 60 N. H. 472. **N. M.**—Territory v. Donahue, 16 N. M. 17, 113 Pac. 601. **N. D.**—Lathrop v. Fargo-Moorhead St. Ry. Co., 23 N. D. 246, 136 N. W. 88.

[a] "If there was a disagreement as to the evidence it was more probable that the recollection as to the facts of a majority of the jury was right, than that of the minority," held proper. *State v. Blackwell*, 9 Ala. 79.

[b] After long confinement such a charge should not be given. *Clemens v. Chicago, R. I. & P. Ry. Co.*, 163 Iowa 499, 144 N. W. 354. And see *Picken v. Miller*, 59 Ind. App. 115, 108 N. E. 968.

79. *United States v. Reid*, 210 Fed. 486; *Highland Foundry Co. v. New York, N. H. & H. R. R. Co.*, 199 Mass. 403, 85 N. E. 437.

80. **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. Carter*, 111 Ark. 272, 164 S. W. 715. **Ind.**—*Richardson v. Coleman*, 131 Ind. 210, 29 N. E. 909, 31 Am. St. Rep. 429; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369. **N. Y.**—*People v. Faber*, 199 N. Y. 256, 92 N. E. 674; *Twiss v. Lehigh Valley R. Co.*, 61 App. Div. 286, 70 N. Y. Supp. 241, 10 N. Y. Ann. Cas. 88. **Tex.**—*Pecos & N. T. Ry. Co. v. Finklea* (Tex. Civ. App.), 155 S. W. 612.

As to compromise verdict, see *supra*, IX, M, 3.

[a] "It is the theory of jury trials that a verdict is the expression of the concurrence of individual judgments rather than the product of mixed thoughts." *St. Louis, I. M. & S. Ry. Co. v. Carter*, 111 Ark. 272, 164 S. W. 715.

[b] **Coercion.**—"Urging a jury to an agreement contrary to the individual opinion and judgment of one of the jurors, may be coercion. The verdict of a jury should not be the general average of the views of its in-

dividual members but the consensus of individual judgment. Every juror takes an oath that is individual and that puts upon him as an individual the responsibility of correctly determining the matter submitted. He is a member of the body of twelve men, but he acts individually and is alone answerable to his conscience." *People v. Faber*, 199 N. Y. 256, 92 N. E. 674.

[c] **Expression of approbation** by judge on learning that the jury was nearer an agreement than before was held prejudicial as indicating approval by court of a surrender by a minority to the majority. *Peavy v. Clemons*, 10 Ga. App. 507, 73 S. E. 756.

[d] **Singling out a minority** and addressing statements particularly to them is a dangerous practice. *Picken v. Miller*, 59 Ind. App. 115, 108 N. E. 968. And see *Mahoney v. San Francisco & San Mateo Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518; *Hagen v. New York, C. & H. R. Co.*, 79 App. Div. 519, 80 N. Y. Supp. 580.

81. *Simonson v. Lovewell*, 118 Ark. 81, 175 S. W. 407.

82. **U. S.**—*Peterson v. United States*, 213 Fed. 920, 130 C. C. A. 398; *St. Louis & S. F. R. Co. v. Bishard*, 147 Fed. 496, 78 C. C. A. 62. **Ark.**—*Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. **Ga.**—*Ball v. State*, 9 Ga. App. 162, 70 S. E. 888. **Ind.**—*Picken v. Miller*, 59 Ind. App. 115, 108 N. E. 968. **Mo.**—*Edens v. Hannibal & St. J. R. Co.*, 72 Mo. 212; *Brooks v. Barth*, 98 Mo. App. 89, 71 S. W. 1098. **Tex.**—*Cornelison v. Ft. Worth & R. G. Ry. Co.*, 46 Tex. Civ. App. 509, 103 S. W. 1186; *Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075. **Va.**—*Whitelaw's Exr. v. Whitelaw*, 83 Va. 40, 1 S. E. 407.

[a] A reference to the way business matters are settled in cases of dispute is improper as advocating a yielding of individual convictions. *Picken v. Miller*, 59 Ind. App. 115, 108 N. E. 968.

Jurors may properly be told that they should lay aside all pride of opinion,⁸³ should not be obstinate or stubborn,⁸⁴ or prejudiced;⁸⁵ that each juror, in case of failure to agree, should re-examine the grounds of his opinion,⁸⁶ that jurors should consider their differences of opinion dispassionately and in a spirit of fairness and candor;⁸⁷ that it is no reflection on a juror to honestly change his opin-

[b] It was error to charge that each juror should "try as hard as you can to be persuaded, instead of trying to persuade the others." *People v. Engle*, 118 Mich. 287, 76 N. W. 502.

83. Ark.—*St. Louis, I. M. & S. Ry. Co. v. Carter*, 111 Ark. 272, 164 S. W. 715. Colo.—See *Holland v. People*, 30 Colo. 94, 69 Pac. 519. Idaho.—*State v. Chambers*, 9 Idaho 673, 75 Pac. 274; *People v. Stock*, 1 Idaho 218. Ind.—*Richardson v. Coleman*, 131 Ind. 210, 29 N. E. 909, 31 Am. St. Rep. 429. Ia.—*Burton v. Neill*, 140 Iowa 141, 118 N. W. 302, 17 Ann. Cas. 532; *State v. Richardson*, 137 Iowa 591, 115 N. W. 220; *State v. Tripp*, 113 Iowa 698, 84 N. W. 546. La.—*State v. Dudoussat*, 47 La. Ann. 977, 17 So. 685. N. C.—*Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190. Va.—*Smith v. Stanley*, 114 Va. 117, 75 S. E. 742.

[a] "The jury room is surely no place for pride of opinion, or for espousing and maintaining, in the spirit of controversy, either side of a cause." *Com. v. Tuey*, 8 Cush. (Mass.) 1.

84. U. S.—*Suslak v. United States*, 213 Fed. 913, 130 C. C. A. 391. Ark.—*Johnson v. State*, 60 Ark. 45, 28 S. W. 792. Ga.—*Golatt v. State*, 130 Ga. 18, 60 S. E. 107. N. Y.—*People v. Faber*, 199 N. Y. 256, 261, 92 N. E. 674. S. C.—*State v. Gallman*, 79 S. C. 229, 60 S. E. 682. Wis.—*Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822; *Secor v. State*, 118 Wis. 621, 95 N. W. 942; *Jackson v. State*, 91 Wis. 253, 64 N. W. 838.

[a] Improper Remarks.—(1) To say that for a juror to "entertain an opinion and stick by that opinion regardless of what any one else in the jury may say" is to commit "willful contempt of court," and subjects the juror to punishment, is prejudicial error. *Levinson v. Zipkin*, 119 N. Y. Supp. 680. And see *Lively v. Sexton*, 35 Ill. App. 417. (2) Where the court remarked that at times men mistake stubbornness for firmness "thereby intimating that one or more of the jurors who were holding out against the ma-

jority were stubborn rather than firm," it was held to be prejudicial error. *Brooks v. Barth*, 98 Mo. App. 89, 71 S. W. 1098. And see *McPeak v. Missouri Pac. Ry. Co.*, 128 Mo. 617, 30 S. W. 170. (3) It is improper to state: "It is no credit to a man merely because he has an opinion to stubbornly stick to it." *Louisville & N. R. Co. v. Coniff's Admr.*, 90 Ky. 560, 14 S. W. 543.

[b] To intimate that a proper penalty for stubbornness "would be the disgrace of exclusion from the jury wheel and the posting of their unfitness in a public office," is improper. *Miller v. Miller*, 187 Pa. 572, 585, 41 Atl. 277.

[c] A charge that "no juror ought to remain entirely firm in his own conviction one way or another, until he has made up his mind beyond all question that he is necessarily right and the others are necessarily wrong," is erroneous. *Cranston v. New York Cent. & H. R. R. Co.*, 103 N. Y. 614, 9 N. E. 500. And see *Dominick v. Hill*, 44 Hun 622, 6 N. Y. St. 329.

85. *Muckleroy v. State* (Tex. Crim.), 42 S. W. 383.

[a] Illustrations.—In *State v. Lawrence*, 38 Iowa 51, it was held not improper for the court, which had some grounds for suspicion, to state "that if any juror went into that jurybox with the predetermination as to how he should find his verdict and to hang the jury, or to cause a disagreement if the verdict could not be rendered as he wanted it, he would have a 'happy time of it,' to speak facetiously."

86. *Burton v. Neill*, 140 Iowa 141, 118 N. W. 302; *Frandsen v. Chicago, R. I. & P. R. Co.*, 36 Iowa 372.

87. U. S.—*Allen v. United States*, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. ed. 528. Ala.—*Phoenix Ins. Co. v. Moog*, 81 Ala. 335, 1 So. 108. Cal.—*People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935. Ia.—*Burton v. Neill*, 140 Iowa 141, 118 N. W. 302, 17 Ann

ion.⁸⁸ They may also be told that a juror should weigh the opinion of a fellow juror as he would the evidence to prove a fact in issue.⁸⁹ Even in criminal cases the jury is not to be told that they are not to be governed and influenced by the judgments of other jurors in reaching a verdict.⁹⁰ On the other hand, where the jurors are unable to agree upon the question of the defendant's guilt or liability they should not be told that they should make concessions in order to arrive at a common understanding,⁹¹ that no question of conscience on the part of the jurors is involved.⁹² A suggestion that if the disagreement between the jurors is as to the amount of the verdict and that if only a small amount stands in the way of an agreement one side or the other should yield, or compromise, is also improper.⁹³ Language of the court so strong as to intimate that a failure to harmonize their views and reach an agreement would defeat justice,⁹⁴ or that failure of a juror to agree is often attributed by the public to ulterior motives,⁹⁵ is improper.

b. *Importance of the Case.*—That the case is an important one, from a public,⁹⁶ or private standpoint,⁹⁷ may well be called to the jury's attention.

c. *Length of Time Spent in the Trial.*—Comment may be made on the length of time consumed by the trial,⁹⁸ and on the time the jury

Cas. 532. **N. M.**—Territory v. Donahue, 16 N. M. 17, 113 Pac. 601. **N. Y.** Green v. Telfair, 11 How. Pr. 260. **N. C.**—Warlick v. Plonk, 103 N. C. 81, 9 S. E. 190. **Wis.**—Barlow v. Foster, 149 Wis. 613, 136 N. W. 822; Jackson v. State, 91 Wis. 253, 64 N. W. 838.

88. Houston & T. C. R. Co. v. Darwin, 47 Tex. Civ. App. 219, 105 S. W. 825.

89. Caldwell v. Duncan, 87 S. C. 331, 69 S. E. 660.

90. See Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154, 41 L. ed. 528; Doty v. Smith, 80 Conn. 245, 67 Atl. 885.

91. **Ark.**—O'Neal v. Richardson, 78 Ark. 132, 92 S. W. 1117. **Ore.**—State v. Ivanhoe, 35 Ore. 150, 57 Pac. 317. **Tex.**—Pecos & N. T. Ry. Co. v. Finklea (Tex. Civ. App.), 155 S. W. 612.

92. Miller v. Miller, 187 Pa. 572, 582, 41 Atl. 277.

93. **Ark.**—St. Louis, I. M. & S. Ry. Co. v. Carter, 111 Ark. 272, 164 S. W. 715. **Ga.**—Alabama Great So. R. Co. v. Daffron, 136 Ga. 555, 71 S. E. 799. See Georgia R. Co. v. Cole, 77 Ga. 77. **Mich.**—Goodsell v. Seeley, 46 Mich. 623, 10 N. W. 44, 41 Am. Rep. 183.

94. **Idaho.**—State v. Chambers, 9 Idaho 673, 75 Pac. 274. **Mass.**—Highland Foundry Co. v. New York, N. H.

& H. R. Co., 199 Mass. 403, 85 N. E. 437. **Mo.**—State v. Pierce, 136 Mo. 34, 37 S. W. 815.

95. **Kan.**—State v. Bybee, 17 Kan. 462. **N. Y.**—People v. Sheldon, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644. See Hagen v. New York Cent. & H. R. R. Co., 79 App. Div. 519, 80 N. Y. Supp. 580. **Pa.**—Miller v. Miller, 187 Pa. 572, 41 Atl. 277.

96. **Ark.**—Whitley v. State, 114 Ark. 243, 169 S. W. 952. **Colo.**—Holland v. People, 30 Colo. 94, 69 Pac. 519. **Ia.** State v. Olds, 106 Iowa 110, 76 N. W. 644. **La.**—State v. Dudoussat, 47 La. Ann. 977, 17 So. 685. **Wis.**—Secor v. State, 118 Wis. 621, 95 N. W. 942.

97. **Cal.**—People v. Rhodes, 17 Cal. App. 789, 121 Pac. 935. **Ga.**—Allen v. Woodson, 50 Ga. 53. **S. C.**—Nickles v. Seaboard Air Line Ry. Co., 74 S. C. 102, 54 S. E. 255. **Wis.**—Barlow v. Foster, 149 Wis. 613, 136 N. W. 822.

98. **Ala.**—Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108. **Colo.**—Streprey v. Stark, 7 Colo. 614, 5 Pac. 111. **Conn.** Clinton v. Howard, 42 Conn. 294. **Ky.** Shely v. Shely, 20 Ky. L. Rep. 1021, 47 S. W. 1071. **Pa.**—Knickerbocker Ice Co. v. Pennsylvania R. Co., 253 Pa. 54, 97 Atl. 1051. **Tenn.**—See East Tennessee & W. N. C. R. Co. v. Win- ters, 85 Tenn. 240, 1 S. W. 790.

has been deliberating.⁹⁹ So also comment may be made as to the number of times that the case has been on trial.¹

d. *Necessity of Decision by Some Jury.*—That the case will, of necessity, have to be decided by some jury, at some time, is a proper suggestion by the court.²

e. *Ability of the Jury.*—The jury may be told that they are just as competent and just as likely to decide the case correctly as any other jury could be;³ that no other jury will ever be in a better position, to decide the case;⁴ that any future jury would be selected in the same manner and from the same source;⁵ and that the record of the jurors in reaching agreements in other cases may be commended.⁶

f. *Expense Involved.*—The fact that the trial has caused expense⁷

99. *Southern Ry. Co. v. Fleming*, 128 Ga. 241, 57 S. E. 481; *Nickles v. Seaboard Air Line Ry. Co.*, 74 S. C. 102, 54 S. E. 255.

1. *Ariz.*—*Machomich Mer. Co. v. Hickey*, 15 Ariz. 421, 140 Pac. 63. *Ia.* *Niles v. Sprague*, 13 Iowa 198. *Mass.* *Com. v. Kelley*, 165 Mass. 175, 42 N. E. 573. *Mich.*—*Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795. *N. M.* *Territory v. Donahue*, 16 N. W. 17, 113 Pac. 601.

Compare Louisville & N. R. Co. v. Coniff's Admr., 90 Ky. 560, 14 S. W. 543.

2. *U. S.*—*United States v. Allis*, 73 Fed. 165. *Ia.*—*State v. Richardson*, 137 Iowa 591, 115 N. W. 220; *Delmonica Hotel Co. v. Smith*, 112 Iowa 659, 84 N. W. 906. *Ky.*—*Covington v. Bostwick*, 26 Ky. L. Rep. 780, 82 S. W. 569. *Mo.*—*State v. Pierce*, 136 Mo. 34, 37 S. W. 815. *N. M.*—*Territory v. Donahue*, 16 N. M. 17, 113 Pac. 601. *S. C.*—*Nickles v. Seaboard Air Line Ry. Co.*, 74 S. C. 102, 54 S. E. 255. *Tenn.*—*Frady v. State*, 8 Baxt. 349. *Tex.*—*Rippetoe v. State*, 67 Tex. Crim. 192, 148 S. W. 811; *Northern Texas Tract. Co. v. Brigrance*, 61 Tex. Civ. App. 15, 128 S. W. 919.

Compare State v. Ivanhoe, 35 Ore. 150, 57 Pac. 317.

[a] "Nor is it a questionable proposition that it is important to defendants and to the community that public prosecutions should be terminated." *Com. v. Whalen*, 16 Gray (Mass.) 25.

3. *U. S.*—*United States v. Allis*, 73 Fed. 165. *Ga.*—*Austin v. Appling*, 88 Ga. 54, 13 S. E. 955; *Parker v. Georgia Pac. Ry. Co.*, 83 Ga. 539, 10 S. E. 233. *Ky.*—*Shely v. Shely*, 20 Ky. L. Rep. 1021, 47 S. W. 1071. *Minn.*—*Scar-*

lotta v. Ash, 95 Minn. 240, 103 N. W. 1025. *Mo.*—*State v. Tucker*, 232 Mo. 1, 133 S. W. 27. *N. M.*—*Territory v. Donahue*, 16 N. M. 17, 113 Pac. 601. *S. C.*—*Nickles v. Seaboard Air Line Ry. Co.*, 74 S. C. 102, 54 S. E. 255. *Tex.*—*Rippetoe v. State*, 67 Tex. Crim. 192, 148 S. W. 811. See *Fry v. State* (Tex. Crim.), 182 S. W. 331. *Wis.* *Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822.

Compare State v. Ivanhoe, 35 Ore. 150, 57 Pac. 317.

4. *Austin v. Appling*, 88 Ga. 54, 13 S. E. 955; *Shely v. Shely*, 20 Ky. L. Rep. 1021, 47 S. W. 1071.

[a] *Illustration.*—"The cause will never be better tried than it has been here and now before you. You have heard all the evidence, you have had it enforced by arguments of counsel, you have been given the principles of law. No one will ever be in a better position than you are to decide it. Decide it. Let nothing prevent you from deciding it." *Prince v. Lowell Elec. Light Corp.*, 201 Mass. 276, 87 N. E. 558.

5. *Lathrop v. Fargo-Moorhead St. Ry. Co.*, 23 N. D. 246, 136 N. W. 88.

6. *Conn.*—*Doty v. Smith*, 80 Conn. 245, 67 Atl. 885. *Ga.*—*White v. Fulton*, 68 Ga. 511. *S. C.*—*Caldwell v. Duncan*, 87 S. C. 331, 69 S. E. 660.

7. *Ga.*—*Allen v. Woodson*, 50 Ga. 53. *Ia.*—*Burton v. Neill*, 140 Iowa 141, 118 N. W. 302, 17 Ann. Cas. 532; *Delmonica Hotel Co. v. Smith*, 112 Iowa 659, 84 N. W. 906. *Kan.*—*Fields v. Dewitt*, 71 Kan. 676, 682, 81 Pac. 467. *Ky.*—*Covington v. Bostwick*, 26 Ky. L. Rep. 780, 82 S. W. 569. *Mich.*—*Kelly v. Emery*, 75 Mich. 147, 42 N. W. 795. *Minn.*—*Watson v. Minneapolis St. Ry.*

to the parties, and to the public, may be noticed;⁸ although by many courts such expressions are not approved and unguarded remarks of this nature may constitute prejudicial error.⁹ Reference may be made to the expense another trial would involve.¹⁰

g. *Suggestion of Method To Remedy Injustice of Verdict.*—If the jury has been unable to agree and it is probable that the apparent injustice of a verdict has deterred them from rendering one, the court may suggest to them that if that were their opinion, after having come to a decision upon the issues, there would be no objection to their stating in writing any recommendation as to what should be done by the parties by way of working a remedy for such injustice.¹¹

h. *Effect of Burden of Proof.*—The duty of a juror to find against the party having the burden of proof unless the contention of that party is supported by a preponderance of the evidence may be emphasized, but care must be exercised not to intimate to the jury that

Co., 53 Minn. 551, 55 N. W. 742. **Mo.** Fairgrieve v. Moberly, 29 Mo. App. 141.

[a] **Improper Remarks.**—It is improper to say: "This trial is a very expensive one indeed, for both parties, particularly to the plaintiff who is not well off, I believe; and if you disagree all of the time we have spent is absolutely lost, and the plaintiff has to pay all of the fees of this trial and expenses and go at it again." Mahoney v. San Francisco & San Mateo Ry. Co., 110 Cal. 471, 476, 42 Pac. 968, 43 Pac. 518.

8. **U. S.**—Suslak v. United States, 213 Fed. 913, 130 C. C. A. 391. **Ala.** Ashford v. McKee, 183 Ala. 620, 62 So. 879. **Ark.**—Johnson v. State, 60 Ark. 45, 28 S. W. 792. **Cal.**—People v. Miles, 143 Cal. 636, 77 Pac. 666. **Conn.**—Clinton v. Howard, 42 Conn. 294. **Idaho.**—People v. Stock, 1 Idaho 218. **Ia.**—Armstrong v. James & Co., 155 Iowa 562, 136 N. W. 686. **La.** State v. Seals, 135 La. 602, 65 So. 756. **Mich.**—Kelly v. Emery, 75 Mich. 147, 42 N. W. 795. **Minn.**—Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742. **Miss.**—May v. State, 98 Miss. 584, 54 So. 70. **N. M.**—Territory v. Donahue, 16 N. M. 17, 113 Pac. 601. **S. C.**—Dover v. Lockhart Mills, 86 S. C. 229, 68 S. E. 525; State v. Jones, 86 S. C. 17, 67 S. E. 160; State v. Rowell, 75 S. C. 494, 56 S. E. 23. **Tex.**—Fry v. State (Tex. Crim.), 182 S. W. 331; Missouri, K. & T. Ry. Co. v. Barber (Tex. Civ. App.), 163 S. W. 116. **Vt.**—State v. Gorham, 67 Vt. 365, 31 Atl. 845. **Wis.**—Moore v. Platte-

ville, 78 Wis. 644, 47 N. W. 1055.

[a] **That the court cannot proceed** with other cases until an agreement is reached, because of the lack of other jurors, is properly mentioned by the court. Dover v. Lockhart Mills, 86 S. C. 229, 68 S. E. 525. And see Ashford v. McKee, 183 Ala. 620, 62 So. 879.

9. **U. S.**—Peterson v. United States, 213 Fed. 920, 130 C. C. A. 398. **Ark.** Little Rock Ry. & El. Co. v. Newman, 77 Ark. 599, 92 S. W. 864. **Idaho.** State v. Chambers, 9 Idaho 673, 75 Pac. 274. **Mo.**—State v. Nelson, 181 Mo. 340, 80 S. W. 947, 103 Am. St. Rep. 602. See McPeak v. Missouri Pac. Ry. Co., 128 Mo. 617, 30 S. W. 170. **Mont.** State v. Fisher, 23 Mont. 540, 59 Pac. 919. **Nev.**—State v. Clark, 38 Nev. 304, 149 Pac. 185, reversing s. c., 36 Nev. 472, 135 Pac. 1083. **Tex.**—Cornelison v. Ft. Worth & R. G. Ry. Co., 46 Tex. Civ. App. 509, 103 S. W. 1186; Conn v. State, 11 Tex. App. 390. See Wootan v. Partridge, 39 Tex. Civ. App. 346, 87 S. W. 356. **Wis.**—Hodges v. O'Brien, 113 Wis. 97, 88 N. W. 901; Hannon v. State, 70 Wis. 448, 36 N. W. 1. See Secor v. State, 118 Wis. 621, 95 N. W. 942.

10. **Ala.**—See Phoenix Ins. Co. v. Moog, 81 Ala. 335, 1 So. 108. **Ia.** Burton v. Neill, 140 Iowa 141, 118 N. W. 302. **Kan.**—Sibley v. Kansas City Cotton-Mills Co., 85 Kan. 256, 116 Pac. 889. **Mich.**—Pierce v. Rehfuess, 35 Mich. 53. **N. Y.**—Green v. Telfair, 11 How. Pr. 260. **Vt.**—Covey v. Rogers, 85 Vt. 308, 81 Atl. 1130.

11. See McCoy v. Jordan, 184 Mass. 575, 69 N. E. 358.

if, as a body they cannot find for the party holding the burden of proof then it is their duty to unite in a verdict for the other party.¹²

i. *Verdict Against Some of the Defendants Only.*—Where the verdict may properly be against some and in favor of other parties, the jury's attention may be called to that fact.¹³

j. *Power of the Court To Correct a Mistake.*—The jury should never be told that, in case they should make a mistake and return an erroneous verdict, the error could be corrected either by the trial court on a motion for a new trial,¹⁴ or on an appeal.¹⁵

k. *Time Within Which Verdict Should Be Rendered.*—The court should not direct the jury to reach an agreement by any particular hour,¹⁶ but it may direct them to hasten their verdict.¹⁷

5. *Time Jury May Be Kept Together.*—a. *In General.*—A jury may be kept together by the court, in its discretion, so long as it seems reasonably possible that an agreement may be reached,¹⁸ and generally

12. *Karner v. Kansas City El. R. R. Co.*, 82 Kan. 842, 109 Pac. 676.

13. *Hyde v. United States*, 35 App. Cas. (D. C.) 451, *affirmed*, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. ed. 1114, a criminal case.

14. *Miller v. Miller*, 187 Pa. 572, 41 Atl. 277.

[a] *Danger of the Practice.*—"When we consider how prone human nature is to shirk grave responsibilities, how willingly it shifts them to others, we are not surprised that jurors, who had sat tiresome weeks in a trial, with before them a possible confinement of other weary weeks, accepted this invitation to unload their burden on the judge, hoping that the right and wrong of a case, difficult to them, would be clearly perceptible to him, and a true verdict be eventually recorded by another, according to the evidence." *Miller v. Miller*, 187 Pa. 572, 586, 41 Atl. 277.

[b] *Clemency of the Court.*—A verdict rendered after the court has promised the jury to exercise clemency in fixing the punishment will be set aside. *McBean v. State*, 83 Wis. 206, 53 N. W. 497.

15. *Ga.*—*Monroe v. State*, 5 Ga. 85. *N. Y.*—*Levinson v. Zipkin*, 119 N. Y. Supp. 680. *Tenn.*—*Taylor v. Jones*, 2 Head 565.

16. *Mass.*—*Prince v. Lowell Elec. Light Corp.*, 201 Mass. 276, 87 N. E. 558. *Miss.*—*Senior v. Brogan*, 66 Miss. 178, 6 So. 649. See *Maury v. State*, 68 Miss. 605, 9 So. 445, 24 Am. St. Rep. 291, verdict of murder set aside where jury was given only one hour to de-

liberate. *Mo.*—*State v. Hill*, 91 Mo. 423, 4 S. W. 121.

Compare Roach v. T. J. Moss Tie Co., 24 Ky. L. Rep. 1222, 71 S. W. 2.

[a] A promise of the court that if the jury returns a verdict the same night he will enter the date of their discharge as of the next day and thus enable them to get an additional day's pay, is improper. *Parrish v. State*, 12 Lea (Tenn.) 655.

17. *Ala.*—See *Ashford v. McKee*, 183 Ala. 620, 62 So. 879. *Ga.*—*Collins v. State*, 78 Ga. 87. *Ky.*—*Roach v. T. J. Moss Tie Co.*, 24 Ky. L. Rep. 1222, 71 S. W. 2. *Tenn.*—See *Wilson v. State*, 109 Tenn. 167, 70 S. W. 57.

18. *U. S.*—*Campbell v. United States*, 221 Fed. 186, 136 C. C. A. 602, forty-eight hours. *Ark.*—*Southern Ins. Co. v. White*, 58 Ark. 277, 24 S. W. 425. *Cal.*—See *People v. Rhodes*, 17 Cal. App. 789, 121 Pac. 935. *Conn.*—*Doty v. Smith*, 80 Conn. 245, 67 Atl. 885. *Ga.*—*Driver v. State*, 112 Ga. 229, 37 S. E. 400. *Idaho.*—*People v. Stock*, 1 Idaho 218, two days and a half. *Ill.*—*Chicago City R. Co. v. Shreve*, 226 Ill. 530, 80 N. E. 1049 (*affirming* 128 Ill. App. 462); *Jeffery v. Robbins*, 73 Ill. App. 353. *Ia.*—*State v. Richardson*, 137 Iowa 591, 115 N. W. 220. *Ky.*—*Gilbert v. Com.*, 21 Ky. L. Rep. 415, 51 S. W. 590; *Monroe v. Brann*, 14 Ky. L. Rep. 764. *La.*—*State v. Seals*, 135 La. 602, 65 So. 756; *State v. Fuselier*, 51 La. Ann. 1317, 26 So. 264. *Minn.*—*Coit v. Waples*, 1 Minn. 134. *Mo.*—*State v. Tucker*, 232 Mo. 1, 133 S. W. 27; *State v. Rose*, 142 Mo. 418, 44 S. W. 329, four days. *Neb.*

they may be sent back repeatedly although they report their inability to agree and ask to be discharged,¹⁹ though in some states there is a limit on the number of times a jury may be sent back.²⁰

b. *Unwarranted Confinement*.—It is improper to hold the jury for such a length of time as will have a depressing effect on them,

Jahnke v. State, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154; Russell v. State, 66 Neb. 497, 92 N. W. 751. **N. Y.** People v. Sheldon, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644; White v. Calder, 35 N. Y. 183, 33 How. Pr. 392; Green v. Telfair, 11 How. Pr. 260; People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168; People v. Koerner, 117 App. Div. 40, 102 N. Y. Supp. 93, fifty-seven hours proper. **N. C.**—Osborne v. Wilkes, 108 N. C. 651, 13 S. E. 285. **N. D.**—Lathrop v. Fargo-Moorhead St. Ry. Co., 23 N. D. 246, 136 N. W. 88, twenty-six hours. **Ohio**.—Young v. State, 26 Ohio Cir. Ct. 747, forty-eight hours. **Okl.** Wishard v. State, 5 Okla. Crim. 610, 115 Pac. 796. **S. C.**—Dover v. Lockhart Mills, 86 S. C. 229, 68 S. E. 525; Nickles v. Seaboard Air Line Ry. Co., 74 S. C. 102, 54 S. E. 255. **Tex.**—Matthews v. State, 72 Tex. Crim. 654, 163 S. W. 723 (forty-two hours proper); Dow v. State, 31 Tex. Crim. 278, 20 S. W. 583; North Dallas Cir. Ry. Co. v. McCue (Tex. Civ. App.), 35 S. W. 1080. **Va.**—Buntin v. Danville, 93 Va. 200, 24 S. E. 830. **Wis.**—Giese v. Schultz, 69 Wis. 521, 34 N. W. 913.

[a] "The judge must be master of the situation, restrained only by the boundaries of a very broad discretion. He must not only be left within the limitation suggested as master of the situation, but efficient administration is promoted by masterful judicial control of it, always paying careful attention to the comfort and health of the jury." Barlow v. Foster, 149 Wis. 613, 136 N. W. 822.

[b] *Illustrations*.—(1) Jury held forty hours, twenty-nine after a report that agreement was impossible. Barlow v. Foster, 149 Wis. 613, 136 N. W. 822. (2) Keeping jury twenty hours on the third trial of a case not improper. Chicago City R. Co. v. Shreve, 128 Ill. App. 462, *affirmed*, 226 Ill. 530, 80 N. E. 1049.

[c] The result obtained is an important factor in determining whether a jury was kept together an unreasonable length of time. Chicago City R.

Co. v. Shreve, 128 Ill. App. 462, *affirmed*, 226 Ill. 530, 80 N. E. 1049.

[d] **Demands of the jury to be discharged** are of importance in determining whether a verdict has been coerced from the jury by unwarranted confinement. State v. Kelley, 45 S. C. 659, 24 S. E. 45.

[e] **Complexity of issues and facts** is to be considered. Lathrop v. Fargo-Moorhead St. Ry. Co., 23 N. D. 246, 136 N. W. 88. And see Barlow v. Foster, 149 Wis. 613, 136 N. W. 822.

[f] **At common law** in cases of felony the rule appears to have required the jury to be kept together until they agreed; but in misdemeanor cases the rule was otherwise. People v. Olcott, 2 Johns. Cas. (N. Y.) 301. See Com. v. Purchase, 2 Pick. (Mass.) 521, 13 Am. Dec. 452.

19. **U. S.**—United States v. Ingham, 97 Fed. 935. **Ky.**—Chesapeake & O. Ry. Co. v. Cowherd, 96 Ky. 113, 27 S. W. 990. **Minn.**—Watson v. Minneapolis St. Ry. Co., 53 Minn. 551, 55 N. W. 742. **S. C.**—State v. Jones, 86 S. C. 17, 67 S. E. 160.

[a] "All who are familiar with jury trials know that jurors are prone to report to the court their inability to agree, but not being discharged, often render, in a reasonable time thereafter, a verdict whose justice demonstrates, as was the case here, the propriety of the action of the court in keeping them together longer." Buntin v. City of Danville, 93 Va. 200, 24 S. E. 830.

20. **Fla.**—Adams v. State, 34 Fla. 185, 15 So. 905; Lambright v. State, 34 Fla. 564, 16 So. 582. **Me.**—See Cowan v. Umbagog Pulp Co., 91 Me. 26, 39 Atl. 340. **Mass.**—Foote v. Foote, 13 Allen 411, holding that the court need not instruct them of their rights. **S. C.** State v. Rowell, 75 S. C. 494, 56 S. E. 23.

[a] **But when the jury returns into court without permission** the direction of the judge for them to withdraw is not to be counted as sending them out. Emery v. Estes, 31 Me. 155.

rendering them incapable of exercising their reasoning faculties to the best purpose.²¹ Much depends upon the conditions under which the jury are held, as to whether they have been coerced into a verdict.²²

c. *Statements by the Court.*—The mere statement by the court, where the jury has failed to agree, that the court is not going to discharge them, does not amount to coercion on his part.²³ The court may properly intimate that if no agreement is reached the jury will be kept together over night,²⁴ or that if a verdict is not returned by a stated time the jury will be excused and later reconvened,²⁵ or that in such event the jury will have no opportunity to report until a later hour;²⁶ but the postponement of the hour at which a report will be received from the jury in such cases must not be unreasonable in

21. *Ia.*—*Clemens v. Chicago*, R. I. & P. Ry. Co., 163 Iowa 499, 144 N. W. 354, seventy hours. *N. Y.*—*People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644. *S. C.*—*State v. Kelley*, 45 S. C. 659, 24 S. E. 45.

22. See cases following, and *infra*, IX, N, 6.

[a] **Coercion Must Be Avoided.**

"The thought is suggested that the conclusion reached may possibly have resulted from weariness, exhaustion, and the overcoming of opposition and differences of opinion by force of numbers and sheer physical and mental inability of a few to withstand the arguments and importunities of a majority of the jurors for such a long period of time. If such were true, then the action taken results in a species of coercion rather than free action and voluntary agreement on a verdict by each individual juror. . . . On the contrary, if the jury were provided with suitable quarters, were able to sleep when nature required it, and were laboring under such surroundings and circumstances as permitted them to proceed leisurely and comfortably in their deliberations . . . the verdict could not be successfully attacked as being the result of coercion." *Jahne v. State*, 68 Neb. 154, 179, 94 N. W. 158, 104 N. W. 154, upholding verdict reached after more than six days' deliberation

[b] **In upholding a verdict reached after eighty-nine hours' deliberation** the court said: "It seems that the men who composed the jury were possessed of a large measure of pluck and endurance and that those who had been voting for acquittal stood resolutely by their opinions until convinced that

they were wrong." *Russell v. State*, 66 Neb. 497, 506, 92 N. W. 751.

Effect of failure to furnish beds, see *infra*, IX, N, 6.

23. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Devaney*, 98 Ark. 83, 135 S. W. 802. *Ga.*—*Southern Ry. Co. v. Fleming*, 128 Ga. 241, 57 S. E. 481; *Jones v. State*, 117 Ga. 710, 44 S. E. 877; *Veal v. State*, 7 Ga. App. 729, 67 S. E. 1054; *Winn v. Ingram*, 2 Ga. App. 757, 59 S. E. 7. *Ia.*—*German Sav. Bank v. Citizens' National Bank*, 101 Iowa 530, 70 N. W. 769, 63 Am. St. Rep. 399. *Minn.*—*Scarlotta v. Ash*, 95 Minn. 240, 103 N. W. 1025. *Mo.*—*State v. Tucker*, 232 Mo. 1, 133 S. W. 27. *Tex.*—*Carlisle v. State (Tex. Crim.)*, 56 S. W. 365. *Wis.*—*Giese v. Schultz*, 69 Wis. 521, 34 N. W. 913.

24. *Kan.*—*Sibley v. Kansas City Cotton Mills Co.*, 85 Kan. 256, 116 Pac. 889. *La.*—*State v. Seals*, 135 La. 602, 65 So. 756. *Mich.*—*Knapp v. Chicago & W. M. Ry. Co.*, 114 Mich. 199, 72 N. W. 200. *Mo.*—*State v. Lash*, 225 Mo. 556, 125 S. W. 464. *Neb.*—*Williams v. State*, 69 Neb. 402, 95 N. W. 1014. *N. Y.*—*Berry v. People*, 1 N. Y. Crim. 43, *affirmed*, 77 N. Y. 588, 1 N. Y. Crim. 57.

Compare: *Ala.*—*De Jarnette v. Cox*, 128 Ala. 518, 29 So. 618. *N. Y.*—*Twiss v. Lehigh Valley R. Co.*, 61 App. Div. 286, 70 N. Y. Supp. 241, 10 N. Y. Ann. Cas. 88. *Wis.*—*Brown v. State*, 127 Wis. 193, 106 N. W. 536.

25. *Madison Coal Co. v. Beam*, 63 Ill. App. 178; *Northern Texas Tract. Co. v. Brigance*, 61 Tex. Civ. App. 15, 128 S. W. 919.

26. *Miss.*—*Wiltcher v. State*, 99 Miss. 374, 54 So. 726. *N. J.*—*Duffy v. McKenna*, 82 N. J. L. 62, 81 Atl.

point of time.²⁷ A statement that the jury will be discharged at a stated hour unless there is then strong probability of an agreement being reached is proper,²⁸ but any statement, amounting to a threat, that the jury will be kept together until they reach an agreement,²⁹ or for a stated and an unreasonable period of time, will constitute coercion;³⁰ though in some jurisdictions it is considered proper to inform the jury that they can be held together until the end of the term.³¹

1101. **N. M.**—Territory *v.* McGinnis, 10 N. M. 269, 61 Pac. 208. **Tex.**—Wilkinson *v.* State, 49 Tex. Crim. 170, 91 S. W. 228.

27. See *Green v. Telfair*, 11 How. Pr. (N. Y.) 260.

[a] **Illustrations.**—"The court told them that they would be confined till the following Tuesday morning, it being then Saturday, unless they agreed on a verdict, and would not receive more than one meal a day. That this was an irregularity which compels a reversal is beyond dispute." *Fairbanks, Morse & Co. v. Weeber*, 15 Colo. App. 268, 62 Pac. 368.

28. *State v. Baker*, 67 Wash. 595, 122 Pac. 335.

29. **Ala.**—*De Jarnette v. Cox*, 128 Ala. 518, 29 So. 618. **La.**—*State v. Green*, 7 La. Ann. 518. **Minn.**—*Doyle v. Wagner*, 108 Minn. 443, 122 N. W. 316. **Miss.**—*May v. State*, 98 Miss. 584, 54 So. 70; *Vicksburg Bank v. Moss*, 63 Miss. 74, irregular but not prejudicial. **Mo.**—*State v. Eatherly*, 185 Mo. 178, 83 S. W. 1081, 105 Am. St. Rep. 567; *State v. Hill*, 91 Mo. 423, 4 S. W. 121; *Fox v. Union Depot Co.*, 7 Mo. App. 593. **N. Y.**—*People v. Sheldon*, 156 N. Y. 268, 283, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644; *Slater v. Mead*, 53 How. Pr. 57; *Green v. Telfair*, 11 How. Pr. 260. **Pa.**—*Miller v. Miller*, 187 Pa. 572, 41 Atl. 277. **S. D.**—*State v. Place*, 20 S. D. 489, 107 N. W. 829. **Tenn.**—*Chesapeake, O. & S. W. R. Co. v. Barlow*, 86 Tenn. 537, 8 S. W. 147; *Hancock v. Elam*, 3 Baxt. 33; *Taylor v. Jones*, 2 Head 565. **Tex.**—*North Dallas Cir. Ry. Co. v. McCue* (Tex. Civ. App.), 35 S. W. 1080. **Va.**—*Buntin v. City of Danville*, 93 Va. 200, 24 S. E. 830, but not prejudicial.

Compare *Pacific R. Co. v. Nash*, 7 Kan. 280.

[a] **Example.**—"In view of the issues involved and quantity of evidence introduced each juror must have

reached a conclusion soon after retiring. An all night session failed to produce an agreement as to the facts. No misunderstanding existed as to the law of the case. Then came the statement of the learned circuit judge that the jury would not be permitted to separate without an agreement. The statement was deliberate, repeated after objection by the accused. It cannot be assumed that the judge did not intend to execute his threat or that the jury would question his sincerity. . . . It would be absurd to say that such a situation would probably have no effect upon the action of an average juror." *State v. Place*, 20 S. D. 489, 107 N. W. 829.

[b] **Bailiff's statement** that the judge had gone away for several days and that he would keep the jury together until the return of the judge, unless they agreed, amounted to coercion. *Alabama Fuel & Iron Co. v. Rice*, 187 Ala. 458, 65 So. 402. And see *supra*, IX, E.

30. *Terre Haute & I. R. Co. v. Jackson*, 81 Ind. 19 (four days); *Hunter v. Hunter* (Tex. Civ. App.), 187 S. W. 1049.

[a] **It is ground for a new trial** for "The irregularity here disclosed is included in the clause of the statute relating to criminal actions which authorizes a new trial 'when the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of the jurors.' Rev. Code Cr. Proc., §430, subd. 4." *State v. Place*, 20 S. D. 489, 107 N. W. 829.

31. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285; *State ex rel. Hannon v. Grizzard*, 89 N. C. 115; *Rippetoe v. State*, 67 Tex. Crim. 192, 148 S. W. 811; *Terry v. State*, 50 Tex. Crim. 438, 97 S. W. 1043; *Brady v. State* (Tex. Crim.), 74 S. W. 771; *Dow v. State*, 31 Tex. Crim. 278, 20 S. W. 583. *Compare*

Where a sealed verdict is permissible,³² a direction to the jury, if they do not agree before court adjourns, to hand their verdict to the officer in charge of them when they do agree and that they may then separate but must return to court at a stated time is proper.³³

6. Imposing Hardships on Jury.—*a. In General.*—At common law it was the aim of the courts to obtain a verdict from the jury in all cases and to effectuate this result various coercive measures were adopted.³⁴ Modern conditions have greatly modified this practice.³⁵

b. Food and Drink.—An agreement of the jury cannot be forced by refusal to furnish them necessary food and drink.³⁶

c. Lodgings.—While the jury is considering the case, comfortable lodgings should be provided for it in case of a prolonged confinement,³⁷

Burgess v. Singer Mfg. Co. (Tex. Civ. App.), 30 S. W. 1110.

32. As to sealed verdict, see the title "Verdict."

33. Mich.—*Stevenson v. Detroit & M. Ry. Co.*, 118 Mich. 651, 77 N. W. 247. **Neb.**—*Gebhardt v. State*, 80 Neb. 363, 114 N. W. 290. **N. Y.**—*Erwin v. Hamilton*, 50 How. Pr. 32, *criticizing Green v. Telfair*, 11 How. Pr. 260. **Pa.**—*Darlington v. Allegheny*, 189 Pa. 202, 42 Atl. 112.

Contra, McCormick v. Cox, 8 Colo. App. 17, 44 Pac. 768.

34. Russell v. State, 66 Neb. 497, 92 N. W. 751; *People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644, for a review of common-law authorities.

[a] "Formerly the practice was to constrain juries to agree; and for the purpose of accelerating unanimity, they might be kept without meat, drink, fire, or candle till they were unanimously agreed; and if they held out and could not agree, though they were not to be threatened or imprisoned, the judges might carry them round the circuit from town to town in a cart (3 Bl. 375). Though these usages have become obsolete, still it is not compatible with the nature of the duty that jurors should in all cases obstinately persist in maintaining perfect independence of individual judgment." *Henderson v. State*, 12 Tex. 525, 533.

35. La.—*State v. Seals*, 135 La. 602, 65 So. 756. **N. Y.**—*People v. Sheldon*, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644. **Pa.**—*Miller v. Miller*, 187 Pa. 572, 586, 41 Atl. 277. **Wis.**—*Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822.

[a] **Advantages Gained.**—"A jury well taken care of by the judicial ad-

ministrator, so taken care of as to be impressed with the idea that everything is being done which is reasonably within the power of the judge to do, to enable them to give their best thought to the matter in hand to the end that a just conclusion may be reached if possible, will, it is believed, in general, partake of the spirit of the judge in that regard and co-operate to their utmost in finally terminating the controversy submitted to them." *Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822.

36. Colo.—*Fairbanks, Morse & Co. v. Weeber*, 15 Colo. App. 268, 62 Pac. 368. **Ga.**—*Henderson v. Reynolds*, 84 Ga. 159, 10 S. E. 734, 7 L. R. A. 327; *Physioc v. Shea*, 75 Ga. 466. **N. Y.**—*People v. Oleott*, 2 Johns. Cas. 301, 309, 1 Am. Dec. 168. **S. C.**—*State v. Kelley*, 45 S. C. 659, 24 S. E. 45. **Tenn.**—*Hancock v. Elam*, 3 Baxt. 33. **Wis.**—*Barlow v. Foster*, 149 Wis. 613, 136 N. W. 822.

[a] **No reversal was awarded** where the jury retired at 11 o'clock a. m. and rendered their verdict at 3 o'clock p. m., although the sheriff declined to give them refreshments, except water, and told them they must wait until they agreed on a verdict or until the judge told him to take them to dinner. *Gaither v. Hascall-Richards, etc. Co.*, 121 N. C. 384, 28 S. E. 546.

As to the care the jury is entitled to receive during the trial, see *supra*, IX, A.

37. Barlow v. Foster, 149 Wis. 613, 136 N. W. 822.

[a] **Discretion of the Court.**—Whether a jury "should be compelled to stay together more than one night without a bed, or at least a cot to lie on, . . . is a matter resting in

otherwise a shorter period of confinement may amount to coercion.³⁸

7. Prejudice From Improper Remarks or Conduct.—a. *In General.*—The bare possibility that the jury may have been misled by statements of the court is insufficient to show that a party has been prejudiced by such remarks.³⁹ That the verdict is returned shortly after the court has given the instructions of which complaint is made, indicates that the verdict is the result of coercion on the part of the court;⁴⁰ more especially is this true when the verdict is in the nature of a compromise.⁴¹ On the other hand, the fact that the verdict was not returned for a considerable time thereafter shows that the remarks of the court were not the controlling feature of the action of the jury.⁴² A subsequent request for instructions on the same,⁴³ or other points, indicates that the jury was not improperly affected by the remarks of the court.⁴⁴

discretion. It seems a wiser exercise of that discretion, however, to provide sleeping accommodations for the jury after the first night at least." *People v. Sheldon*, 156 N. Y. 268, 274, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644.

38. *Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154.

As to unreasonable period of confinement, see *supra*, IX, N, 5, b.

[a] "They had been out for about eighty-four hours without beds or cots; forty of those hours they had been confined in a small room. . . . If one or more members of the jury surrendered their convictions to put an end to the punishment they were undergoing, and with an indefinite continuance of which they were all threatened, it is not to be wondered at." *People v. Sheldon*, 156 N. Y. 268, 285, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644.

[b] But in *Russell v. State*, 66 Neb. 497, 92 N. W. 751, a verdict was sustained although it appeared that the jury were kept together eighty-nine hours "without beds, cots or other facilities for obtaining sleep."

39. *Ia.*—*Brossard v. Chicago*, M. & St. P. Ry. Co., 167 Iowa 703, 149 N. W. 915; *State v. Smith*, 99 Iowa 26, 68 N. W. 428, 61 Am. St. Rep. 219. *Neb.*—*Jahnke v. State*, 68 Neb. 154, 94 N. W. 158, 104 N. W. 154. *S. C.*—*Caldwell v. Duncan*, 87 S. C. 331, 69 S. E. 660. *Wis.*—*Giese v. Schultz*, 69 Wis. 521, 34 N. W. 913.

Contra, *Shaw v. State*, 79 Miss. 577, 31 So. 209. And see *Brown v. State*, 127 Wis. 193, 106 N. W. 536, a criminal case.

[a] Absence of defendant when proper remarks are addressed to the jury is not prejudicial. *Fry v. State* (Tex. Crim.), 182 S. W. 331. See generally the title "Trial."

40. *U. S.*—*Peterson v. United States*, 213 Fed. 920, 130 C. C. A. 398. *Ala.*—*Alabama Fuel & Iron Co. v. Rice*, 187 Ala. 458, 65 So. 402; *Meadows v. State*, 182 Ala. 51, 62 So. 737, Ann. Cas. 1915D, 663; *De Jarnette v. Cox*, 128 Ala. 518, 29 So. 618. *Cal.*—*Mahoney v. San Francisco & S. M. Ry. Co.*, 110 Cal. 471, 42 Pac. 968, 43 Pac. 518. *Conn.*—*Scholfeld Gear & Pulley Co. v. Scholfeld*, 71 Conn. 1, 40 Atl. 1046. *Ga.*—*Physioc v. Shea*, 75 Ga. 466. *Mo.*—*McPeak v. Missouri Pac. Ry. Co.*, 128 Mo. 617, 30 S. W. 170 (one hour and a half); *Brooks v. Barth*, 98 Mo. App. 89, 71 S. W. 1098; *Fox v. Union Depot Co.*, 7 Mo. App. 593. *N. Y.*—*Slater v. Mead*, 53 How. Pr. 57. *Tex.*—*Sargent v. Lawrence*, 16 Tex. Civ. App. 540, 40 S. W. 1075.

41. *Kan.*—*State v. Bybee*, 17 Kan. 462. *Ky.*—*Louisville & N. R. Co. v. Coniff's Admr.*, 90 Ky. 560, 14 S. W. 543. *Minn.*—*Doyle v. Wagner*, 108 Minn. 443, 122 N. W. 316. *Miss.*—*Vicksburg Bank v. Moss*, 63 Miss. 74. 42. *Ia.*—*Clemens v. Chicago*, R. I. & P. Ry. Co., 163 Iowa 499, 144 N. W. 354; *Burton v. Neill*, 140 Iowa 141, 118 N. W. 302; *State v. Richardson*, 137 Iowa 591, 115 N. W. 220. *Kan.*—*State v. Rogers*, 56 Kan. 362, 43 Pac. 256. *Wash.*—*State v. Baker*, 67 Wash. 595, 122 Pac. 335.

43. *People v. Grubb*, 24 Cal. App. 604, 141 Pac. 1051.

44. *O'Neal v. Richardson*, 78 Ark. 132, 92 S. W. 1117; *Armstrong v.*

b. *Character of the Verdict.*—Where the liability of the defendant is conceded or was properly found by the jury and the sole question is as to the prejudicial effect of the instructions of the court as affecting the measure of recovery, no prejudice will be found to have been suffered if it can be reasonably inferred that a jury of average judgment, after considering the evidence, would not have awarded a less sum,⁴⁵ or where the evidence is of such a character that the court could properly have directed the jury to have returned the verdict which was rendered,⁴⁶ or even where the verdict is supported by the clear weight of the evidence.⁴⁷

X. DISCHARGE OF JURORS AND JURY.—A. **AUTHORITY OF COURT TO DISCHARGE ENTIRE JURY.**—Formerly, a jury impaneled and sworn in a case affecting life or member could not be discharged until they had rendered a verdict;⁴⁸ and the jury could be conveyed from one circuit to another until they agreed on a verdict.⁴⁹ But this rule has been questioned and relaxed,⁵⁰ so that under the modern practice the court may discharge the jury before the rendition of the verdict⁵¹ when the ends of justice will be furthered thereby, or when

James & Co., 155 Iowa 562, 136 N. W. 686.

45. *St. Louis, I. M. & S. R. Co. v. Carter*, 111 Ark. 272, 164 S. W. 715.

46. *Grimes Dry Goods Co. v. Malcolm*, 58 Fed. 670, 7 C. C. A. 426. See *North Dallas Cir. Ry. Co. v. McCue* (Tex. Civ. App.), 35 S. W. 1080.

47. *State v. Lawrence*, 38 Iowa 51.

48. See the following: *Ala.*—*Ned v. State*, 7 Port. 187. *Ga.*—*Stocks v. State*, 91 Ga. 831, 18 S. E. 847; *Monroe v. State*, 5 Ga. 85. *Miss.*—*Nelson v. State*, 47 Miss. 621. *N. J.*—*State v. Hall*, 9 N. J. L. 256. *N. Y.*—*People v. Oleott*, 2 Johns. Cas. 301, 1 Am. Dec. 168. *N. C.*—*In re Spier*, 12 N. C. 491; *State v. Garrigues*, 2 N. C. 241. *Eng.*—*Winsor v. Reg.*, 10 Cox C. C. 276, 327; *Reg. v. Charlesworth*, 9 Cox C. C. 44; 4 Bl. Com. 361.

49. *Berry v. Wallin*, 1 Overt. (Tenn.) 241 (stating early English rule); *Morris v. Davies*, 3 Car. & P. (Eng.) 427, 14 E. C. L. 645; *Rex v. Ledingham*, 1 Vent. 97, 104, 86 Eng. Reprint 67, 72.

50. *Ala.*—*Hawes v. State*, 88 Ala. 37, 7 So. 302. *D. C.*—*United States v. Bigelow*, 3 Mackey 393. *Mass.*—*Com. v. Sholes*, 13 Allen 554; *Com. v. Bowden*, 9 Mass. 494. *Mo.*—*Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413. *N. Y.*—*People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *People v. Olecott*, 2 Johns. Cas. 301, 309, 1 Am. Dec. 168. *Ohio.*—*Hurley v. State*, 6 Ohio

399. *Pa.*—*Com. v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465. *Va.*—*Com. v. Fells*, 9 Leigh (36 Va.) 613. *Eng.*—*Rex v. Edwards*, 4 Taunt. 309, 128 Eng. Reprint 348; *Winsor v. Reg.*, 6 B. & S. 143, 122 Eng. Reprint 1150; *Rex v. Scalbert*, 2 Leach C. C. 620; *Rex v. Stevenson*, 2 Leach C. C. 546; *Kinloch's Case*, *Foster's Crown Cas.* 16.

51. See the following: *U. S.*—*Thompson v. United States*, 155 U. S. 271, 15 Sup. Ct. 73, 39 L. ed. 146; *Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed. 968; *United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165; *United States v. Watson*, 3 Ben. 1, 28 Fed. Cas. No. 16,651; *United States v. Shoemaker*, 2 McLean 114, 27 Fed. Cas. No. 16,279; *United States v. Morris*, 1 Curt. 23, 26 Fed. Cas. No. 15,815; *United States v. Haskell*, 4 Wash. (C. C.) 402, 26 Fed. Cas. No. 15,321. *Ala.*—*Scott v. State*, 110 Ala. 48, 20 So. 468; *McCauley v. State*, 26 Ala. 135; *Powell v. State*, 19 Ala. 577, 580; *Ned v. State*, 7 Port. 187. *Ark.*—*Ball v. State*, 48 Ark. 94, 2 S. W. 462; *Atkins v. State*, 16 Ark. 568. *Conn.*—*State v. Woodruff*, 2 Day 504, 2 Am. Dec. 122. *D. C.*—*United States v. Bigelow*, 3 Mackey 393. *Fla.*—*Tervin v. State*, 37 Fla. 396, 20 So. 551; *Ellis v. State*, 25 Fla. 702, 6 So. 768. *Ill.*—*Miller v. Metzger*, 16 Ill. 390; *Thomas v. Leonard*, 5 Ill. 556; *Ochs v. People*, 25 Ill. App. 379; *Logg v. People*, 8 Ill. App. 99. *Ind.*—*Welsh v. State*, 126

a necessity therefor arises, and this is true even in capital cases.⁵² The court no longer has the right to have the jury conveyed from one circuit to another until it agrees on a verdict.⁵³

The power to discharge a jury ought to be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious reasons, however.⁵⁴ In capital cases, especially, the courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner.⁵⁵

Ind. 71, 25 N. E. 883, 9 L. R. A. 664; *Leas v. Patterson*, 38 Ind. 465; *Miller v. State*, 8 Ind. 325. **Ia.**—*State v. Pierce*, 77 Iowa 245, 42 N. W. 181. **Ky.**—*Com. v. Olds*, 5 Litt. 137. **La.**—*State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448; *State v. Costello*, 11 La. Ann. 283. **Mass.**—*Com. v. McCormick*, 130 Mass. 61, 39 Am. Rep. 423; *Com. v. Townsend*, 5 Allen 216; *Com. v. Roby*, 12 Pick. 496; *Com. v. Bowden*, 9 Mass. 494. **Miss.**—*Whitten v. State*, 61 Miss. 717; *Josephine v. State*, 39 Miss. 613; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *State v. Moor*, Walk. 134, 12 Am. Dec. 541. **Mo.**—*State v. Arthur*, 32 Mo. App. 24. **Nev.**—*State v. Pritchard*, 16 Nev. 101. **N. J.**—*State v. Hall*, 9 N. J. L. 256. **N. Y.**—*People v. Reagle*, 60 Barb. 527; *Canter v. People*, 38 How. Pr. 91; *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *People v. Denton*, 2 Johns. Cas. 275; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168. **N. C.**—*State v. Bass*, 82 N. C. 570; *State v. Johnson*, 75 N. C. 123, 22 Am. Rep. 666; *State v. Jefferson*, 66 N. C. 309; *State v. Tilletson*, 52 N. C. 114, 75 Am. Dec. 456; *State v. Weaver*, 35 N. C. 203; *State v. Morrison*, 20 N. C. 113; *In re Spier*, 12 N. C. 491. **Pa.**—*Com. v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465. **Tenn.**—*State v. Brooks*, 3 Humph. 70. *Compare Ward v. State*, 1 Humph. 253. **Va.**—*Wright v. Com.*, 75 Va. 914; *Com. v. Fells*, 9 Leigh (36 Va.) 613. **Eng.**—*Winsor v. Reg.*, 6 B. & S. 143, 122 Eng. Reprint 1150; *Powell v. Sonnett*, 1 Dowl. N. S. 56.

Grounds of discharge, see *infra*, X, E.

52. U. S.—*United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165; *United States v. Shoemaker*, 2 McLean 114, 27 Fed. Cas. No. 16,279; *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. No. 14,858. **La.**—*State v. Costello*, 11 La. Ann. 283. **Miss.**—*State v. Moor*, Walk. 134, 12 Am. Dec. 541. **N. C.**—*State*

v. Scruggs, 115 N. C. 805, 20 S. E. 720; *State v. Whitson*, 111 N. C. 695, 16 S. E. 332; *State v. Chase*, 82 N. C. 575; *State v. Bass*, 82 N. C. 570; *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90; *State v. Honeycutt*, 74 N. C. 391; *State v. Wiseman*, 68 N. C. 203; *State v. Jefferson*, 66 N. C. 309; *State v. Allman*, 64 N. C. 364; *State v. Ephraim*, 19 N. C. 162. **Ohio.**—*Dobbins v. State*, 14 Ohio St. 493. **S. C.**—*State v. Ray*, Rice 1, 33 Am. Dec. 90. **Tenn.**—*State v. Connor*, 5 Coldw. 311; *State v. Brooks*, 3 Humph. 70; *State v. Waterhouse*, Mart. & Y. 278. **Va.**—*Com. v. Fells*, 9 Leigh (36 Va.) 613. **Eng.**—*Rex v. Edwards*, 4 Taunt. 309, 128 Eng. Reprint 348; *Winsor v. Reg.*, 6 B. & S. 143, 122 Eng. Reprint 1150.

53. Ga.—*Spearman v. Wilson*, 44 Ga. 473. **Mo.**—*Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413. **N. Y.**—*People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168. **S. C.**—*State v. McKee*, 1 Bailey L. 651, 21 Am. Dec. 499.

But see *State v. Bullock*, 63 N. C. 570.

54. Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed. 968; *United States v. Perez*, 9 Wheat. (U. S.) 579, 6 L. ed. 165. See also *infra*, X, E, 1.

[a] **Not an Absolute Power.**—The power to discharge a jury without the consent of the prisoner is not an absolute, uncontrolled, discretionary power, but one that must be exercised in accordance with established legal rules and sound legal discretion in the application of those rules to the facts and circumstances of each case. **Cal.**—*Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. **Neb.**—*State v. Schuchardt*, 18 Neb. 454, 25 N. W. 722. **Nev.**—*Ex parte Maxwell*, 11 Nev. 428, 436. **Ohio.**—*Dobbins v. State*, 14 Ohio St. 493.

55. Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed.

B. AUTHORITY TO DISCHARGE AND SUBSTITUTE INDIVIDUAL JURORS.

At common law and in the absence of statute covering the particular case, the court cannot withdraw an individual juror, during trial, but must discharge the whole jury,⁵⁶ unless the accused consents to have the others remain.⁵⁷ If either party desires, the balance may be recalled and examined as originally upon their voir dire and the parties may have their challenges over.⁵⁸ It has been held, however, that the court may discharge a juror, where the defendant does not demand a temporary postponement pending the juror's illness.⁵⁹

Statutes have been enacted which have abrogated the common law in whole or in part, and allow the court to swear a new juror instead of the disabled or incompetent juror,⁶⁰ or in its discretion to dis-

968; *United States v. Perez*, 9 Wheat. (U. S.) 579, 6 L. ed. 165.

56. **U. S.**—*United States v. Watkins*, 3 Cranch (C. C.) 441, 28 Fed. Cas. No. 16,649. **Ga.**—*Simmons v. State*, 88 Ga. 272, 14 S. E. 613. **Ill.**—*Stone v. People*, 3 Ill. 326, for present law see *infra*, this section. **Ia.**—*Grable v. State*, 2 G. Gr. 559. **Ky.**—*O'Brian v. Com.*, 6 Bush 563. **Minn.**—*State v. Ronk*, 91 Minn. 419, 98 N. W. 334, rule applies to criminal cases only. **Miss.**—*Dennis v. State*, 96 Miss. 96, 50 So. 499, 25 L. R. A. (N. S.) 36. **Nev.**—*State v. Vaughan*, 23 Nev. 103, 43 Pac. 193. **Pa.**—*Gearhart v. Jordan*, 11 Pa. 325. **Eng.**—*Wharton's Case*, 1 Yelv. 24, 80 Eng. Reprint 17. **Can.**—*Noble v. Billings*, 8 N. Bruns. 85.

As to authority of court to discharge entire jury, see *supra*, X, A.

57. **La.**—*Prentice v. Chewning*, 1 Rob. 71. **Minn.**—*State v. Ronk*, 91 Minn. 419, 98 N. W. 334. **Nev.**—*State v. Vaughan*, 23 Nev. 103, 43 Pac. 193. **Can.**—*Noble v. Billings*, 8 N. Bruns. 85.

As to consent generally, see *infra*, X, G.

58. **Nev.**—*State v. Vaughan*, 23 Nev. 103, 43 Pac. 193, *distinguishing* *State v. Pritchard*, 16 Nev. 101, on the ground that nothing occurred which would impute improper motives to or prejudice the jury against the defendant. **W. Va.**—See *State v. Davis*, 31 W. Va. 390, 7 S. E. 24. **Eng.**—*Rex v. Edwards*, 4 Taunt. 309, 128 Eng. Reprint 348; *Reg. v. Beere*, 2 M. & Rob. 472; *Rex v. Scalbert*, 2 Leach C. C. 620; *Reg. v. Ashe*, 1 Cox C. C. 150; *Rex v. Edwards*, 3 Camp. 207.

[a] After evidence has been introduced and a juror has been discharged on account of disqualification, it is error to accept the other jurors without

first discharging them and allowing the defendant the privilege of re-examining them as to their then state of mind, before being resworn to try the case with the new juror. *State v. Vaughan*, 23 Nev. 103, 43 Pac. 193.

59. *Lindsey v. Tioga Lumb. Co.*, 103 La. 468, 32 So. 464, 92 Am. St. Rep. 384.

Illness of juror as ground of discharge, see *infra*, X, E, 9, a.

60. See generally the statutes, and the following: **Ala.**—*Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Hawes v. State*, 88 Ala. 37, 7 So. 302; *Bell v. State*, 44 Ala. 393; *State v. Williams*, 3 Stew. 454. **Cal.**—*People v. Van Horn*, 119 Cal. 323, 51 Pac. 538; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *People v. Stewart*, 64 Cal. 60, 28 Pac. 112 (holding that after a sick juror has been discharged by the court the other eleven should be retendered to the defendant and that he is entitled to all the challenges which the law gave him in the first instance); *Grady v. Early*, 18 Cal. 108. **Ga.**—*Wesley v. State*, 65 Ga. 731; *Watkins v. State*, 60 Ga. 601; *Jackson v. State*, 51 Ga. 402; *Hook v. Stovall, Dunn & Co.*, 26 Ga. 704, 711. **Ill.**—*Ochs v. People*, 124 Ill. 399, 16 N. E. 662; *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Thomas v. Leonard*, 5 Ill. 556; *Stone v. People*, 3 Ill. 326, 328. **Ind.**—*Douthitt v. State*, 144 Ind. 397, 400, 42 N. E. 907. **Ia.**—*Grable v. State*, 2 G. Gr. 559. **Ky.**—*Taylor v. Combs*, 50 S. W. 64. *Compare* *Shelby v. Com.*, 91 Ky. 563, 16 S. W. 461, and *O'Brian v. Com.*, 9 Bush 333, 15 Am. Rep. 715. **La.**—*State v. Nash*, 46 La. Ann. 194, 14 So. 607; *State v. Diskin*, 34 La. Ann. 919, 44 Am. Rep. 448. **Miss.**—*Roberts v. State*, 72 Miss. 728, 18 So.

charge the whole jury,⁶¹ for good cause or illness during trial.⁶² According to some authorities, it is immaterial whether the reason existed before or after the jury was sworn.⁶³ In the exercise of its sound discretion, the court may, before the jury is sworn, excuse or discharge a juror who has been accepted,⁶⁴ and it has been held frequently, without reference to statute, that the court may discharge an individual juror after he has been sworn and before⁶⁵ the intro-

481; *Jefferson v. State*, 52 Miss. 767; *McGuire v. State*, 37 Miss. 369. **Neb.** *Catron v. State*, 52 Neb. 389, 72 N. W. 354. **Nev.**—*State v. Pritchard*, 16 Nev. 101. **N. Y.**—*People v. Hughes*, 137 N. Y. 29, 32 N. E. 1105; *People v. Beckwith*, 103 N. Y. 360, 8 N. E. 662. **N. C.**—*State v. Scruggs*, 115 N. C. 805, 20 S. E. 720. **N. D.**—*State v. Hazledahl*, 2 N. D. 521, 524, 52 N. W. 315, 16 L. R. A. 150. **Okla.**—*Turner v. Territory*, 15 Okla. 557, 82 Pac. 650. **S. C.**—*State v. Stephens*, 11 S. C. 319, holding no proper evidence had been heard. Compare *State v. Cason*, 41 S. C. 531, 19 S. E. 918, although quoting from the case just cited the court by way of dictum says that the trial court has no inherent power after the jury had been sworn to withdraw a juror and substitute another. **Tenn.**—*De Berry v. State*, 99 Tenn. 207, 42 S. W. 31; *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Boyd v. State*, 14 Lea 161; *State v. Curtis*, 5 Humph. 601; *Lewis v. State*, 3 Head 127, 143; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591; *Garner v. State*, 5 Yerg. 160. **W. Va.** *State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

[a] **Statute applies to civil actions only in Minnesota.** *State v. Ronk*, 91 Minn. 419, 98 N. W. 334.

61. See generally the statutes, and **U. S.**—*Silsby v. Foote*, 14 How. 218, 14 L. ed. 394. **Ala.**—*Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695. **La.** *Henry v. Cuvillier*, 3 Mart. (N. S.) 524. **N. C.**—*State v. Scruggs*, 115 N. C. 805, 20 S. E. 720. **N. D.**—*State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. **Tenn.**—*Taylor v. State*, 11 Lea 708; *Snowden v. State*, 7 Baxt. 482; *State v. Curtis*, 5 Humph. 601; *Garner v. State*, 5 Yerg. 160. **W. Va.**—*State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

As to authority of court to discharge entire jury, see *infra*, X, A.

62. Grounds of discharge, see *infra*, X, E.

63. **U. S.**—*Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed. 968. **Nev.**—*State v. Vaughan*, 23 Nev. 103, 43 Pac. 193. **Tenn.**—*Ward v. State*, 1 Humph. 253. **Va.**—*Dilworth v. Com.*, 12 Gratt. (53 Va.) 689, 65 Am. Dec. 264. See also the cases cited *supra*, this section.

64. **Ga.**—*Ozburn v. State*, 87 Ga. 173, 13 S. E. 247. **Ky.**—*Sullivan v. Com.*, 169 Ky. 797, 185 S. W. 134. **La.**—*State v. Johnson*, 48 La. Ann. 437, 19 So. 476. **Nev.**—*State v. Larkin*, 11 Nev. 314. **N. Y.**—*People v. Damon*, 13 Wend. 351; *Petrie v. Williams*, 88 Hun 292, 34 N. Y. Supp. 670. **Tenn.**—*Taylor v. State*, 11 Lea 708, 718; *Griffie v. State*, 1 Lea 41.

65. **U. S.**—*Silsby v. Foote*, 14 How. 218, 14 L. ed. 394. **Ark.**—*Cornelius v. State*, 12 Ark. 782, under statute. **La.**—*State v. Moncla*, 39 La. Ann. 868, 2 So. 814. **Nev.**—*State v. Pritchard*, 16 Nev. 101. **N. Y.**—*People v. Damon*, 13 Wend. 351.

[a] **Unauthorized Person on Jury.** Where after a jury is sworn but before any evidence has been taken, it transpires that another has without authority taken the place of a juror examined and selected without challenge or examination, the court should discharge the former and substitute the latter and have the jury resworn. *State v. Sternberg*, 59 Mo. 410.

[b] **In Texas** (1) in capital cases each juror is sworn when selected. After he is sworn the court cannot discharge him unless the defendant consents. But in felony cases less than capital, the juror is not sworn until the whole jury has been selected. The court may in a proper case discharge him before the entire jury is sworn. *Ripley v. State*, 29 Tex. App. 37, 14 S. W. 448; *Sterling v. State*, 15 Tex. App. 249. See *Evans v. State*, 6 Tex. App. 513, holding that where a juror is found incompetent to serve, he may in the discretion of the court be dis-

duction of evidence, even in a capital case,⁶⁶ for cause existing before as well as after the swearing.⁶⁷

In all cases of substitution, the incapacitated juror must be discharged by the court before the substitution is made.⁶⁸ The remainder of the jurors are not again subject to challenge,⁶⁹ and need not be re-sworn.⁷⁰

C. WHO MAY DISCHARGE. — The power to discharge a juror or jury rests with the court alone,⁷¹ and cannot be delegated to the clerk or any other officer of the court,⁷² although according to some authorities, the officer may act under instructions of the court in discharging a jury.⁷³

charged at any time before evidence taken as well for cause existing before as after the juror was sworn, notwithstanding the court as a matter of precaution swore part of them. *Rip- pey v. State*, 29 Tex. App. 37, 14 S. W. 448. (2) In case of necessity arising after the swearing of the jury, the only course the court can take is to discharge the jury. *Sterling v. State*, 15 Tex. App. 249; *Ellison v. State*, 12 Tex. App. 557.

66. *People v. Damon*, 13 Wend. (N. Y.) 351.

67. *People v. Damon*, 13 Wend. (N. Y.) 351. See *supra*, VII, D, 7, d, e and f.

68. *Powell v. State*, 48 Ala. 154; *People v. Dolan*, 51 Mich. 610, 17 N. W. 78.

69. *De Berry v. State*, 99 Tenn. 207, 42 S. W. 31; *State v. Curtis*, 5 Humph. (Tenn.) 601; *Mahala v. State*, 10 Yerg. (Tenn.) 532, 537, 31 Am. Dec. 591; *Garner v. State*, 5 Yerg. (Tenn.) 160.

[a] **Where Juror With Opinion Associates With Others.**—Where it is discovered that a juror has formed an opinion after having been accepted and having associated with the other jurors, it is not necessary to discharge the whole jury but they should be re-examined to ascertain if they are still competent after association with the disqualified juror. *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500; *Taylor v. State*, 11 Lea (Tenn.) 708.

[b] **Under a statute giving the defendant a designated period of time in which to make his challenge to the jurors, if one of the jurors is on account of illness discharged and another juror substituted in his place, and the defendant demands time in which to challenge the jury as then constituted, it is error to refuse the demand.** *State v. McKinney*, 254 Mo. 688, 163 S. W. 822.

70. *De Berry v. State*, 99 Tenn. 207, 42 S. W. 31, and cases in preceding note.

71. N. Y.—*People v. Reagle*, 60 Barb. 527, holding that the presiding judge alone could not discharge the jury. N. C.—*State v. Jefferson*, 66 N. C. 309. Tenn.—*State v. Brooks*, 3 Humph. 70.

[a] **Judicial Act.**—The finding of a cause for withdrawing a juror or taking a case from the jury is a judicial act. *United States v. Morris*, 1 Curt. 23, 26 Fed. Cas. No. 15,815.

[b] **Absence of Part of Court.** Where the court consists of a presiding judge and two associates, the presiding judge cannot discharge the jury in the absence of the associated justices. *People v. Reagle*, 60 Barb. (N. Y.) 527.

72. *Ingersoll v. Lansing*, 51 Hun 101, 5 N. Y. Supp. 288.

[a] **Judge Must Be Personally Present in Court.**—Where a judge was absent from the court and telegraphed the clerk to discharge the jury and the clerk did, it was error. *State v. Jefferson*, 66 N. C. 309.

73. *People v. Shotwell*, 27 Cal. 394.

[a] **Compare Hines v. State**, 24 Ohio St. 134, wherein the court without the knowledge of the accused or his counsel instructed the officer to discharge the jury at a certain time if they should not have reached a verdict, and at the given time, being informed that there was no probability of the jury agreeing the officer discharged the jury, and it was held that such discharge was unauthorized as no legal necessity was shown therefor and the effect was to discharge the accused.

[b] **Conduct of Officer.**—(1) Where the court directs the officer in charge of the jury to discharge the jurors at

If the officer neglects to discharge the jury in obedience to the court's instructions, however, and the jury renders a verdict, the verdict is valid.⁷⁴

D. WHEN DISCHARGE MAY BE MADE.—A jury cannot be discharged on Sunday or a legal holiday for any other reason,⁷⁵ than that they have arrived at a verdict on such a day,⁷⁶ although some decisions deny the right to discharge on such a day for this reason.⁷⁷

E. GROUNDS OF DISCHARGE.—**1. In General.**—The power of a court to discharge a jury should not be lightly used, but should be exercised only in cases of extreme, manifest and absolute necessity.⁷⁸

a specified time if there is no probability of an agreement, he should keep them until informed by them that there is no probability of an agreement. *State v. Cottrell*, 19 R. I. 724, 37 Atl. 947. (2) So where the court ordered the officer to discharge the jury if they should not reach an agreement by a specified hour, the jurors failing to agree at that time asked for further time for deliberation and the officer after waiting ten or fifteen minutes refused to give them five minutes more and discharged them. Shortly thereafter they stated that they had agreed, but the officer refused to take the verdict which they handed to the court next morning. It was held that the verdict was invalid because that at the time it was rendered the jury had been discharged. *Com. v. Townsend*, 5 Allen (Mass.) 216.

74. *Hansen v. Ludlow Mfg. Co.*, 167 Mass. 112, 44 N. E. 1091.

75. *Jackson v. State*, 102 Ala. 76, 15 So. 351; *Ex parte Tice*, 32 Ore. 179, 49 Pac. 1038.

76. U. S.—*United States v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. ed. 300. **Ala.**—*Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627. **Ky.**—*Meece v. Com.*, 78 Ky. 586. **La.**—*State v. Ford*, 37 La. Ann. 443. **N. H.**—*Webber v. Merrill*, 34 N. H. 202. **N. M.**—*Territory v. Nichols*, 3 N. M. 103, 2 Pac. 78. **N. J.**—*Van Riper v. Van Riper*, 4 N. J. L. 156, 7 Am. Dec. 576. **N. C.**—*State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90; *State v. Ricketts*, 74 N. C. 187. **Pa.**—*Huidekoper v. Cotton*, 3 Watts 56. **S. C.**—*Hiller v. English*, 4 Strobb. 486. **Grounds of discharge**, see *infra*, X, E.

77. Ill.—*Scammon v. Chicago*, 40 Ill. 146. *Compare Baxter v. People*, 8 Ill. 368. **Ind.**—*Kiger v. Coats*, 18 Ind. 153, 81 Am. Dec. 351. But see *Joy v. State*,

14 Ind. 139; *McCorkle v. State*, 14 Ind. 39; *Cory v. Silcox*, 5 Ind. 370. **N. Y.**—*Merritt v. Earle*, 31 Barb. 38. But see *Hoghtaling v. Osborn*, 15 Johns. 119. **Ore.**—*Ex parte Tice*, 32 Ore. 179, 49 Pac. 1038. **Vt.**—*Blood v. Bates*, 31 Vt. 147.

78. See the following: **U. S.**—*United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165; *United States v. Shoemaker*, 2 McLean 114, 27 Fed. Cas. No. 16,279; *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. No. 14,858. **Ala.**—*Powell v. State*, 19 Ala. 577, 581. **Ark.**—*Atkins v. State*, 16 Ark. 568. **Ga.**—*Nolan v. State*, 55 Ga. 521, 21 Am. Rep. 281; *Judge v. State*, 8 Ga. 173. **Ind.**—*State v. Wamire*, 16 Ind. 357; *McCorkle v. State*, 14 Ind. 39; *Miller v. State*, 8 Ind. 325. **Ia.**—*State v. Callendine*, 8 Iowa 288. **Miss.**—*Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Boles v. State*, 24 Miss. 445. **Nev.**—*Ex parte Maxwell*, 11 Nev. 428, 436. **N. Y.**—*People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *People v. Denton*, 2 Johns. Cas. 275; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *People v. Barrett*, 2 Caines 304, 2 Am. Dec. 239; *Grant v. People*, 4 Park. Crim. 527. **N. C.**—*State v. Davis*, 80 N. C. 384; *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90; *State v. Wiseman*, 68 N. C. 203; *State v. Jefferson*, 66 N. C. 309; *State v. Bailey*, 65 N. C. 426; *State v. Alman*, 64 N. C. 364; *State v. Ephraim*, 19 N. C. 162; *In re Spier*, 12 N. C. 491. **Ohio.**—*Dobbins v. State*, 14 Ohio St. 499. **Pa.**—*Hilands v. Com.*, 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235; *Com. v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *Com. v. Hetrich*, 1 Woodw. Dec. 288. **S. C.**—*State v. Edwards*, 2 Nott & McC. 13, 17, 10 Am. Dec. 557. **Tenn.**—*State v. Connor*, 5 Coldw. 311; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591; *State v.*

and should usually be confined to cases where by the act of God or by some sudden and unforeseen accident it is impossible to proceed without manifest injustice to the public or the defendant,⁷⁹ unless the accused consents thereto.⁸⁰ What constitutes a sufficient necessity is usually within the court's sound discretion,⁸¹ and depends upon the circumstances of each individual case.⁸² Generally the court may discharge a jury, even against the consent of the defendant,⁸³ where such a necessity exists as to make it apparent that the ends of justice would otherwise be defeated.⁸⁴ In criminal cases, the court may properly exercise this power whenever it discovers anything that will render the verdict void, or will render it impossible to arrive at a verdict.⁸⁵ In civil cases, the court may discharge the jury whenever it

Brooks, 3 Humph. 70. **Tex.**—Taylor v. State, 35 Tex. 97; Pizano v. State, 20 Tex. App. 139, 54 Am. Rep. 511. **Va.**—Williams v. Com., 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403. **W. Va.** Gruber v. State, 3 W. Va. 699.

[a] "By necessity cannot be intended that which is physical only. . . . It is a moral necessity arising from the impossibility of proceeding with the cause, without producing evils which ought not to be sustained." Com. v. Purchase, 2 Pick. (Mass.) 521.

[b] That jurors were drinking is not a ground for discharge. State v. Leunig, 42 Ind. 541.

[c] Under the Louisiana practice, the court may discharge jurors whenever he thinks their services are no longer necessary. State v. West, 35 La. Ann. 28.

As to discharge of individual jurors, see *infra*, X, E, 14.

79. People v. Barrett, 2 Caines (N. Y.) 304, 2 Am. Dec. 239.

80. As to necessity for consent, see *infra*, X, G.

81. State v. Pritchard, 16 Nev. 101; Com. v. Fells, 9 Leigh (36 Va.) 613.

[a] "One general rule is deducible from all the cases, which is, that the court may discharge the jury whenever a necessity for so doing shall arise; but what facts and circumstances shall be considered as constituting a necessity cannot be reduced to any general rule. The power to discharge is a discretionary power, which the court, as in all other cases of judicial discretion, must exercise soundly, according to the circumstances of the case. Com. v. Fells, 9 Leigh (36 Va.) 613, 617.

82. Ga.—Stocks v. State, 91 Ga. 831, 18 S. E. 847. Neb.—Conklin v. State,

25 Neb. 784, 41 N. W. 788, holding that the jury could not be discharged on account of insufficient accommodations. N. H.—School Dist. No. 1 v. Bragdon, 23 N. H. 507.

83. See *infra*, X, G, and cases cited in the next note.

84. Ala.—Powell v. State, 19 Ala. 577, 581. Ark.—Atkins v. State, 16 Ark. 568. Ill.—Logg v. People, 8 Ill. App. 99. Ind.—McCorkle v. State, 14 Ind. 39; Miller v. State, 8 Ind. 325. La.—State v. Nash, 46 La. Ann. 194, 14 So. 607; State v. West, 35 La. Ann. 28; State v. Costello, 11 La. Ann. 283. Mass.—Com. v. McCormick, 130 Mass. 61, 39 Am. Rep. 423. Miss.—Whitten v. State, 61 Miss. 717; Boles v. State, 24 Miss. 445. Nev.—State v. Vaughan, 23 Nev. 103, 43 Pac. 193; State v. Pritchard, 16 Nev. 101. N. Y.—People v. Goodwin, 18 Johns. 187, 9 Am. Dec. 203; People v. Barrett, 2 Caines 304, 2 Am. Dec. 239; People v. Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168; People v. Denton, 2 Johns. Cas. 275. N. C. State v. Gimsey, 80 N. C. 377, 30 Am. Rep. 90; State v. Davis, 80 N. C. 384; State v. Wiseman, 68 N. C. 203; State v. Jefferson, 66 N. C. 309; State v. Bailey, 65 N. C. 426; State v. Alman, 64 N. C. 364; State v. Ephraim, 19 N. C. 162; *In re Spier*, 12 N. C. 491. Pa.—Hilands v. Com., 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235; Com. v. Cook, 6 Serg. & R. 577, 9 Am. Dec. 465. S. C.—State v. Edwards, 2 Nott & McC. 13, 17, 10 Am. Dec. 557. Tenn.—State v. Connor, 5 Coldw. 311; Mahala v. State, 10 Yerg. 532, 31 Am. Dec. 591. Va.—Williams v. Com., 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403.

85. Ala.—Powell v. State, 19 Ala. 577, 581. Ark.—Atkins v. State, 16 Ark. 568. Ga.—Nolan v. State, 55 Ga.

is determined there is no necessity for its verdict.⁸⁶

It is impossible to define all the circumstances which render it necessary to interfere,⁸⁷ but certain grounds have been recognized as constituting a sufficient necessity warranting a discharge of the jury,⁸⁸ and some statutes have been enacted authorizing a discharge where it would not be permissible at common law.⁸⁹ The statutes requiring a discharge under certain circumstances do not interfere with the power of the court to discharge the jury under other circumstances of evident necessity.⁹⁰

If two or more grounds for a discharge exist, the jury may be discharged if either is sufficient without reference to the other;⁹¹ but if neither is sufficient in itself, it cannot be supplemented by the other so as to authorize a discharge.⁹²

2. Defective Indictment.—A jury may be properly discharged where it is found that the indictment is so defective that a conviction thereunder cannot be had.⁹³

3. Failure To Arraign Defendant.—The weight of authority is to the effect that the failure to arraign the accused will warrant a

521, 21 Am. Rep. 281; *Judge v. State*, 8 Ga. 173. **Ind.**—*State v. Wamire*, 16 Ind. 357; *McCorkle v. State*, 14 Ind. 39; *Miller v. State*, 8 Ind. 325. **Ia.**—*State v. Callendine*, 8 Iowa 288. **Miss.**—*Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Boles v. State*, 24 Miss. 445. **N. C.**—*State v. Davis*, 80 N. C. 384; *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90; *State v. Wiseman*, 68 N. C. 203; *State v. Jefferson*, 66 N. C. 309; *State v. Bailey*, 65 N. C. 426; *State v. Allman*, 64 N. C. 364; *In re Spier*, 12 N. C. 491. **Ohio.**—*Dobbins v. State*, 14 Ohio St. 499. **Pa.**—*Hilands v. Com.*, 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235; *Com. v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *Com. v. Hetrich*, 1 Woodw. Dec. 288. **S. C.**—*State v. Edwards*, 2 Nott & McC. 13, 10 Am. Dec. 557. **Tenn.**—*State v. Connor*, 5 Coldw. 311; *State v. Brooks*, 3 Humph. 70; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591. **Tex.**—*Taylor v. State*, 35 Tex. 97; *Pizano v. State*, 20 Tex. App. 139, 54 Am. Rep. 511. **Va.**—*Williams v. Com.*, 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403. **W. Va.**—*Gruber v. State*, 3 W. Va. 699.

86. *Stapp v. National Life & M. Assn.*, 37 S. C. 417, 16 S. E. 134.

87. *United States v. Perez*, 9 Wheat. (U. S.) 579, 6 L. ed. 165.

88. See *infra*, X, E, 2.

89. See generally the statutes and *Crookham v. State*, 5 W. Va. 510.

[a] A statute authorizing a continuance does not contemplate that the jury will be discharged when the case is postponed to a subsequent day of the term or even when continued for the term, except upon a showing of necessity. *Pizano v. State*, 20 Tex. App. 139, 54 Am. Rep. 511.

90. *Smith v. State*, 40 Fla. 203, 23 So. 854; *Tervin v. State*, 37 Fla. 396, 20 So. 551. See also *State v. Vaughan*, 23 Nev. 103, 43 Pac. 193.

91. *Conklin v. State*, 25 Neb. 784, 41 N. W. 788.

92. *Conklin v. State*, 25 Neb. 784, 41 N. W. 788.

93. **Ala.**—*Scott v. State*, 110 Ala. 48, 20 So. 468; *Robinson v. State*, 52 Ala. 587. **Ark.**—*State v. Ward*, 48 Ark. 36, 2 S. W. 191, 3 Am. St. Rep. 213. **Cal.**—*People v. Larsen*, 68 Cal. 18, 8 Pac. 517. **Ia.**—*State v. Smith*, 88 Iowa 178, 55 N. W. 198; *State v. Parker*, 66 Iowa 586, 24 N. W. 225. **Neb.**—*State v. Priebnow*, 16 Neb. 131, 19 N. W. 628. **N. Y.**—*Johnson's Case*, 5 City Hall Rec. 103. **N. C.**—*State v. England*, 78 N. C. 552. **Tenn.**—*Walton v. State*, 3 Sneed 687.

[a] Where the court erroneously judged the indictment invalid and discharged the jury, the defendant neither objecting nor consenting, it was held not to be a discharge from necessity. *Robinson v. Com.*, 88 Ky. 386, 11 S. W. 210.

discharge of the jury without the consent of the accused.⁹⁴

4. Irregularities in Drawing Jurors and Jury.—The court may discharge the jury where it is illegally drawn,⁹⁵ where a juror fraudulently procures himself to be selected,⁹⁶ or where a juror is returned through outside influence and under suspicious circumstances.⁹⁷ If, through mistake, thirteen jurors are sworn, the judge may discharge the one last drawn and proceed with the trial.⁹⁸

5. Disqualification of Jurors.—Bias or prejudice of a juror, discovered either before or after the jury is sworn is a ground of discharge.⁹⁹ And if after the jury is sworn, it is discovered that one of the jurors is an alien,¹ has conscientious scruples against finding a verdict involving life and death,² or was a member of the grand jury indicting the accused,³ he may be discharged and another substituted.⁴

94. U. S.—United States *v.* Riley, 5 Blatchf. 204, 27 Fed. Cas. No. 16,164. **Ala.**—Prince *v.* State, 140 Ala. 158, 37 So. 171. **Ia.**—State *v.* Pierce, 77 Iowa 245, 42 N. W. 181. **Ky.**—Disney *v.* Com., 9 Ky. L. Rep. 413; Minor *v.* Com., 5 Ky. L. Rep. 176. **La.**—State *v.* Heard, 49 La. Ann. 375, 21 So. 632. **N. D.**—State *v.* Bronkol, 5 N. D. 507, 67 N. W. 680, wherein the discharge was on account of failure to arraign and was held to be warranted even though the state's witnesses had been examined before the jury was discharged. **Tenn.**—Link *v.* State, 3 Heisk. 252. **Tex.**—Yerger *v.* State (Tex. Crim.), 41 S. W. 621. **Wis.**—State *v.* Parish, 43 Wis. 395.

Contra, State *v.* Kinghorn, 56 Wash. 131, 105 Pac. 234, 27 L. R. A. (N. S.) 136.

As to necessity for consent of accused generally, see *infra*, X, G.

95. Barney *v.* State, 49 Neb. 515, 68 N. W. 636.

As to drawing and selecting jury, see *supra*, VII, B.

96. State *v.* Duvall, 135 La. 710, 65 So. 904.

97. Ochs *v.* People, 124 Ill. 399, 16 N. E. 662.

98. Bullard *v.* State, 38 Tex. 504, 19 Am. Rep. 30; Davis *v.* State, 9 Tex. App. 634.

99. **Ga.**—Polk *v.* State, 18 Ga. App. 324, 89 S. E. 437. **Kan.**—State *v.* Hansford, 76 Kan. 678, 92 Pac. 551, 14 L. R. A. (N. S.) 548. **Mich.**—People *v.* Parker, 145 Mich. 488, 108 N. W. 999. **Nev.**—State *v.* Vaughan, 23 Nev. 103, 43 Pac. 193. **Tenn.**—Taylor *v.* State, 11 Lea 708.

As ground of challenge, see generally *supra*, VII, E.

[a] Where one of the jurors was found to be surety upon a recognizance entered into by one of the defendants before trial, it was held that a discharge of the jury was authorized. *Com. v. McCormick*, 130 Mass. 61, 39 Am. Rep. 423.

[b] Conversation between the complaining witness and the foreman of the jury concerning the case is sufficient cause for discharge. *People v. Fishman*, 64 Misc. 256, 119 N. Y. Supp. 89.

1. Fla.—Keech *v.* State, 15 Fla. 591. **Ill.**—Thomas *v.* Leonard, 5 Ill. 556; Stone *v.* People, 3 Ill. 326. **Mich.**—People *v.* Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501.

Qualifications of jurors generally, see *supra*, VII, F.

2. U. S.—Logan *v.* United States, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429. **Nev.**—State *v.* Vaughan, 23 Nev. 103, 43 Pac. 193; State *v.* Pritchard, 16 Nev. 101. **N. Y.**—People *v.* Damon, 13 Wend. 351; O'Brien *v.* People, 3 Abb. Pr. 368, 36 N. Y. 276. **S. C.**—State *v.* Stephens, 11 S. C. 319.

As ground of challenge, see *supra*, VII, E.

3. Ala.—Pierce *v.* State, 8 Ala. App. 359, 63 So. 33. **Ga.**—Jackson *v.* State, 51 Ga. 402; Minyard *v.* State, 17 Ga. App. 398, 87 S. E. 710. **Ohio.**—Stewart *v.* State, 15 Ohio St. 155.

Contra, Whitmore *v.* State, 43 Ark. 271.

4. As to discharge of individual jurors, see *infra*, X, E, 14.

6. Matters Relating to the Evidence. — The fact that the prosecutor is unprepared with his evidence is not a good ground for discharging the jury,⁵ although the absence of material evidence in some cases has been held sufficient ground therefor.⁶

7. Tampering With Jury. — Whenever the trial court finds that the jury has been tampered with, a mistrial should be ordered and the jury discharged.⁷

8. Escape of Accused. — There is some conflict as to the right to discharge the jury where the prisoner escapes from custody during the progress of the trial, some cases holding that the right exists on the ground that no valid verdict can be rendered in the absence of the accused,⁸ and others that, where the accused is present at the commencement of the trial and voluntarily absents himself, the court would not be bound to discharge the jury.⁹

9. Illness or Death. — a. *Of Juror.* — The death or serious illness of a juror rendering it impossible to proceed with the case authorizes a discharge of the jury.¹⁰ Indeed, the statutes sometimes provide that the court may, in its discretion, swear in a new juror,¹¹ or discharge

5. *State v. Callendine*, 8 Iowa 288; *People v. Green*, 13 Wend. (N. Y.) 55; *People v. Barrett*, 2 Caines (N. Y.) 304, 2 Am. Dec. 239; *People ex rel. Stabile v. Warden, etc.*, 139 App. Div. 488, 124 N. Y. Supp. 341.

6. *Jones v. Reg.*, 1 Crim. L. Mag. (Can.) 766, holding that in a felony trial it was within the discretion of the court to discharge the jury after it had been sworn and to remand the prisoner where a material crown witness was unavoidably absent.

[a] Where the absence of the witness was occasioned by defendant, *query* whether the judge would not be justified in discharging the jury. *Reg. v. Charlesworth*, 1 B. & S. 460, 121 Eng. Reprint 786.

[b] Where one of the prosecution's witnesses refuses to be sworn, the court may discharge the jury. *United States v. Coolidge*, 2 Gall. 364, 25 Fed. Cas. No. 14,858.

7. *State v. Bell*, 81 N. C. 591; *State v. Wiseman*, 68 N. C. 203.

8. *State v. Battle*, 7 Ala. 259; *Andrews v. State*, 2 Sneed (Tenn.) 550.

9. *Ind.*—*State v. Wamire*, 16 Ind. 357. *Miss.*—*Price v. State*, 36 Miss. 531, 72 Am. Dec. 195. *Ohio.*—*Fight v. State*, 7 Ohio (pt. 1) 180, 28 Am. Dec. 626.

10. *Ala.*—*Webb v. State*, 100 Ala. 47, 14 So. 865; *Hawes v. State*, 88 Ala. 37, 7 So. 302; *Jackson v. State*, 78 Ala. 471; *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695; *Ned v. State*, 7 Port.

187, 213; *Nugent v. State*, 4 Stew. & P. 72, 79, 24 Am. Dec. 746. *Ark.*—*Whitmore v. State*, 43 Ark. 271; *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611; *Atkins v. State*, 16 Ark. 568. *Cal.*—*People v. Ross*, 85 Cal. 383, 24 Pac. 789; *People v. Hunkeler*, 48 Cal. 331; *Ex parte McLaughlin*, 41 Cal. 211, 19 Am. Rep. 272; *People v. Webb*, 38 Cal. 467. *Fla.*—*Ellis v. State*, 25 Fla. 702, 6 So. 768. *Ill.*—*Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321. *Ind.*—*Doles v. State*, 97 Ind. 555. *Kan.*—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322. *La.*—*State v. Moncla*, 39 La. Ann. 868, 2 So. 814. *Md.*—*Deford v. State*, 30 Md. 179. *Mass.*—*Com. v. Roby*, 12 Pick. 496. *Mich.*—*People v. Hutchings*, 137 Mich. 527, 100 N. W. 753. *Mo.*—*State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314; *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413; *Hector v. State*, 2 Mo. 166, 22 Am. Dec. 454. *N. C.*—*State v. Scruggs*, 115 N. C. 805, 20 S. E. 720; *State v. Wiseman*, 68 N. C. 203; *In re Spier*, 12 N. C. 491. *N. D.*—*State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. *S. C.*—*State v. McKee*, 1 Bailey & L. 651, 21 Am. Dec. 499. *Tenn.*—*Fletcher v. State*, 6 Humph. 249; *State v. Curtis*, 5 Humph. 601; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591. *Tex.*—*Bates v. State*, 19 Tex. 122; *Flison v. State*, 12 Tex. App. 507. *Vt.*—*State v. Emery*, 59 Vt. 84, 7 Atl. 129.

11. See generally the statutes, and the following: *U. S.*—*Silby v. Foote*,

the whole jury,¹² in such cases. Such statutes do not prohibit continuing the case for a few days pending the outcome of the juror's illness, however.¹³

The character of the illness of a juror to warrant either his discharge or the discharge of the whole jury must be such as to render him incapable of a proper performance of his duties as a juror,¹⁴ although it has been held that the court is not obliged to wait until the juror is actually sick if there is every reason to believe he would become sick through longer confinement.¹⁵ Whether the illness is sufficient to incapacitate the juror is a question addressed to the court's discretion.¹⁶

b. *In Juror's Family*.—The serious illness or death of one of a juror's family is likewise a sufficient reason for a discharge of the jury.¹⁷

14 How. 218, 14 L. ed. 394 (practice in New York); *Young v. Marine Ins. Co.*, 1 Cranch (C. C.) 566, 30 Fed. Cas. No. 18,164. **Ala.**—*Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695. See *Bell v. State*, 44 Ala. 393, holding if the juror is discharged before the jury retire, his place must be supplied and the trial commenced anew; if afterwards, the panel must be discharged. **Cal.**—*People v. Wong* Ark, 96 Cal. 125, 30 Pac. 1115; *People v. Brady*, 72 Cal. 490, 14 Pac. 202; *People v. Stewart*, 64 Cal. 60, 28 Pac. 112. **Ga.**—*Ozburn v. State*, 87 Ga. 173, 13 S. E. 247; *Pannel v. State*, 29 Ga. 681. **Ia.**—*State v. Garrity*, 98 Iowa 101, 67 N. W. 92. **La.**—*State v. Moncla*, 39 La. Ann. 868, 2 So. 814. **Mo.**—*State v. Baber*, 74 Mo. 292, 41 Am. Rep. 314. **Tenn.**—*De Berry v. State*, 99 Tenn. 207, 42 S. W. 31; *Snowden v. State*, 7 Baxt. 482; *State v. Curtis*, 5 Humph. 601. **W. Va.**—*State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

As to discharge of individual juror, see *infra*, X, E, 14.

12. See generally the statutes, and the following: **Ala.**—*Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695. **Ia.**—*State v. Garrity*, 98 Iowa 101, 67 N. W. 92. **Minn.**—*State v. Ronk*, 91 Minn. 419, 98 N. W. 334, holding that a discharge of the whole jury is the proper procedure unless the accused consents to a substitution. **N. C.**—*State v. Scruggs*, 115 N. C. 805, 20 S. E. 720. **N. D.**—*State v. Hazledahl*, 2 N. D. 521, 52 N. W. 315, 16 L. R. A. 150. **Tenn.**—*State v. Curtis*, 5 Humph. 601; *Snowden v. State*, 7 Baxt. 482.

13. *State v. Garrity*, 98 Iowa 101, 67 N. W. 92.

14. **Ark.**—*Johnson v. State*, 60 Ark. 45, 28 S. W. 792. **Neb.**—*Conklin v. State*, 25 Neb. 784, 41 N. W. 788. **N. Y.**—*People v. Buchanan*, 25 N. Y. Supp. 481. **Pa.**—*Com. v. Clue*, 3 Rawle 498.

[a] A mere temporary attack of sickness of a juror though it may for the time being incapacitate him is not necessarily a ground for discharging him. *Republic of Hawaii v. Palea*, 12 Haw. 159.

[b] Unless the juror's illness is so serious that his life is endangered, a discharge is not warranted. *Com. v. Clue*, 3 Rawle (Pa.) 498.

[c] In the case of insanity of one of the jurors the jury should be discharged or a new juror substituted and the trial begun de novo. **U. S.**—*United States v. Haskell*, 4 Wash. (C. C.) 402, 26 Fed. Cas. No. 15,321. **Mo.**—*Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413. **N. C.**—*State v. Wiseman*, 68 N. C. 203; *In re Spier*, 12 N. C. 491. **Tenn.**—*Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591; *Snowden v. State*, 7 Baxt. 482. **Eng.**—*Rex v. Edwards*, 4 Taunt. 309, 128 Eng. Reprint 348.

15. *Com. v. Fells*, 9 Leigh (36 Va.) 617.

16. **U. S.**—*United States v. Haskell*, 4 Wash. (C. C.) 402, 26 Fed. Cas. No. 15,321. **Mass.**—*Hubbard v. Gale*, 105 Mass. 511. **Tex.**—*Ray v. State*, 4 Tex. App. 450.

Discretion of court generally, see *supra*, X, E, 1.

17. **Ala.**—*Hawes v. State*, 88 Ala. 37, 7 So. 302; *Parsons v. State*, 22 Ala.

c. *Of Accused*.—Where the accused is stricken with an illness of so serious a nature as to necessitate his absence from the court room, it is sufficient ground for a discharge of the jury.¹⁸

d. *Of Court or Counsel*.—The illness of the presiding judge,¹⁹ or of any member of his family,²⁰ if of such a nature as to render it impossible to proceed with the trial, will authorize discharge of the jury. So will the sickness of counsel if there be no associate counsel capable of conducting the case.²¹

10. *Inability of Jury To Agree on Verdict*.²²—a. *In General*. The power of the court to discharge the jury, without the consent of the accused, when it appears that an agreement cannot be reached after a reasonable time for deliberation has been allowed, has long been generally conceded,²³ and is sometimes recognized by statute or con-

50. **Neb.**—*Catron v. State*, 52 Neb. 389, 72 N. W. 354. **W. Va.**—*State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

[a] *Where a juror's wife was expecting to be confined at any time, the juror may be withdrawn and the jury discharged.* *Com. v. Fells*, 9 Leigh (36 Va.) 613.

[b] *The death of a juror's son is a good ground for a discharge of the jury in a case of felony.* *State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

[c] *Death of Juror's Mother.* *Stocks v. State*, 91 Ga. 831, 18 S. E. 847.

18. **Ala.**—*Ned v. State*, 7 Port. 187. **Ark.**—*Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611. **Cal.**—*People v. Webb*, 38 Cal. 467. **Fla.**—*Fails v. State*, 60 Fla. 8, 53 So. 612, Ann. Cas. 1912B, 1146; *Ellis v. State*, 25 Fla. 702, 6 So. 768. **Mass.**—*Com. v. Roby*, 12 Pick. 496. **N. C.**—*State v. Wiseman*, 68 N. C. 203. **S. C.**—*State v. McKee*, 1 Bailey L. 651, 21 Am. Dec. 499. **Tenn.**—*Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591. **Tex.**—*Brown v. State*, 38 Tex. 483. **Eng.**—*Rex v. Streek*, 2 Car. & P. 413, 12 E. C. L. 646; *Meadows' Case*, Foster 76; *Rex v. Stevenson*, 2 Leach C. C. 546.

[a] *If the prisoner is found to be insane, in a fit or taken in labor, the jury may be discharged.* *State v. McKee*, 1 Bailey L. (S. C.) 651, 21 Am. Dec. 499.

19. **Ala.**—*Nugent v. State*, 4 Stew. & P. 72. **Ark.**—*Whitmore v. State*, 43 Ark. 271. **Cal.**—*People v. Webb*, 38 Cal. 467. **La.**—*State v. Varnado*, 124 La. 711, 50 So. 661. **Mo.**—*State v. Ulrich*, 110 Mo. 350, 19 S. W. 656. **S. C.**—*State v. McKee*, 1 Bailey L. 651, 21 Am. Dec. 499.

[a] But see *Ex parte Ulrich*, 42 Fed. 587, holding that where after a person has pleaded not guilty and been put on trial for a felony and evidence has been introduced by the state, the court adjourns the case to take up the trial of another set for that day, and on the adjournment day on the ground that he is unwell discharges the jury without the prisoner's consent the discharge is equivalent to an acquittal.

20. *State v. Tatman*, 59 Iowa 471, 13 N. W. 632.

21. See *United States v. Watson*, 3 Ben. 1, 28 Fed. Cas. No. 16,651, holding that the discharge was not authorized in this particular case because the record did not show that the assistant district attorney could not have conducted the case.

22. *As affected by expiration of term and completion of business of court, see infra*, X, E, 13.

23. See the following: **U. S.**—*Dreyer v. Illinois*, 187 U. S. 71, 23 Sup. Ct. 28, 47 L. ed. 79; *Logan v. United States*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. ed. 429; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872. **Ala.**—*Andrews v. State*, 174 Ala. 11, 56 So. 998; *Barrett v. State*, 35 Ala. 406. **Ark.**—*Whitmore v. State*, 43 Ark. 271; *Potter v. State*, 42 Ark. 29; *Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611. **Cal.**—*People v. Greene*, 100 Cal. 140, 34 Pac. 630; *People v. Smalling*, 94 Cal. 112, 29 Pac. 421; *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. **Conn.**—*Dutton v. Tracy*, 4 Conn. 79; *State v. Woodruff*, 2 Day 504, 2 Am. Dec. 122. **Del.**—*State v. Gamble*, 2 Penne. 368, 45 Atl. 716. **Fla.**—*Johnson v. State*, 54 Fla. 45, 44 So. 765;

stitutional provision;²⁴ although some cases have questioned the right

Tervin v. State, 37 Fla. 396, 20 So. 551; *Ellis v. State*, 25 Fla. 702, 6 So. 768. **Ga.**—*Lovett v. State*, 80 Ga. 255, 4 S. E. 912; *Lester v. State*, 33 Ga. 329; *Williford v. State*, 23 Ga. 1. **Idaho.** *State v. Jorgenson*, 3 Idaho 620, 32 Pac. 1129. **Ind.**—*State v. Leach*, 120 Ind. 124, 22 N. E. 111; *Shaffer v. State*, 27 Ind. 131; *State v. Nelson*, 26 Ind. 366; *State v. Walker*, 26 Ind. 346; *Wyatt v. State*, 1 Blackf. 257. **Ia.** *State v. Vaughan*, 29 Iowa 286. **Kan.** *State v. White*, 19 Kan. 445, 27 Am. Rep. 137. **Ky.**—*Com. v. Olds*, 5 Litt. 137; *Thompson v. Com.*, 15 Ky. L. Rep. 838, 25 S. W. 1059. **La.**—*State v. Harris*, 119 La. 297, 44 So. 22, 11 L. R. A. (N. S.) 178; *State v. Blackman*, 35 La. Ann. 483; *State v. Flint*, 33 La. Ann. 1288; *State v. Ferguson*, 8 Rob. 613. **Me.**—*Richards v. Page*, 81 Me. 563, 18 Atl. 289; *Ware v. Ware*, 8 Greenl. 42. **Md.**—*Deford v. State*, 30 Md. 179. **Mass.**—*Com. v. Cody*, 165 Mass. 133, 42 N. E. 575; *Com. v. Roby*, 12 Pick. 496; *Com. v. Purchase*, 2 Pick. 521, 13 Am. Dec. 452; *Com. v. Bowden*, 9 Mass. 494. **Mich.**—*People v. Harding*, 53 Mich. 481, 19 N. W. 155; *People v. Schoeneth*, 44 Mich. 489, 7 N. W. 70. **Minn.**—*State v. Sommers*, 60 Minn. 90, 61 N. W. 907; *Rollins v. Nolting*, 53 Minn. 232, 54 N. W. 1118. **Miss.**—*Helm v. State*, 67 Miss. 562, 7 So. 487; *State v. Moor*, Walk. 134, 12 Am. Dec. 541. **Mo.**—*State v. Dunn*, 80 Mo. 681; *State v. Copeland*, 65 Mo. 497; *State v. Matrassey*, 47 Mo. 295; *State v. Scott*, 45 Mo. 302. **Nev.**—*Ex parte Maxwell*, 11 Nev. 428. **N. H.** *School Dist. No. 1 v. Bragdon*, 23 N. H. 507. **N. Y.**—*People v. Reagle*, 60 Barb. 527; *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *People v. Green*, 13 Wend. 55; *Vanderwerker v. People*, 5 Wend. 530; *People v. Barrett*, 2 Caines 304, 2 Am. Dec. 239; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168; *People v. Denton*, 2 Johns. Cas. 275; *Hauxhurst's Case*, 2 City Hall Rec. 33. **N. C.**—*State v. Whitson*, 111 N. C. 695, 16 S. E. 332; *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285; *State v. Car-*

land, 90 N. C. 668; *State v. Twiggs*, 90 N. C. 685; *Hannon v. Grizzard*, 89 N. C. 115; *State v. Honeycutt*, 74 N. C. 391; *State v. Jefferson*, 66 N. C. 309; *State v. Bullock*, 63 N. C. 570; *State v. Prince*, 63 N. C. 529. **Ohio.** *Dobbins v. State*, 14 Ohio St. 493; *Poage v. State*, 3 Ohio St. 229; *Hurley v. State*, 26 Ohio 399. **Ore.**—*State v. Reinhart*, 26 Ore. 466, 38 Pac. 822; *State v. Shaffer*, 23 Ore. 555, 32 Pac. 545. **Pa.**—*McCreary v. Com.*, 29 Pa. 323. **S. C.**—*State v. Stephenson*, 54 S. C. 234, 32 S. E. 305; *State v. Kelley*, 45 S. C. 659, 24 S. E. 45. **Tenn.** *State v. Pool*, 4 Lea 363; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591; *State v. Waterhouse*, Mart. & Y. 278. **Tex.**—*Moseley v. State*, 33 Tex. 671; *Penn v. State*, 36 Tex. Crim. 140, 35 S. W. 973; *Wright v. State*, 35 Tex. Crim. 158, 32 S. W. 701; *Smith v. State*, 22 Tex. App. 196, 2 S. W. 542; *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462; *Harrison Branch v. State*, 20 Tex. App. 599; *Powell v. State*, 17 Tex. App. 345. **Va.** *Jones v. Com.*, 86 Va. 740, 10 S. E. 1004; *Wright v. Com.*, 75 Va. 914; *Com. v. Fells*, 9 Leigh (36 Va.) 613. For the rule prior to enactment of statute, see *Williams v. Com.*, 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403. **W. Va.**—*Crookham v. State*, 5 W. Va. 510. **Wis.** *State v. Crane*, 4 Wis. 400. **Eng.**—*Conway v. Reg.*, 7 Ir. L. Rep. 149; *Matter of Newton*, 13 Q. B. 716, 116 Eng. Reprint 1437; *Reg. v. Davidson*, 2 F. & F. 250; *Powell v. Sonnett*, 1 Dowl. (N. S.) 56; *Winsor v. Reg.*, 7 B. & S. 490, 35 L. J. M. C. 161, L. R. 1 Q. B. 390, 12 Jur. (N. S.) 561, 14 L. T. 567, 14 W. R. 695, 10 Cox C. C. 327; *Dewar v. Purday*, 4 Nev. & M. 633.

24. See generally the statutes and constitutions, and the following: **Cal.** *People v. James*, 97 Cal. 400, 32 Pac. 317. **Colo.**—*In re Allison*, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790. **Fla.**—*Lambright v. State*, 34 Fla. 564, 16 So. 582; *Adams v. State*, 34 Fla. 185, 15 So. 905. **Kan.** *State v. Rudy*, 9 Kan. App. 69, 57

in capital cases,²⁵ and even in felony cases generally;²⁶ but this limitation is not recognized in most states.²⁷

After the jury have been discharged they have no authority to re-assemble and afterwards agree upon a verdict.²⁸

b. *Determination of Inability.*—Whether it is possible for the jury to agree is a question of fact or of mixed law and fact.²⁹ To warrant a discharge on this ground, ample time and opportunity must be given the jury for deliberation, and the court must be convinced that there is no reasonable probability that an agreement will be reached.³⁰ No definite rule can be laid down as to what will constitute a reasonable time for deliberation within the rule. This question rests in the sound legal discretion of the court which must be exercised in conformity with established rules,³¹ and with due respect to the character and the

Pac. 263. **Minn.**—Rollins *v.* Nolting, 53 Minn. 232, 54 N. W. 1118. **Neb.**—State *v.* Shuchardt, 18 Neb. 454, 25 N. W. 722. **Ohio.**—Ladd *v.* State, 5 Ohio Cir. Ct. 276. **Tex.**—Varnes *v.* State, 20 Tex. App. 107; Moseley *v.* State, 33 Tex. 671; Wright *v.* State, 35 Tex. Crim. 158, 32 S. W. 701. **Va.**—Jones *v.* Com., 86 Va. 740, 10 S. E. 1004; Wright *v.* Com., 75 Va. 914. **W. Va.**—Crookham *v.* State, 5 W. Va. 510. **Wyo.**—Hovey *v.* Sheffner, 16 Wyo. 254, 93 Pac. 305, 125 Am. St. Rep. 1037, 15 L. R. A. (N. S.) 227.

See also the cases cited in the preceding note.

25. **Ala.**—Ned *v.* State, 7 Port. 187. **Kan.**—State *v.* Allen, 59 Kan. 758, 54 Pac. 1060, decided on the ground that the record did not show sufficient grounds for a discharge. **Miss.**—Josephine *v.* State, 39 Miss. 613. **N. C.**—State *v.* Ephraim, 19 N. C. 162. **Pa.**—Com. *v.* Fitzpatrick, 121 Pa. 109, 15 Atl. 466, 6 Am. St. Rep. 757, 1 L. R. A. 451; McCreary *v.* Com., 29 Pa. 323; Com. *v.* Clue, 3 Rawle 498. **Tenn.**—Mahala *v.* State, 10 Yerg. 532, 31 Am. Dec. 591. **Va.**—Williams *v.* Com., 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403. Compare cases cited *supra*, this section.

26. **Dye v. Com.**, 7 Gratt. (48 Va.) 662; Williams *v.* Com., 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403.

27. **People v. Olcott**, 1 Johns. (N. Y.) 301, 1 Am. Dec. 168, right extends to felonies. See generally the cases cited *supra*, this section.

28. **Com. v. Townsend**, 5 Allen (Mass.) 216.

Accepting verdict where officer directed to discharge the jury disobeys his instructions, see *supra*, X, B.

29. **State v. Reinhart**, 26 Ore. 466, 38 Pac. 822.

30. **Ind.**—Murphy *v.* Wilson, 46 Ind. 537; State *v.* Walker, 26 Ind. 346. **Neb.**—State *v.* Shuchardt, 18 Neb. 454, 25 N. W. 722. **Nev.**—*Ex parte* Maxwell, 11 Nev. 428, 436. **N. Y.**—People *v.* Ward, 1 Wheeler Crim. Cas. 469. **Ohio.**—Dobbins *v.* State, 14 Ohio St. 493.

[a] The proper test as to the right of the court to discharge the jury before reaching a verdict is whether they have been together for such a time as to render it altogether probable that they will not agree. **Wright v. State**, 35 Tex. Crim. 158, 32 S. W. 701.

[b] Merely because the court thought the jury would be unable to agree is no ground for its discharge. **Williams v. Com.**, 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403.

Time spent in deliberation, see *supra*, IX, J, 2.

31. See the following: **U. S.**—United States *v.* Perez, 9 Wheat. 579, 6 L. ed. 165. **Cal.**—People *v.* Greene, 100 Cal. 140, 34 Pac. 630. **Colo.**—*In re* Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790. **Ga.**—Driver *v.* State, 112 Ga. 229, 37 S. E. 400. **Idaho.**—State *v.* Jorgenson, 3 Idaho 620, 32 Pac. 1129; People *v.* Stock, 1 Idaho 218. **Kan.**—State *v.* Rudy, 9 Kan. App. 69, 57 Pac. 263. **Me.**—Richards *v.* Page, 81 Me. 563, 18 Atl. 289. **Mass.**—Com. *v.* Townsend, 5 Allen 216; Com. *v.* Purchase, 2 Pick. 521, 13 Am. Dec. 452; Com. *v.* Bowden, 9 Mass. 494. **Mich.**—People *v.* Harding, 53 Mich. 48, 18 N. W. 555, 51 Am. Rep. 95. **Minn.**—Rollins *v.* Nolting, 53 Minn. 232, 54 N. W. 1118. **Miss.**—Price *v.* State, 36 Miss. 531, 72

peculiar circumstances of the case.³² The decision of the court will not be interfered with except for its abuse of discretion.³³

The jury should announce the fact that they were unable to agree in open court, and in the presence of the accused,³⁴ but the court is not bound by their mere statement of that fact,³⁵ and may in his dis-

Am. Dec. 195. **Mo.**—State *v.* Matrassey, 47 Mo. 295. **Nev.**—Ex parte Maxwell, 11 Nev. 428. **N. H.**—School Dist. No. 1 *v.* Bragdon, 23 N. H. 507. **N. Y.** People *v.* Sheldon, 156 N. Y. 268, 50 N. E. 840, 66 Am. St. Rep. 564, 41 L. R. A. 644; Peonle *v.* Reagle, 60 Barb. 527; People *v.* Green, 13 Wend. 55; People *v.* Goodwin, 18 Johns. 187, 9 Am. Dec. 203; People *v.* Olcott, 2 Johns. Cas. 301, 1 Am. Dec. 168. **N. C.** State *v.* Bullock, 63 N. C. 570. **Ohio.** Dobbins *v.* State, 14 Ohio St. 493; Hurley *v.* State, 6 Ohio 399. **Pa.**—McCreary *v.* Com., 29 Pa. 323. **S. C.** State *v.* Stephenson, 54 S. C. 234, 32 S. E. 305; State *v.* McKee, 1 Bailey L. 651, 21 Am. Dec. 499. **Tenn.**—State *v.* Pool, 4 Lea 363; State *v.* Waterhouse, Mart. & Y. 278. **Tex.**—Brady *v.* State, 21 Tex. App. 659, 1 S. W. 462; Varnes *v.* State, 20 Tex. App. 107. **Va.**—Jones *v.* Com., 86 Va. 740, 10 S. E. 1004.

See also *supra*, IX, J, 2.

32. See the following: **U. S.**—United States *v.* Workman, 30 Fed. Cas. No. 16,764. **Ala.**—Andrews *v.* State, 174 Ala. 11, 56 So. 998, Ann. Cas. 1914B, 760; Barrett *v.* State, 35 Ala. 406. **Colo.** In re Allison, 13 Colo. 525, 22 Pac. 820, 16 Am. St. Rep. 224, 10 L. R. A. 790. **Del.**—State *v.* Gamble, 2 Penne. 368, 45 Atl. 716. **Fla.**—White *v.* State, 63 Fla. 49, 59 So. 17; Smith *v.* State, 40 Fla. 203, 23 So. 854; Lambright *v.* State, 34 Fla. 564, 16 So. 582. **Ga.** Lovett *v.* State, 80 Ga. 255, 4 S. E. 912; Williford *v.* State, 23 Ga. 1. **Haw.** King *v.* Keliianaiwi, 4 Hawaii 213. **Idaho.**—People *v.* Stock, 1 Idaho 218. **Ind.**—State *v.* Leach, 120 Ind. 124, 22 N. E. 111; Fowler *v.* State, 85 Ind. 538; Shaffer *v.* State, 27 Ind. 131; State *v.* Walker, 26 Ind. 346; Miller *v.* State, 8 Ind. 325. **Kan.**—State *v.* White, 19 Kan. 445, 27 Am. Rep. 137. **La.**—State *v.* Harris, 119 La. 297, 44 So. 22, 11 L. R. A. (N. S.) 178; State *v.* Blackman, 35 La. Ann. 483. **Mass.** Com. *v.* Townsend, 5 Allen 216; Com. *v.* Purchase, 2 Pick. 521; Com. *v.* Bowden, 9 Mass. 494. **Mich.**—People *v.* Parker, 145 Mich. 488, 108 N. W. 999; People *v.* Harding, 53 Mich. 481, 19

N. W. 155. **Minn.**—Rollins *v.* Nolting, 53 Minn. 232, 54 N. W. 1118. **Miss.** Whitten *v.* State, 61 Miss. 717; Josephine *v.* State, 39 Miss. 613. **Neb.** Conklin *v.* State, 25 Neb. 784, 41 N. W. 788; State *v.* Shuchardt, 18 Neb. 454, 25 N. W. 722. **Nev.**—Ex parte Maxwell, 11 Nev. 428. **N. H.**—School Dist. No. 1 *v.* Bragdon, 23 N. H. 507. **N. J.**—Gulick *v.* Van Tilburgh, 16 N. J. L. 417. **N. Y.**—People *v.* Green, 13 Wend. 55; People *v.* Denton, 2 Johns. Cas. 275; People *v.* Koerner, 117 App. Div. 40, 102 N. Y. Supp. 93. **N. C.** State *v.* Carland, 90 N. C. 668; State *v.* Honeycutt, 74 N. C. 391; State *v.* Alman, 64 N. C. 364. **Ohio.**—Hines *v.* State, 24 Ohio St. 134; Poage *v.* State, 3 Ohio St. 229. **Ore.**—State *v.* Reinhart, 26 Ore. 466, 38 Pac. 822. **S. C.** State *v.* Stephenson, 54 S. C. 234, 32 S. E. 305. **Tenn.**—State *v.* Pool, 4 Lea 363; Mahala *v.* State, 10 Yerg. 532, 31 Am. Dec. 591. **Tex.**—Penn *v.* State, 36 Tex. Crim. 140, 35 S. W. 973; Wright *v.* State, 35 Tex. Crim. 158, 32 S. W. 761; Smith *v.* State, 22 Tex. App. 196, 2 S. W. 542; Brady *v.* State, 21 Tex. App. 659, 1 S. W. 462; Varnes *v.* State, 20 Tex. App. 107; Powell *v.* State, 17 Tex. App. 345. See Rudder *v.* State, 29 Tex. App. 262, 15 S. W. 717, holding disagreement of jury after less than forty-eight hours' deliberation is not such necessity as will justify the discharge of the jury in a criminal case. **Va.**—Jones *v.* Com., 86 Va. 740, 10 S. E. 1004; Wright *v.* Com., 75 Va. 914. **Wash.**—State *v.* Grimes, 80 Wash. 14, 141 Pac. 184; State *v.* Costello, 29 Wash. 366, 69 Pac. 1099.

[a] "Every case of this kind must rest with the court; under all the particular or peculiar circumstances of the case." People *v.* Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. Dec. 168.

33. See *infra*, X, J.

34. People *v.* Cage, 48 Cal. 323, 17 Am. Rep. 436; State *v.* Reinhart, 26 Ore. 466, 38 Pac. 822.

35. Ex parte Glenn, 111 Fed. 25; Wright *v.* State, 35 Tex. Crim. 158, 3; S. W. 701.

cretion send them back for further deliberation,³⁶ although such statement is proper evidence to be considered.³⁷ Nor does the mere statement of the sheriff or other officer having charge of the jury in itself warrant the discharge.³⁸

11. Absence, Misconduct and Separation of Jurors.³⁹—Misconduct on the part of either an individual juror or the whole panel, if discovered before verdict is rendered, will authorize a discharge of the jury.⁴⁰ Thus if a juror absents himself from trial, the whole jury may be discharged,⁴¹ unless the misbehaving juror is discharged and another substituted.⁴² A separation of the jury which would necessitate setting aside the verdict is sufficient ground for discharging the jury;⁴³ but where the jury is allowed to separate, their separation is not ground for discharge.⁴⁴ In some states the parties must be given an opportunity to explain the separation and show that the jurors were subjected to no corrupting influences.⁴⁵

12. To Hold Accused for Higher Grade of Crime.—The opinion of the judge that the evidence shows the accused to be guilty of a

36. *White v. Calder*, 35 N. Y. 183, 33 How. Pr. 392; *Erwin v. Hamilton*, 50 How. Pr. (N. Y.) 32; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817. See also *supra*, IX.

37. *People v. Parker*, 145 Mich. 488, 108 N. W. 999.

38. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436.

39. As to separation of jurors, see *supra*, IX, D.

As to conduct of jurors, see *supra*, IX, G.

40. U. S.—*Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. ed. 968. Conn.—*State v. Allen*, 46 Conn. 531. Fla.—*Tervin v. State*, 37 Fla. 396, 20 So. 551. Ind.—*State v. Leunig*, 42 Ind. 541. Ia.—*Grable v. State*, 2 G. Gr. 559. Mich.—*In re Ascher*, 130 Mich. 540, 90 N. W. 418, 57 L. R. A. 806; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. N. Y.—*In re Arams*, 97 Misc. 221, 162 N. Y. Supp. 863. N. C.—*State v. Wiseman*, 68 N. C. 203; *State v. Jefferson*, 66 N. C. 309. Eng.—*Reg. v. Ward*, 10 Cox C. C. 573.

[a] An intentional disregard of the evidence in returning a verdict authorizes a discharge. *People v. Murray*, 85 Cal. 350, 24 Pac. 666.

41. Ind.—*Maynard v. Black*, 41 Ind. 310; *Harris v. Doe*, 4 Blackf. 369. Ky.—*Orr v. Bobb*, Sneed 244. Mich.—*People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. N. J.—*State v. Hall*, 9 N. J. L. 256. Pa.—*Pennell*

v. Percival, 13 Pa. 197. S. C.—*State v. Scarborough*, 2 S. C. 439; *State v. McKee*, 1 Bailey L. 651, 21 Am. Dec. 499. S. D.—*State v. La Croix*, 8 S. D. 369, 66 N. W. 944. Tenn.—*Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591. Eng.—*Reg. v. Ward*, 10 Cox C. C. 573. But see *Standley v. State*, 10 Ga. 82. 42. *Toool v. Com.*, 11 Leigh (38 Va.) 714.

As to authority to discharge and substitute individual jurors, see *supra*, X, B.

43. Ind.—*Wyatt v. State*, 1 Blackf. 257. N. J.—*State v. Hall*, 9 N. J. L. 256. N. Y.—*People v. Reagle*, 60 Barb. 527.

And see La.—*State v. Costello*, 11 La. Ann. 283. Miss.—*Nelson v. State*, 47 Miss. 621. N. H.—*State v. Prescott*, 7 N. H. 287. N. Y.—*People v. Ransom*, 7 Wend. 417, 423; *People v. Douglass*, 4 Cow. 26, 15 Am. Dec. 332; *People v. McKay*, 18 Johns. 212, 218. Tenn.—*Griffie v. State*, 1 Lea 41; *Hines v. State*, 8 Humph. 597; *Stone v. State*, 4 Humph. 27, 38; *McLain v. State*, 10 Yerg. 241. Va.—*Overbee v. Com.*, 1 Rob. (40 Va.) 819; *Toool v. Com.*, 11 Leigh (38 Va.) 714.

Separation as ground for a new trial, see *supra*, IX, and generally the title "New Trial."

44. *State v. McKee*, 1 Bailey L. (S. C.) 651, 21 Am. Dec. 499.

45. *Standley v. State*, 10 Ga. 82. See the following: Haw.—*Prov. Government v. Caecires*, 9 Hawaii 522. Ia.—*Grable v. State*, 2 G. Gr. 559, this case

higher grade of crime is not such a necessity as requires the discharge of the jury.⁴⁶

13. Expiration of Term and Completion of Business.—If the jury after deliberation have not been able to reach an agreement by the end of the term, the court may discharge them,⁴⁷ unless it has power to continue the term for the conclusion of the case.⁴⁸ And if all the business of the term except the case under deliberation is completed, the court cannot discharge the jury if any part of the term is expired,⁴⁹ unless the jury has been given a reasonable time for deliberation.⁵⁰ If the impaneling of the jury is not completed until the last day of the term and the court deems the remainder of the term too short for a trial of the cause, it may discharge the jury before it is charged with or sworn in the case.⁵¹

14. Discharge of a Juror.—The discharge of an incompetent juror after the jury has been accepted does not, it has been held, create a necessity for discharging the remaining eleven.⁵²

F. ASCERTAINING EXISTENCE OF GROUNDS.⁵³—The determination of the existence of the ground of the discharge rests largely and almost exclusively in the discretion of the trial court.⁵⁴ The facts must

was decided, however, on the ground that when the new juror was substituted the trial was not begun de novo. **Mo.**—*State v. Brannon*, 45 Mo. 329. **N. Y.**—*People v. Buchanan*, 25 N. Y. Supp. 481. **Pa.**—*Hilands v. Com.*, 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235. **S. C.**—*State v. Anderson*, 2 Bailey 565.

46. *People v. Hunckeler*, 48 Cal. 331.

47. **Ala.**—*Walker v. State*, 117 Ala. 42, 23 So. 149; *Barrett v. State*, 35 Ala. 406; *Powell v. State*, 19 Ala. 577; *State v. Battle*, 7 Ala. 259; *Lore v. State*, 4 Ala. 173; *Ned v. State*, 7 Port. 187. **Cal.**—*Johnson v. Pacific Cement Co.*, 50 Cal. 648. **Ind.**—*Ashbaugh v. Edgecomb*, 13 Ind. 466. **Ky.**—*Com. v. Olds*, 5 Litt. 137; *Shearer v. Clay*, 1 Litt. 260; *Brooks v. Clay*, 3 A. K. Marsh. 545. **Mass.**—*Com. v. Roby*, 12 Pick. 496. **Miss.**—*Teat v. State*, 53 Miss. 439, 24 Am. Rep. 708; *Josephine v. State*, 39 Miss. 613; *State v. Moor*, Walk. 134, 12 Am. Dec. 541. **Mo.**—*State v. Jeffers*, 64 Mo. 376; *Norvell v. Deval*, 50 Mo. 272, 11 Am. Rep. 413. **Nev.** *Ex parte Maxwell*, 11 Nev. 428. **N. Y.** *People v. Goodwin*, 18 Johns. 187, 9 Am. Dec. 203; *People v. Denton*, 2 Johns. Cas. 275. **N. C.**—*State v. Whitson*, 111 N. C. 695, 16 S. E. 332; *State v. Tilletson*, 52 N. C. 114, 75 Am. Dec. 456. **S. C.**—*State v. McLemore*, 2 Hill 680. **Tenn.**—*State v. Brooks*, 3 Humph. 70; *Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591; *Berry v. Wallin*, 1 Overt.

(Tenn.) 241. **Va.**—*Williams v. Com.*, 2 Gratt. (43 Va.) 567, 44 Am. Dec. 403.

Inability to agree as ground of discharge generally, see *supra*, X, E, 10.

48. **Ind.**—*Wright v. State*, 5 Ind. 290, 61 Am. Dec. 90. **Miss.**—*Helm v. State*, 67 Miss. 562, 6 So. 322; *Whitten v. State*, 61 Miss. 717, decided under a statute providing that when a trial of a case has begun the court might bring it to a conclusion even though the term expired by law. **N. C.** *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90. **Pa.**—*Com. v. Fitzpatrick*, 121 Pa. 109, 15 Atl. 466, 6 Am. St. Rep. 757, 1 L. R. A. 451.

49. *Ex parte Vincent*, 43 Ala. 402.

50. *Barrett v. State*, 35 Ala. 406; *Powell v. State*, 19 Ala. 577, 581 (decided on the ground that the judgment entry showed that it was considered by the judge that the term of said court should be then closed from some absolute necessity though not showing what the necessity was); *Battle's Case*, 7 Ala. 259; *In re Newton*, 13 Q. B. (Eng.) 716, 116 Eng. Reprint 1437.

51. *State v. Lawry*, 4 Nev. 161.

52. *State v. Pritchard*, 16 Nev. 101, 117.

As to authority of court to discharge entire jury, see *supra*, X, A.

53. **Determination of inability of jury to agree**, see *supra*, X, E, 10, b.

54. *State v. Smith*, 44 Kan. 75, 24

be established as other facts are established in courts of justice in accordance with the rules of evidence governing such matters.⁵⁶ The accused has a right to be present,⁵⁶ to produce witnesses,⁵⁷ and to cross-examine.⁵⁸

G. CONSENT OF ACCUSED TO DISCHARGE.—Where there is a manifest necessity for the discharge of a jury,⁵⁹ or of a juror, under statute,⁶⁰ the court may discharge the jury or the juror without the consent, and even against the objection, of the accused. In the absence of such necessity, however, the court cannot lawfully discharge the jury against the objection and without the consent of the accused,⁶¹

Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774. See also *supra*, X, E.

55. *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774.

[a] The discretion of the court should be exercised only upon some kind of evidence. *People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436; *People v. Reagle*, 60 Barb. (N. Y.) 527.

[b] **Illness** (1) must be determined judicially. *Ill.*—*Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321. *Ind.* *Rulo v. State*, 19 Ind. 298. *Kan.* *State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322, (2) like any other fact in a court of justice, subject to the rules of evidence. *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774. (3) A nonexpert may prove illness of juror. *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321. See also 5 ENCY. OF EV. 696, et seq.

[c] **Question of Fact.**—The state of a juror's health is a question of fact to be decided by the presiding judge and his decision is final and not subject to exceptions. *Hubbard v. Gale*, 105 Mass. 511.

56. *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774.

[a] **Ex parte investigation** in which neither defendant, his counsel, nor the jury are permitted to take part, from which the judge indicates his belief of possible corruption of the jury, does not authorize a discharge, and if such discharge is made it will prevent a subsequent trial for the same offense. *People v. Parker*, 145 Mich. 488, 108 N. W. 999.

Presence of accused at discharge of jury, see *infra*, X, H.

57. *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774.

58. *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774.

59. **Mo.**—*State v. Matrassey*, 47 Mo. 295. **N. Y.**—*People v. Olcott*, 1 Johns. 301, 1 Am. Dec. 168. **Pa.**—*Hilands v. Com.*, 111 Pa. 1, 2 Atl. 70, 56 Am. Rep. 235. **Tenn.**—*Fletcher v. State*, 6 Humph. 249. **Tex.**—*Schindler v. State*, 17 Tex. App. 408. **Va.**—*Wright v. Com.*, 75 Va. 914.

See also cases cited *supra*, X, E, 1. But see *Prentice v. Chewning*, 1 Rob. (La.) 71.

60. *State v. Davis*, 31 W. Va. 390, 7 S. E. 24.

61. **U. S.**—*United States v. Randall*, 2 Cranch (C. C.) 412, 27 Fed. Cas. No. 16,117. **Ala.**—*Bell v. State*, 44 Ala. 393; *Grogan v. State*, 44 Ala. 9. **Colo.** *Swink v. Bohn*, 6 Colo. App. 517, 41 Pac. 838. **Fla.**—*Ellis v. State*, 25 Fla. 702, 6 So. 768. **Ga.**—*Simmons v. State*, 88 Ga. 272, 14 S. E. 613; *Spencer v. State*, 15 Ga. 562; *Langton v. State*, 14 Ga. 426. **Ill.**—*Bond v. Wood*, 69 Ill. 282. **Ind.**—*Henning v. State*, 106 Ind. 386, 6 N. E. 803, 7 N. E. 4, 55 Am. Rep. 756; *McCorkle v. State*, 14 Ind. 39. **N. C.**—*State v. Ephraim*, 19 N. C. 162. **S. C.**—*State v. Edwards*, 2 Nott & McC. 13, 17, 10 Am. Dec. 557. **Tenn.**—*Ward v. State*, 1 Humph. 253.

[a] **In Capital Cases.**—**N. C.**—*State v. Tilletson*, 52 N. C. 114, 75 Am. Dec. 456. **Pa.**—*Com. v. Fitzpatrick*, 121 Pa. 109, 15 Atl. 466, 6 Am. St. Rep. 757, 1 L. R. A. 451 (*Compare McCreary v. Com.*, 29 Pa. 323); *Com. v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *Com. v. Clue*, 3 Rawle 498. **S. C.**—*State v. Ray*, Rice 1, 33 Am. Dec. 90. **Tenn.** *State v. Brooks*, 3 Humph. 70. **Va.** *Com. v. Fells*, 9 Leigh (36 Va.) 613.

[b] **A discharge without consent of the accused after the court charged**

although it may do so with his consent.⁶² The court is not bound to discharge the jury because the defendant consents thereto, or requests it, however.⁶³

Implication and Presumption of Consent.—The assent of the accused will sometimes be implied:⁶⁴ thus it will be presumed to have been given where objection does not affirmatively appear;⁶⁵ but mere silence of the accused is not to be construed to mean consent.⁶⁶

Consent of Counsel.—The right to discharge a jury on consent of counsel of the accused has been questioned;⁶⁷ but such consent has also been held sufficient when given in the presence of the accused.⁶⁸

H. PRESENCE OF ACCUSED AT DISCHARGE.—In all criminal cases, the prisoner is entitled to be present at the time of the discharge of the jury; a discharge in his absence is unauthorized,⁶⁹ except, under

the jury and the prosecuting officer entered a nolle prosequi by permission is unauthorized. *State v. Connor*, 5 Coldw. (Tenn.) 311.

62. *Ala.*—*Hughes v. State*, 35 *Ala.* 351; *Cobia v. State*, 16 *Ala.* 781; *Pierce v. State*, 8 *Ala. App.* 359, 63 *So.* 33; *Ned v. State*, 7 *Port.* 187. *Ga.*—*Spencer v. State*, 15 *Ga.* 562; *Lancton v. State*, 14 *Ga.* 426. *Ind.*—*McCorkle v. State*, 14 *Ind.* 39. *Mass.*—*Com. v. Sholes*, 13 *Allen* 554. *Mich.*—*People v. White*, 68 *Mich.* 648, 37 *N. W.* 34; *People v. Gardner*, 62 *Mich.* 307, 29 *N. W.* 19. *Mo.*—*State v. Baber*, 74 *Mo.* 292, 41 *Am. Rep.* 314. *N. Y.*—*McFall v. People*, 18 *Hun* 382. *N. C.*—*State v. Davis*, 80 *N. C.* 384; *In re Spier*, 12 *N. C.* 491. But see *State v. Ephraim*, 19 *N. C.* 162, holding that even with the consent of the accused there must be some evident urgent overruling necessity arising during the trial which was beyond human foresight and control. *Pa.*—*Com. v. Fitzpatrick*, 121 *Pa.* 109, 15 *Atl.* 466, 6 *Am. St. Rep.* 757, 1 *L. R. A.* 451. *S. C.*—*State v. McKee*, 1 *Bailey L.* 651, 21 *Am. Dec.* 499. *Tenn.*—*Elijah v. State*, 1 *Humph.* 102. *Tex.*—*Rudder v. State*, 29 *Tex. App.* 262, 15 *S. W.* 717; *Arcia v. State*, 28 *Tex. App.* 198, 12 *S. W.* 599. *Utah.*—*People v. Kerm*, 8 *Utah* 268, 30 *Pac.* 988.

63. *State v. Wamire*, 16 *Ind.* 357; *People v. Buchanan*, 25 *N. Y. Supp.* 481.

64. *Ind.*—*Long v. State*, 46 *Ind.* 582; *Kingen v. State*, 46 *Ind.* 132. *Ia.*—*State v. Pierce*, 77 *Iowa* 245, 42 *N. W.* 181. *Tenn.*—*Morgan v. State*, 3 *Sneed* 475. *W. Va.*—*State v. Sutfin*, 22 *W. Va.* 771.

[a] Objection raised by defendant

to juror operates as consent. *Stewart v. State*, 15 *Ohio St.* 155.

[b] An entry upon the minutes of "juror withdrawn, mistrial declared" will be taken to mean that the discharge of the jury was with the consent of the defendant by agreement between respective counsel. *Lancton v. State*, 14 *Ga.* 426.

65. *Cal.*—*People v. Curtis*, 76 *Cal.* 57, 17 *Pac.* 941. *Ga.*—*Lancton v. State*, 14 *Ga.* 426. *Tenn.*—*Morgan v. State*, 3 *Sneed* 475. *Va.*—*Dye v. Com.*, 7 *Gratt.* (48 *Va.*) 662. *Utah.*—*People v. Kerm*, 8 *Utah* 268, 30 *Pac.* 988.

66. *Ex parte Glenn*, 111 *Fed.* 257; *Allen v. State*, 52 *Fla.* 1, 41 *So.* 593, 120 *Am. St. Rep.* 188. But see *Robinson v. Com.*, 88 *Ky.* 386, 11 *S. W.* 210, holding that the defendant may waive his right to object to the discharge of the jury by merely remaining silent at the time of the discharge.

67. *U. S.*—*United States v. Shaw*, 59 *Fed.* 110. *Ind.*—*State v. Wamire*, 16 *Ind.* 357. *Tex.*—*Sterling v. State*, 15 *Tex. App.* 249.

68. *Catron v. State*, 52 *Neb.* 389, 72 *N. W.* 354.

69. *Ind.*—*State v. Wilson*, 50 *Ind.* 487, 19 *Am. Rep.* 719. *Minn.*—*State v. Sommers*, 60 *Minn.* 90, 61 *N. W.* 907. *Neb.*—*State v. Shuchardt*, 18 *Neb.* 454, 25 *N. W.* 722. *N. C.*—*State v. Alman*, 64 *N. C.* 364. *Tex.*—*Selman v. State*, 33 *Tex. Crim.* 631, 28 *S. W.* 541; *Rudder v. State*, 29 *Tex. App.* 262, 15 *S. W.* 717.

[a] An investigation into a juror's illness and discharge of the jury in the absence of the accused is erroneous. *State v. Smith*, 44 *Kan.* 75, 24 *Pac.* 84, 21 *Am. St. Rep.* 266, 8 *L. R. A.* 774.

statutes which sometimes authorize it in misdemeanor cases,⁷⁰ or where the accused waives his right to be present,⁷¹ or unless the sickness of the prisoner requires the discharge.⁷²

I. **RECORD.**—Generally, the court discharging a jury before verdict is required to set out the facts showing the necessity therefor and its finding or judgment thereon,⁷³ in such a manner that the conclusions of the court as to the question may be reviewed by the appellate court.⁷⁴

J. **REVIEW.**⁷⁵—If no necessity for the discharge of a jury in a

[b] **A discharge after rendition of verdict** in a felony case amounts to an acquittal if the verdict was rendered in the absence of the accused, and the error cannot be cured by immediately reassembling the jury and receiving verdict in the defendant's presence. *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31.

70. *Selman v. State*, 33 Tex. Crim. 631, 28 S. W. 541 (where his counsel is present); *Dye v. Com.*, 7 Gratt. (48 Va.) 662.

71. *People v. Smalling*, 94 Cal. 112, 29 Pac. 421.

72. *Fails v. State*, 60 Fla. 8, 53 So. 612, Ann. Cas. 1912B, 1146.

73. **U. S.**—*Ex parte Glenn*, 111 Fed. 257. **Cal.**—*People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436, its judgment. **Fla.** *Adams v. State*, 34 Fla. 185, 15 So. 905. **Idaho.**—*State v. Jorgenson*, 3 Idaho 620, 32 Pac. 1129. **Kan.**—*State v. Allen*, 59 Kan. 758, 54 Pac. 1060; *State v. Smith*, 44 Kan. 75, 24 Pac. 84, 21 Am. St. Rep. 266, 8 L. R. A. 774. **Mich.**—*People v. Parker*, 145 Mich. 488, 108 N. W. 999. *Compare* *People v. Harding*, 53 Mich. 481, 19 N. W. 155, holding that it has never been the practice in Michigan to make such an entry. **Neb.**—*Conklin v. State*, 25 Neb. 784, 41 N. W. 788; *State v. Shuchardt*, 18 Neb. 454, 25 N. W. 722. **Nev.**—*Ex parte Maxwell*, 11 Nev. 428. **N. C.** *State v. McGimsey*, 80 N. C. 377, 30 Am. Rep. 90; *State v. Jefferson*, 66 N. C. 309; *State v. Prince*, 63 N. C. 529; *State v. Ephraim*, 19 N. C. 162. **Ohio.**—*Hines v. State*, 24 Ohio St. 134; *Dobbins v. State*, 14 Ohio St. 493; *Poage v. State*, 3 Ohio St. 229; *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542; *Hurley v. State*, 6 Ohio 399. **Tenn.** *State v. Pool*, 4 Lea 363; *State v. Waterhouse*, Mart. & Y. 278. **Tex.** *Wright v. State*, 35 Tex. Crim. 158, 32 S. W. 701.

[a] **A mere finding by the court**

that the ends of justice require a discharge will not be sufficient, where the reasons for the discharge must be stated. *State v. Leunig*, 42 Ind. 541.

[b] **Where a juror is discharged "on complaint of being sick,"** the record should show that the court ascertained the truth of that fact before discharging him. *Robinson v. State*, 52 Ala. 587. Illness of juror as ground for discharge, see *supra*, X, E, 9, a.

[c] **Statement by Foreman of Jury Not Sufficient.**—See *Ex parte Maxwell*, 11 Nev. 428.

[d] **The minutes of the clerk are insufficient** under a statute requiring the court to order the reason for the discharge be entered of record. *Conklin v. State*, 25 Neb. 784, 41 N. W. 788.

[e] **The reason stated will be taken as the true one.** *Conklin v. State*, 25 Neb. 784, 41 N. W. 788.

[f] **In California**, (1) the judgment of the court must be expressed in some form on the record (*People v. Cage*, 48 Cal. 323, 17 Am. Rep. 436), (2) but the reasons on which the court deems it proper to discharge the jury need not be. *People v. Greene*, 100 Cal. 140, 34 Pac. 630.

[g] **The record may be amended** at the next term to show the true cause for the discharge of the jury. *State v. Davis*, 80 N. C. 384. As to amendment of record generally, see the title "Records."

74. **Ind.**—*Fowler v. State*, 85 Ind. 538; *Vanderkarr v. State*, 51 Ind. 91, holding that unless the grounds given for the discharge are shown by the bill of exceptions it will be presumed that the ruling was properly made. **Miss.**—*Josephine v. State*, 39 Miss. 613. **Nev.**—*Ex parte Maxwell*, 11 Nev. 428. **N. C.**—*State v. Jefferson*, 66 N. C. 309; *State v. Ephraim*, 19 N. C. 162. **Tenn.** *State v. Pool*, 4 Lea 363; *State v. Waterhouse*, Mart. & Y. 278.

75. See generally the titles "Ap-

civil action exists, a discharge without the consent of the parties constitutes reversible error.⁷⁶ But as a general rule, the discretion of the court in discharging a juror or the jury will not be interfered with on appeal except where abused.⁷⁷ If nothing appears in the record to show an abuse of the court's discretion, its action in discharging the jury or a juror will be presumed correct.⁷⁸ In some jurisdictions, the action of the court is not reviewable at all;⁷⁹ findings of the court upon questions of fact are conclusive on appeal.⁸⁰

peals;" "Review;" "Writ of Error."

76. *Swink v. Bohn*, 6 Colo. App. 517, 41 Pac. 838.

As to grounds of discharge generally, see *supra*, X, E.

77. See the following: **Ala.**—*Hawes v. State*, 88 Ala. 37, 7 So. 302; *Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31; *Mixon v. State*, 55 Ala. 129, 28 Am. Rep. 695; *Ned v. State*, 7 Port. 187. **Ark.**—*Lee v. State*, 26 Ark. 260, 7 Am. Rep. 611. **Cal.**—*Ex parte McLaughlin*, 41 Cal. 211, 10 Am. Rep. 272. **La.** *State v. Harris*, 119 La. 297, 44 So. 22, 11 L. R. A. (N. S.) 178. **Nev.** *State v. Vaughan*, 23 Nev. 103, 43 Pac. 193. **N. H.**—*Morrill v. Warner*, 66 N. H. 572, 29 Atl. 412; *School Dist. No. 1 v. Bragdon*, 23 N. H. 507. **N. Y.** *People v. Beckwith*, 103 N. Y. 360, 8 N. E. 662; *People v. Green*, 13 Wend. 55; *People v. Olcott*, 2 Johns. Cas. 301, 1 Am. Dec. 168. **Ohio.**—*Dobbins v. State*, 14 Ohio St. 493. **Pa.**—*Com. v. Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465. **Tenn.**—*Mahala v. State*, 10 Yerg. 532, 31 Am. Dec. 591. **Tex.**—*Rudder v. State*, 29 Tex. App. 262, 15 S. W. 717; *O'Connor v. State*, 28 Tex. App. 288, 13 S. W. 14; *Clark v. State*, 28 Tex. App. 189, 12 S. W. 729, 19 Am. St. Rep. 817; *Brady v. State*, 21 Tex. App. 659, 1 S. W. 462; *Varnes v. State*, 20 Tex. App. 107; *Schindler v. State*, 17 Tex. App. 408; *Ray v. State*, 4 Tex. App. 450. **Va.**—*Wright v. Com.*, 75 Va. 914.

78. **Ark.**—*Atkins v. State*, 16 Ark. 568. **Idaho.**—*State v. Jorgenson*, 3 Idaho 620, 32 Pac. 1129. **Ill.**—*People v. Ezell*, 155 Ill. App. 298. **Ind.**—*Fowler v. State*, 85 Ind. 538; *Vanderkarr v. State*, 51 Ind. 91. **Kan.**—*State v. Reed*, 53 Kan. 767, 37 Pac. 174, 42 Am. St. Rep. 322. **La.**—*State v. Harris*, 119 La. 297, 44 So. 22, 11 L. R. A. (N. S.) 178. **Miss.**—*Helm v. State*, 66 Miss. 537, 6 So. 322. **Mo.**—*State v. Copeland*, 65 Mo. 497. **Neb.**—*Barney v. State*, 49

Neb. 515, 68 N. W. 636. **Tenn.**—*State v. Brooks*, 3 Humph. 70; *State v. Waterhouse*, Mart. & Y. 278. **Tex.** *O'Connor v. State*, 28 Tex. App. 288, 13 S. W. 14. **W. Va.**—*State v. Sutfin*, 22 W. Va. 771.

[a] **Presumption of Consent.**—Where a statute provides that the minutes of the clerk should be signed by the presiding judge, and the minutes showed that the jury was discharged on account of inability to agree, and that the accused consented to the discharge, but before the judge signed the minutes he was taken sick and died without ever signing them, it will be presumed that the defendant consented to the discharge. *Moore v. State*, 3 Heisk. (Tenn.) 493.

79. **U. S.**—*United States v. Perez*, 9 Wheat. 579, 6 L. ed. 165; *United States v. Workman*, 30 Fed. Cas. No. 16,764; *United States v. Shoemaker*, 2 McLean 114, 27 Fed. Cas. No. 16,279; *United States v. Morris*, 1 Curt. 23, 26 Fed. Cas. No. 15,815. **Haw.**—*King v. Keliihanaiwi*, 4 Hawaii 213. **Me.**—*Ware v. Ware*, 8 Greenl. 42. **Md.**—*Hoffman v. State*, 20 Md. 425. **Mass.**—*Hubbard v. Gale*, 105 Mass. 511; *Com. v. Purchase*, 2 Pick. 521, 13 Am. Dec. 452. **Mich.**—*People v. Parker*, 145 Mich. 488, 108 N. W. 999; *People v. Harding*, 53 Mich. 481, 487, 19 N. W. 155. **Ore.** *State v. Reinhart*, 26 Ore. 466, 38 Pac. 822. **Eng.**—*Winsor v. Reg.*, 7 B. & S. 490, 35 L. J. M. C. 161, L. R. 1 Q. B. 390, 12 Jur. (N. S.) 561, 14 L. T. 567, 14 W. R. 695, 10 Cox C. C. 327.

[a] **In North Carolina** the rule is that in all cases not capital the action of the judge in discharging the jury is not subject to review. *State v. Twiggs*, 90 N. C. 685; *State v. Chase*, 82 N. C. 575; *State v. Bass*, 82 N. C. 570; *State v. Bailey*, 65 N. C. 426; *State v. Bullock*, 63 N. C. 570; *State v. Prince*, 63 N. C. 529.

80. **Mass.**—*Hubbard v. Gale*, 105 Mass. 511. **N. C.**—*State v. Prince*, 63

K. EFFECT OF DISCHARGE. — 1. On Trial and Action. — In either case, whether an individual juror or the whole panel is discharged, the trial must be begun *de novo*.⁸¹ The discharge of a jury in a civil action does not operate as a discontinuance.⁸²

2. On Authority of Court Over Jury. — The authority of the court over the jury terminates on their discharge,⁸³ and thereafter the court cannot recall them for further deliberation.⁸⁴ A jury after being discharged may be recalled for the purpose of putting its verdict in proper form, however;⁸⁵ but a change in matter of substance cannot then be made.⁸⁶ Where the jury separates after returning a verdict in open court, but in the absence of the defendant, it may be recalled and the verdict properly read in his presence.⁸⁷

3. As an Acquittal. — The effect of a discharge as an acquittal of a defendant is treated elsewhere in this work.⁸⁸

N. C. 529. **Ore.**—*State v. Reinhart*, 26 Ore. 466, 38 Pac. 822.

[a] **Necessity of Discharge for Disagreement Presumed.**—The discharge of a jury upon their reporting that they cannot agree implies that the judge assents to their conclusion and that he decides it to be necessary to discharge them without verdict, and this decision is conclusive. *People v. Harding*, 53 Mich. 481, 19 N. W. 155.

81. Ala.—*Bell v. State*, 44 Ala. 393. **Ill.**—*Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321. **Ia.**—*Grable v. State*, 2 G. Gr. 559. **La.**—*Follin v. Foucher*, 8 La. 563; *Prentice v. Chewing*, 1 Rob. 71. **Miss.**—*Dennis v. State*, 96 Miss. 96, 50 So. 499, 25 L. R. A. (N. S.) 36. **Okla.**—*Turner v. Territory*, 15 Okla. 557, 82 Pac. 650. **Eng.**—*Reg. v. Ashe*, 1 Cox C. C. 150; *Reg. v. Beere*, 2 Moody & R. 472.

82. Whitten v. State, 61 Miss. 717.

[a] It is simply a mistrial and a new jury may be impaneled to try the case. *Leas v. Patterson*, 38 Ind. 465; *Ashbaugh v. Edgecomb*, 13 Ind. 466.

83. Ala.—*Cook v. State*, 60 Ala. 39, 31 Am. Rep. 31. **Ill.**—*Bond v. Wood*, 69 Ill. 282. **Me.**—*Richards v. Page*, 81 Me. 563, 18 Atl. 289. **Mass.**—*Com. v. Townsend*, 5 Allen 216. **S. C.**—*State v. Dawkins*, 32 S. C. 17, 10 S. E. 772. **Va.**—*Mills v. Com.*, 7 Leigh (34 Va.) 751.

84. See State v. Dawkins, 32 S. C. 17, 10 S. E. 772.

85. Ind.—*Pehlman v. State*, 115 Ind. 131, 17 N. E. 270. **Md.**—*Hechter v. State*, 94 Md. 429, 50 Atl. 1041, 56 L. R. A. 457. **Tex.**—*Boyett v. State*, 26 Tex. App. 689, 9 S. W. 275.

86. Ill.—*Farley v. People*, 138 Ill. 97, 27 N. E. 927. **Me.**—*State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272. **Mass.**—*Com. v. Dorus*, 108 Mass. 488. **Wis.**—*Koch v. State*, 126 Wis. 470, 106 N. W. 531, 3 L. R. A. (N. S.) 1086; *Allen v. State*, 85 Wis. 22, 54 N. W. 999.

[a] **Cannot Alter It.**—Having signed their verdict and delivered it to a messenger to be deposited with the proper custodian thereof, the jury has no control over it and cannot afterwards act judicially upon it. *West v. West & East R. Co.*, 61 Miss. 536.

[b] **Where the sealed verdict returned is defective**, and the jurors have been separated for a considerable time, the defect is not cured by their subsequent rendition of a new verdict, in the absence of full proof that no harm resulted to the defendant by reason of their separation. *United States v. Swan*, 7 N. M. 306, 34 Pac. 533. See *State v. Whittier*, 21 Me. 341, 38 Am. Dec. 272.

87. Russell v. State, 11 Tex. App. 288.

88. See 14 STANDARD PROC. 559.

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CROSS-REFERENCES:

Admiralty;	Martial Law;
Equity Jurisdiction and	Probate Courts;
Procedure;	Service of Process and Papers;
Justices of the Peace;	United States Courts.

For jurisdiction of particular subject matter, see particular titles.

Jurisdiction after remand of cause, see the title "Mandate and Proceedings Thereafter."

For further references and cross-references, see the index to this work and the cross-references throughout this article.

I. DEFINITIONS, DISTINCTIONS, AND GENERAL STATEMENT.—A. GENERAL STATEMENT.—The very foundation of judicial proceedings is jurisdiction.¹ There is, however, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly and certainly determined, than the subject of the jurisdiction of courts.² It is a subject, too, about which much has been loosely said.³ Indeed, there is probably no word in legal terminology so frequently used as the word "jurisdiction," so capable of use in a general and vague sense, and which is used so often by men learned in the law, without a due regard to precision in its application.⁴

B. JURISDICTION DEFINED.⁵—There are numerous definitions of "jurisdiction,"⁶ the substance of all of which is that it is the power to hear and determine a cause or controversy between parties to a

1. *Moody v. Port Clyde Dev. Co.*, 102 Me. 365, 66 Atl. 967, 975.

2. *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

3. *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

4. *Watson v. Jones*, 13 Wall. (U. S.) 679, 732, 20 L. ed. 666.

[a] "The word jurisdiction, itself, seems to be often used without any determinate signification." *Withers v. Patterson*, 27 Tex. 491, 496, 86 Am. Dec. 643.

[b] "There is an ambiguity concealed in the word 'jurisdiction.'" *Isham v. Sienknecht* (Tenn.), 59 S. W. 779.

Jurisdiction defined, see *infra*, I, B.

5. For definition of equity jurisdiction, see 8 STANDARD PROC. 387, et seq.

6. See *infra*, this section.

[a] Thus, (1) it has been defined as the authority by which courts and judicial officers take cognizance of and

decide cases (U. S.—*Worcester v. Georgia*, 6 Pet. 515, 8 L. ed. 483. Ind.—*Ellison v. State*, 125 Ind. 492, 24 N. E. 739. Ohio.—*Mahoning Valley R. Co. v. Santoro*, 93 Ohio St. 53, 112 N. E. 190; *Parker v. Wallace*, 3 Ohio 490; *Girls' Industrial Home v. Steffen*, 9 Ohio Dec. 696, 7 Ohio N. P. 409. Okla.—*Bockfinger v. Foster*, 10 Okla. 488, 62 Pac. 799; *Parker v. Lynch*, 7 Okla. 631, 56 Pac. 1982. Tex.—*Brownsville v. Basse*, 43 Tex. 440), (2) a right to begin the inquiry (*Coopers v. Central Ohio R. Co.*, 2 Ohio Dec. 199), (3) power to hear and determine issues of law and fact, which means authority to perform any judicial function (*In re McCormick's Estate*, 72 Ore. 608, 144 Pac. 425, affirming 72 Ore. 608, 143 Pac. 915), (4) the legal authority to administer justice (Minn.—*Holmes v. Campbell*, 12 Minn. 221, 277. Pa.—*Mills v. Com.*, 13 Pa. 627. P. R.—*Bayron v. Garcia*, 17 Porto Rico 512; *Ex parte*

suit.⁷ To this must be added, according to some decisions, the power

Bou, 7 Porto Rico 133. **W. Va.**—Johnston v. Hunter, 50 W. Va. 52, 40 S. E. 448), (5) power to inquire into the facts and apply the law (**U. S.**—Wedding v. Meyler, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. ed. 570, 66 L. R. A. 833. **Ind.**—Robertson v. State, 109 Ind. 79, 10 N. E. 582, 643. **Mass.**—Hopkins v. Com., 3 Mete. 460), (6) or to entertain an action, petition or other proceeding. *Ex parte* Wade, 2 Okla. Crim. 100, 107, 100 Pac. 35; Perry v. Morse, 57 Vt. 509.

7. U. S.—United States v. Morse, 218 U. S. 493, 31 Sup. Ct. 37, 54 L. ed. 1123; Davis v. Cleveland, C. C. & St. L. R. Co., 217 U. S. 157, 172, 30 Sup. Ct. 463, 54 L. ed. 708; McNitt v. Turner, 16 Wall. 352, 365, 21 L. ed. 341; Rexford v. Brunswick-Balke-Collender Co., 181 Fed. 462, 104 C. C. A. 210. **Ala.**—Pullman Palace Car Co. v. Harrison, 122 Ala. 149, 25 So. 697, 82 Am. St. Rep. 68; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; Lamar v. Gunter, 39 Ala. 324; Wightman v. Karsner, 20 Ala. 446, 451. **Ark.**—Stevenson v. Christie, 64 Ark. 72, 42 S. W. 418, 419; Trammell v. Town of Russellville, 34 Ark. 105, 110, 36 Am. Rep. 1; *Ex parte* Woods, 3 Ark. 532. **Cal.**—Sherer v. Superior Court, 96 Cal. 653, 31 Pac. 565; North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315-326; Altschul v. Folaek, 55 Cal. 633, 641; Central Pac. R. Co. v. Placer County, 43 Cal. 365; Hickman v. O'Neal, 10 Cal. 292; Lange v. Superior Court, 11 Cal. App. 1, 103 Pac. 908; Dahlgren v. Superior Court, 8 Cal. App. 622, 97 Pac. 681. **Colo.** Whipple v. Stevenson, 25 Colo. 447, 55 Pac. 188, 190; Newman v. Bullock, 23 Colo. 217, 47 Pac. 379; Bassick Min. Co. v. Schoolfield, 10 Colo. 46, 14 Pac. 65, 67. **Conn.**—Sanford v. Sanford, 28 Conn. 6, 15. **Del.**—Lewis v. Hazel, 4 Harr. 470. **Ga.**—Wilson v. Atlanta, etc. R. Co., 115 Ga. 171, 41 S. E. 699. **Ill.** Saylor v. Duel, 236 Ill. 429, 86 N. E. 119, 19 L. R. A. (N. S.) 377; O'Brien v. People, 216 Ill. 354, 363, 75 N. E. 108, 108 Am. St. Rep. 219; People v. Talmadge, 194 Ill. 67, 61 N. E. 1049, 1050; Chicago Title & Trust Co. v. Brown, 183 Ill. 42, 55 N. E. 632, 633, 47 L. R. A. 798; Kelly v. People, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; Fleischman v. Walker, 91 Ill. 318; Kirk v. Vonberg, 34 Ill. 440. **Ind.**—City of Indianapolis v. Hawkins, 180 Ind. 382, 103 N. E. 10; State v. Osborn, 155 Ind. 385, 58 N. E. 491, 493; Board of Comrs. of White County v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; Cason v. Harrison, 135 Ind. 330, 35 N. E. 268; McGuffey v. McClain, 130 Ind. 327, 30 N. E. 296; Lantz v. Moffett, 102 Ind. 23, 26 N. E. 195. **Ia.**—*In re* Culver's Estate, 159 Iowa 679, 140 N. W. 878; Sigmond v. Bebbler, 104 Iowa 431, 73 N. W. 1027, 1028; Oliver v. Riley, 92 Iowa 23, 60 N. W. 180, 181; Jones v. Brown, 54 Iowa 74, 79, 6 N. W. 140, 37 Am. Rep. 185. **Me.**—Adams v. Macfarlane, 65 Me. 143; Merrill v. Curtis, 57 Me. 152. **Mass.**—Hopkins v. Com., 3 Mete. 460. **Minn.**—State v. Dreger, 97 Minn. 221, 106 N. W. 904; Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378, 380; State v. Matter, 78 Minn. 377, 81 N. W. 9, 10; *In re* Mousseau's Will, 30 Minn. 202, 14 N. W. 887; Montour v. Purdy, 11 Minn. 384, 404, 83 Am. Dec. 88. **Mo.**—State *ex rel.* McNamee v. Stobie, 194 Mo. 14, 92 S. W. 191; Gray v. Bowles, 74 Mo. 419, 423. **Neb.**—Douglas County v. Vinsonhaler, 82 Neb. 810, 118 N. W. 1058; Smiley v. Sampson, 1 Neb. 56, 69. **N. J.** State v. Sheriff of Middlesex, 15 N. J. L. 68, 85. **N. M.**—Leitensdorfer v. Webb, 1 N. M. 34, 53. **N. Y.**—D'Ivernois v. Leavitt, 8 Abb. Pr. 59; People v. Murray Hill Bank, 10 App. Div. 328, 41 N. Y. Supp. 804, 805; People *ex rel.* Gaynor v. McKane, 78 Hun 154, 28 N. Y. Supp. 981. **N. C.**—State v. Hall, 142 N. C. 710, 55 S. E. 806. **Ohio.** Mahoning Valley R. Co. v. Santoro, 93 Ohio St. 53, 112 N. E. 190; State v. Board of State Suprs., 70 Ohio St. 341, 71 N. E. 717; Spoors v. Cowen, 44 Ohio St. 497, 9 N. E. 132; Paine's Lessee v. Mooreland, 15 Ohio 435, 45 Am. Dec. 585; Travis v. State, 12 Ohio Cir. Ct. (N. S.) 374, *affirmed*, 82 Ohio St. 439, 92 N. E. 1125; Girls' Industrial Home v. Steffen, 9 Ohio Dec. 696, 7 Ohio N. P. 409; Sheldon's Lessee v. Newton, 3 Ohio St. 494; Chapman v. Bolton Steel Co., 4 Ohio Cir. Ct. 242, 2 Ohio Cir. Dec. 523; State v. Metzger, 10 Ohio N. P. (N. S.) 97; Coopers v. Central Ohio R. Co., 2 Ohio Dec. 199. **Okla.** Dickson v. Lowe, 163 Pac. 523; Apache State Bank v. Voight, 161 Pac. 214; Model Clothing Co. v. First Nat. Bank of Cushing, 160 Pac. 450; Parmenter

to render the particular judgment in the particular case.⁸ The word "jurisdiction" is a term of large and comprehensive import and embraces every kind of judicial action upon the subject-matter.⁹ It

r. Ray, 158 Pac. 1183; *Parker v. Lynch*, 7 Okla. 631, 56 Pac. 1082; *Myers v. Berry*, 3 Okla. 612, 41 Pac. 580; *Twine v. Carey*, 2 Okla. 249, 37 Pac. 1096; *Ex parte Wade*, 2 Okla. Crim. 100, 100 Pac. 35. **Pa.**—*In re Greenough Street*, 169 Pa. 210, 32 Atl. 427. **R. I.**—*State v. Smith*, 29 R. I. 513, 72 Atl. 710. **S. D.**—*In re Taylor*, 7 S. D. 382, 64 N. W. 253, 257, 58 Am. St. Rep. 843, 45 L. R. A. 136. **Tex.** *Scott v. Hunt*, 92 Tex. 389, 49 S. W. 210; *Templeton v. Ferguson*, 89 Tex. 47, 54, 33 S. W. 329, *affirming* 32 S. W. 148; *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295; *Banton v. Wilson*, 4 Tex. 400, 403. **Vt.**—*State v. Wakefield*, 60 Vt. 618, 15 Atl. 181; *Perry v. Morse*, 57 Vt. 509; *Vaughn v. Congdon*, 56 Vt. 111, 48 Am. Rep. 758. **Va.**—*Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249. **Wash.**—*State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905; *State v. Langhorne*, 12 Wash. 588, 41 Pac. 97. **W. Va.**—*Sperry v. Sanders*, 50 W. Va. 70, 40 S. E. 327; *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448. **Wis.**—*Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131.

See 15 STANDARD PROC. 420 et seq.

[a] "That definition probably covers the full meaning of the term, for it may be elaborated in various ways and still retain the same meaning." *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448.

[b] Other definitions are collated in *Ex parte Wade*, 2 Okla. Crim. 100, 100 Pac. 35.

8. **U. S.**—*Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. **Cal.**—*Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732. **Colo.**—*Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216; *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105. **Mo.**—*Charles v. White*, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674, 21 L. R. A. (N. S.) 481. **N. Y.** *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 569, 19 Am. Rep. 211. **Tex.** *Stewart v. Anderson*, 70 Tex. 588, 597, 8 S. W. 295; *Brownsville v. Basse*, 43 Tex. 440, 449. **Wis.**—*Two Rivers Mfg.*

Co. v. Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131; *In re Crow*, 60 Wis. 349, 19 N. W. 713; *Mason v. Beach*, 55 Wis. 607, 13 N. W. 884; *Hurlbut v. Wilcox*, 19 Wis. 419.

[a] **Reason.**—The court may have jurisdiction of the parties and subject matter and still be limited in its modes of procedure, and in the extent and character of its judgments, and a material departure therefrom renders the judgment void. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Anthony v. Kasey*, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277; *Thurman v. Morgan*, 79 Va. 367; *Nulton v. Isaacs*, 30 Gratt. (71 Va.) 726.

[b] **Illustrations.**—(1) If for instance, the action be upon a money demand, the court notwithstanding its complete jurisdiction over the subject matter and the parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property the court is powerless to admit in the case the probate of a will. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. (2) If a magistrate, having authority to fine for assault and battery, should sentence the offender to be imprisoned in the penitentiary, or to suffer the punishment prescribed for homicide, his judgment would be as much a nullity as if the preliminary jurisdiction to hear and determine had not existed. *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538.

Necessity for court having jurisdiction in order to render a valid judgment, see 14 STANDARD PROC. 777, et seq.

9. *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Hopkins v. Com.*, 3 Mete. (Mass.) 460.

[a] **Jurisdiction embraces** (1) the power to hear and determine the questions coram judice in the particular case (*State v. First Judicial Dist. Court*, 24 Mont. 539, 63 Pac. 395; *Mahoning Valley Ry. Co. v. Santora*, 93 Ohio St. 53, 112 N. E. 190), (2) the

includes power to enforce the execution of what is decreed.¹⁰

C. ORIGINAL JURISDICTION.¹¹—A court has original jurisdiction, as distinguished from appellate jurisdiction, when it has the power to entertain cases in the first instance,¹² or is the court in which an action has its origin.¹³

D. APPELLATE JURISDICTION.¹⁴—Appellate jurisdiction is the power and authority conferred upon a superior court to rehear and determine causes which have been tried in inferior courts.¹⁵ It is

authority of law to act officially in the matter in hand (*Jones v. Brown*, 54 Iowa 74, 79, 6 N. W. 140, 37 Am. Rep. 185), (3) the power and authority to declare the law (*Mills v. Com.*, 13 Pa. 627; *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448), (4) the power to consider and decide one way or the other, as the law may require (*U. S. Geneva Furniture Mfg. Co. v. Karpen & Bros.*, 238 U. S. 254, 259, 35 Sup. Ct. 788, 59 L. ed. 1295; *Nolen v. Riechman*, 225 Fed. 812. N. Y.—*Bennett v. Cole*, 173 App. Div. 521, 159 N. Y. Supp. 1001. Tex.—*Auto Tr. Co. v. City of Fort Worth*, 182 S. W. 685), (5) the right to adjudicate concerning the subject matter in the given case (*Reynolds v. Stockton*, 140 U. S. 254, 268, 11 Sup. Ct. 773, 35 L. ed. 464; *Munday v. Vail*, 34 N. J. L. 418), (6) the power to hear and determine the subject matter in controversy between parties to the suit, to adjudicate or exercise any judicial power over them, (*State of Rhode Island v. State of Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *Model Clothing Co. v. First Nat. Bank*, etc. (Okla.), 160 Pac. 450; *Parmenter v. Ray* (Okla.), 158 Pac. 1183), (7) the power to adjudicate a case upon the merits, and dispose of it as justice may require. *The Resolute*, 168 U. S. 437, 18 Sup. Ct. 112, 42 L. ed. 533.

[b] It has been defined as the power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of law, or to award the remedies provided by law upon a state of facts proved or admitted, referred to the tribunal for decision, and authorized by law to be the subject of investigation or action by that tribunal, and in favor of or against persons (or a res) who present themselves or who are brought before the court in some manner sanctioned by law as proper and sufficient.

Isham v. Sienknecht (Tenn.), 59 S. W. 779.

[c] Jurisdiction (1) as applied to a particular claim or controversy, is the power to hear and determine that controversy. *Central Pacific R. Co. v. Placer County*, 43 Cal. 365. (2) Thus the power to hear may be granted, and the power to determine withheld, or the power to hear and determine may be granted, and the power to enforce the determination withheld, or the power to hear, determine and enforce may be conferred, but restricted to particular litigants or subjects. *State v. North American L. etc. Co.*, 106 La. 621, 631, 31 So. 172, 87 Am. St. Rep. 309.

10. Ill.—*Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; *Fleischman v. Walker*, 91 Ill. 318; *Kirk v. Vonberg*, 34 Ill. 440. La.—*State v. North American, etc. Co.*, 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309. Me.—*Merrill v. Curtis*, 57 Me. 152. Mass.—*Hopkins v. Com.*, 3 Mete. 460; *Com. v. Curtis*, Thacher Cr. Cas. 202. N. Y.—*In re Ferguson*, 9 Johns. 239. Ohio.—*Girls' Industrial Home v. Steffen*, 9 Ohio Dec. 696, 7 Ohio N. P. 409. Tex.—*Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

As to enforcement of judgments and decrees, see generally the title "Judgments and Decrees, Enforcement of."

11. As to courts of general original jurisdiction, see *infra*, V.

12. Ky.—*Smith v. Carr*, Hard. 305. Minn.—*Castner v. Chandler*, 2 Minn. 86. Ohio.—*South End Bank v. McGuffey*, 1 Ohio Cir. Ct. 88, 1 Ohio Cir. Dec. 53. Okla.—*Burks v. Walker*, 25 Okla. 353, 109 Pac. 544.

Appellate jurisdiction defined, see *infra*, I, D.

13. *Abbott v. Knowlton*, 31 Me. 77.

14. As to jurisdiction of appellate courts, see generally *infra*, VI.

15. Ark.—*Ex parte Batesville & B. R. Co.*, 39 Ark. 82; *State v. Jones*, 22

not only a continuation of the exercise of the same judicial power which has been exercised in the court of original jurisdiction,¹⁶ but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power.¹⁷ The essential criterion of appellate jurisdiction is, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.¹⁸ In reference to judicial tribunals, an appellate

Ark. 331. **Fla.**—*State v. Baker*, 19 Fla. 19, 26. **Ill.**—*Crull v. Keener*, 17 Ill. 246. **Kan.**—*Auditor v. Atchison*, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575. **Ky.**—*Smith v. Carr*, Hard. 305. **N. D.**—*Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 447, 67 N. W. 300, 32 L. R. A. 730. **Tex.**—*Waters-Fierce Oil Co. v. State*, 106 S. W. 326; *Brownsville v. Basse*, 43 Tex. 440.

See 2 STANDARD PROC. 140, 154.

[a] "We find no definition of appellate jurisdiction so limited that it will not permit the appellate court to review the facts as well as the law if the legislature so requires." *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.

[b] "In a code state it is thus defined: 'Jurisdiction to revise or correct the proceedings in a cause already instituted and acted upon by an inferior court or by a tribunal having the attributes of a court.' *Auditor of State v. Atchison, T. & Santa Fe R. Co.*, 6 Kan. 505." *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.

[c] Defined from the point of view of courts, (1) courts of appellate jurisdiction are those which take cognizance of causes removed from another court by appeal or writ of error. *Atwood v. Whipple*, 48 Ohio St. 308, 28 N. E. 674. (2) Right of appeal and appellate jurisdiction must not be confounded, however. *State v. Chittenden*, 127 Wis. 468, 509, 107 N. W. 500.

16. *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730; *Piqua Bank v. Knoup*, 6 Ohio St. 342.

Courts of original jurisdiction defined, see *supra*, I, C.

17. *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730; *Piqua Bank v. Knoup*, 6 Ohio St. 342.

18. Story on the Constitution, §1761,

quoted in **Fla.**—*Darden v. Lines*, 2 Fla. 573. **Kan.**—*Auditor of State v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 7 Am. Rep. 575. **N. D.**—*Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.

[a] **Mandamus as Exercise of Appellate Jurisdiction.**—(1) The term appellate in a constitutional provision giving a court exclusive appellate jurisdiction in criminal cases is used in its broadest sense as embracing the power and jurisdiction to review and correct proceedings of inferior courts in criminal cases. Under this rule mandamus to an inferior court to direct its action in the course of justice is an exercise of appellate jurisdiction. *Brown v. State*, 6 Okla. Crim. 442, 119 Pac. 447; *State ex rel. Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736. (2) But mandamus to an officer is the exercise of original jurisdiction. *State ex rel. Eubanks v. Cole*, 4 Okla. Crim. 25, 109 Pac. 736.

[b] "In *Elliot*, App. Proc. §514, it is laid down that 'the decision of pending appeals is by no means all there is of appellate jurisdiction, for appellate jurisdiction extends much further; it includes the power to remove obstacles to appeals, the power to assist a party to perfect an appeal, and the power to compel decisions by inferior tribunals.' And further (section 516): 'The power to issue a writ of mandamus in aid of appellate jurisdiction is much more comprehensive than fugitive expressions in some of the decided cases indicate. The power is, indeed, very closely akin to an original one, but is, nevertheless, an attribute of appellate jurisdiction. It has been held that mandamus lies where the trial court refuses to entertain jurisdiction when it ought to do so, or refuses to proceed with a trial in a case where it is its duty under the law to proceed.'" *Winstead v. Evans* (Tex. Civ. App.), 33 S. W. 580. See gener-

jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other court, whose judgment or proceedings are to be revised.¹⁹

E. EXCLUSIVE JURISDICTION.—When a proceeding in respect to a certain matter can only be tried in one court, that court is said to have exclusive jurisdiction.²⁰

F. CONCURRENT JURISDICTION is that of several different tribunals, each authorized to deal with the same subject-matter.²¹ It means equal jurisdiction.²²

G. GENERAL, SPECIAL OR LIMITED JURISDICTION.—A distinction is recognized between courts of general and those of special and inferior jurisdiction.²³ Courts of common-law jurisdiction are not determined altogether by the extent of their jurisdiction as to subjects over which they may adjudicate.²⁴ They are such as exercise their powers according to the course of the common law.²⁵ It is not necessary that they have all common-law jurisdiction over every class of subjects, including all civil and criminal matters.²⁶ A court having jurisdiction only in civil cases is nevertheless a court of general jurisdiction, al-

ly *infra*, VI, E, 2 and the titles "Mandamus," "Officers."

As to original jurisdiction of appellate courts, see *infra*, VI, C.

19. Story on the Constitution, §1761, quoted in Auditor of State *v. Atchison*, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575; *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730.

[a] It is not sufficient, then, that there has been a decision; but there must have been a decision "by a court," "clothed with judicial authority and acting in a judicial capacity." The tribunal from which an appeal lies need not be called a court, but it must be one having the attributes of a court,—a tribunal where justice is judicially administered, that is, according to law. Acts purely executive in character cannot be reviewed. Auditor of State *v. Atchison*, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575.

20. *Parker v. Lynch*, 7 Okla. 631, 56 Pac. 1082; *Ex parte Wade*, 2 Okla. Crim. 100, 107, 100 Pac. 35.

21. *Hereules Iron Works v. Elgin*, J. & E. Ry. Co., 141 Ill. 491, 30 N. E. 1050; *Oklahoma, etc. Co. v. Phillip*, 27 Okla. 234, 111 Pac. 334; *Rogers v. Bonnett*, 2 Okla. 553, 37 Pac. 1078; *Ex parte Wade*, 2 Okla. Crim. 100, 107, 100 Pac. 35.

22. *State v. Sinnott*, 89 Me. 41, 35 Atl. 1007.

23. See 15 STANDARD PROC. 433.

As to courts of general original jurisdiction, see *infra*, V.

As to courts of limited and inferior jurisdiction, see *infra*, VIII.

24. *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254.

25. *U. S.*—*Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476. *Cal.* *In re Conner*, 39 Cal. 98, 2 Am. Rep. 427. *Ill.*—*People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254. *Utah.*—*Kenyon v. Kenyon*, 3 Utah 431, 24 Pac. 829.

[a] "Courts having common-law jurisdiction, . . . , are those which have the power to punish offenses, to enforce rights, or to redress wrongs recognized by the common law, or which, in the determination of the causes which they decide, are governed by the principles, rules, and usages of that law. The term 'having common law jurisdiction' is used to distinguish these courts from those which have no jurisdiction save in equity, in admiralty, or in matters not involving offenses or rights under the common law." *Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476.

26. *U. S.*—*Levin v. United States*, 128 Fed. 826, 63 C. C. A. 476; *Ex parte Tweedy*, 22 Fed. 84; *United States v. Power*, 14 Blatchf. 223, 27 Fed. Cas. No. 16,080. *Cal.*—*In re Conner*, 39 Cal. 98, 2 Am. Rep. 427. *Ill.*—*People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254.

though limited to a certain class of cases.²⁷ All courts, even the highest courts, are more or less limited in their jurisdiction.²⁸ The term "limited jurisdiction," is somewhat ambiguous,²⁹ the line of demarcation between courts of general and limited jurisdiction not being so definite as is generally supposed;³⁰ it is usual to state what particular courts fall within the one class, and what within the other.³¹ The word *limited*, seems to be used sometimes carelessly instead of the term *special*.³² Where the power of a court in a particular matter is derived directly from the constitution, it is not a special jurisdiction.³³

H. CIVIL AND CRIMINAL JURISDICTION. — Civil jurisdiction is that which exists when the subject-matter is not of a criminal nature;³⁴ it simply means jurisdiction to hear and determine civil actions.³⁵

Me.—*In re Dean*, 83 Me. 489, 22 Atl. 385, 13 L. R. A. 229. Mass.—*Ex parte Gladhill*, 8 Mete. 168. N. H.—*State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196.

27. *People v. McGowan*, 77 Ill. 644, 20 Am. Rep. 254.

28. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

[a] They are limited to particular classes of actions, such as civil or criminal, or to particular modes of administering relief, such as legal or equitable, or to transactions of a special character such as arise on navigable waters, or relate to the testamentary disposition of estates, or to the use of particular process in the enforcement of their judgments. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

[b] The character of a court as a municipal and inferior court depends upon the subjects of its jurisdiction and its relation to other tribunals, and not upon the form of its process or the counties to which it might be issued. *McCauley v. Fulton*, 44 Cal. 355; *Chipman v. Bowman*, 14 Cal. 157; *Hickman v. O'Neal*, 10 Cal. 232.

[c] City (1) courts (*Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698), and (2) courts of justices of the peace (*Paul v. Armstrong*, 1 Nev. 82) are of special and limited jurisdiction. See generally the title "Justices of the Peace."

[d] Where an appeal is allowed to any court from an assessing body, whatever the grade of the court, it is one of limited jurisdiction for such purpose, and must keep strictly within it. *Arapahoe v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060.

29. *Den ex dem. Obert v. Hammel*,

18 N. J. L. 73.

30. *Tucker v. Harris*, 13 Ga. 1, 7, 58 Am. Dec. 488.

31. *Tucker v. Harris*, 13 Ga. 1, 7, 58 Am. Dec. 488.

32. *Obert v. Hammel*, 18 N. J. 73.

[a] The true distinction between courts is such as possess a *general*, and such as have only a *special* jurisdiction, for a particular purpose; or clothed with *special powers*, for the performance of specific duties, beyond which they have no manner of authority: and these special powers to be exercised in a summary way; either by a tribunal already existing for general purposes; or else by persons appointed or to be appointed in some definite form. *Cason v. Cason*, 31 Miss. 578; *Obert v. Hammel*, 18 N. J. L. 73.

33. *Ex parte Brown*, 3 Okla. Crim. 329, 105 Pac. 577.

34. *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 457, 14 Abb. Pr. (N. S.) 346.

[a] "The terms 'civil' and 'criminal,' when used, whether in reference to jurisdiction, or judicial proceedings generally, have respect to the nature and form of the remedy and the cause of action or occasion for instituting legal proceedings. Civil stands for the opposite of criminal, and hence we have courts known as courts of civil jurisdiction and of criminal jurisdiction, distinguished by the character of the prosecutions in each." *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 456, 14 Abb. Pr. (N. S.) 346. See also *Matter of City of Buffalo*, 139 N. Y. 422, 34 N. E. 1103.

35. *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 456, 14 Abb. Pr. (N. S.) 346.

Criminal jurisdiction exists for the punishment of crimes.³⁶

1. JURISDICTION OF SUBJECT-MATTER.³⁷ — The phrase "jurisdiction of the subject-matter" means, not only authority to hear and determine the class of actions to which the particular case belongs,³⁸ but authority to hear and determine the particular questions the court assumes to decide,³⁹ or the particular relief which it assumes to grant.⁴⁰ It means jurisdiction over the nature of the cause of action and the relief sought;⁴¹ or as sometimes stated, it is the power to adjudge concerning

36. *Ellison v. State*, 125 Ind. 492, 24 N. E. 739; *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 457, 14 Abb. Pr. (N. S.) 346.

[a] "The word 'jurisdiction' (judicare) is a term of large and comprehensive import, and embraces every kind of judicial action upon the subject-matter, from finding the indictment to pronouncing the sentence. . . . To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment, in a regular course of judicial proceeding." *Hopkins v. Com.*, 3 Metc. (Mass.) 460, quoted in *State v. Smith*, 29 R. I. 513, 72 Atl. 710.

37. How acquired, see *infra*, IV, B, 2.

38. U. S.—*United States v. Ness*, 230 Fed. 950, 145 C. C. A. 144; *United States v. New York & O. S. Co.*, 216 Fed. 61, 132 C. C. A. 305. *Ariz.*—*Tube City, etc. Co. v. Otterson*, 16 Ariz. 305, 146 Pac. 203. *Colo.*—*People v. District Court*, 26 Colo. 386, 58 Pac. 604, 46 L. R. A. 850; *Bassick Min. Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. 65. *Ill.*—*People v. Harper*, 244 Ill. 121, 91 N. E. 90; *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001; *O'Brien v. People*, 216 Ill. 354, 363, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; *Davis v. Jacksonville & P. Ry. Co.*, 180 Ill. App. 1. *Ind.*—*Daniels v. Bruce*, 176 Ind. 151, 95 N. E. 569; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Chicago & A. Ry. Co. v. Sutton*, 130 Ind. 405, 30 N. E. 291; *State ex rel. Egan v. Wolever*, 127 Ind. 306, 26 N. E. 762; *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431; *Myer v. Minch*, 45 Ind. App. 495, 91 N. E. 32; *United States H. & A. Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760. *Kan.*—*Manley v. Park*, 62 Kan. 553, 64 Pac. 28. *Me.*—*Rush v. Buckley*, 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318. *Minn.*—*Sache*

v. Wallace, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803. *Mo.*—*St. Louis, etc. Co. v. Lowder*, 138 Mo. 533, 39 S. W. 799, 60 Am. St. Rep. 565; *Musick v. Kansas City, etc. Ry. Co.*, 114 Mo. 309, 21 S. W. 491; *State v. Neville*, 110 Mo. 345, 19 S. W. 491; *Dowdy v. Wamble*, 110 Mo. 280, 19 S. W. 489; *Fields v. Maloney*, 78 Mo. 172. *N. Y.*—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Richards v. Richards*, 87 Misc. 134, 149 N. Y. Supp. 1028. *Okla.*—*Crutcher v. Block*, 19 Okla. 246, 91 Pac. 895, 14 Ann. Cas. 1029; *Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356; *Bockfinger v. Foster*, 10 Okla. 488, 62 Pac. 799; *Parker v. Lynch*, 7 Okla. 631, 56 Pac. 1082. *R. I.*—*State v. Smith*, 29 R. I. 513, 72 Atl. 710. *Tex.*—*Gulf, T. & W. Ry. Co. v. Lunn*, 141 S. W. 538. *Va.*—*Howard v. Landsberg's Committee*, 108 Va. 161, 168, 60 S. E. 769. *Wash.*—*State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757. *W. Va.*—*Stewart v. Northern Assur. Co.*, 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; *Hall v. Hall*, 12 W. Va. 1.

[a] "Jurisdiction of the subject-matter means the power lawfully conferred to deal with the particular subject involved in a particular action in a civil court or of a particular offense charged in an indictment in a criminal prosecution." *People v. Blake*, 121 App. Div. 613, 106 N. Y. Supp. 319.

39. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 Ann. Cas. 348, 11 L. R. A. (N. S.) 803.

40. *Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803.

41. U. S.—*Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. ed. 931. *Ala.*—*Woolf v. McGaugh*, 175 Ala. 299, 57 So. 754. *Kan.*—*Manley v. Park*, 62 Kan. 553, 64 Pac. 28. *Mo.*—*Hope v.*

the general question or subject involved in the suit or action,⁴² and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question.⁴³

J. JURISDICTION OF PERSON.⁴⁴ — Jurisdiction of the person is the power to deal with the person of the defendant and to render a personal judgment against him;⁴⁵ and consists in a right to determine the controversy between them, and ultimately compel them to submit to its decision.⁴⁶

K. DISTINCTIONS. — 1. Power Distinguished. — Although there is a distinction in some respects between "power" and "jurisdiction,"⁴⁷ and they are considered as distinct in some cases,⁴⁸ "power" includes "jurisdiction," as a rule.⁴⁹ The distinction is often brought out when applied to courts of chancery,⁵⁰ the jurisdiction being denied where the power exists, but ought not to be exercised.⁵¹ If, in a particular case, the court determines that it cannot enforce any decree which

Blair, 105 Mo. 85, 93, 16 S. W. 595, 24 Am. St. Rep. 366. **Ore.**—Dayton v. Board of Equalization, 33 Ore. 131, 50 Pac. 1009.

42. U. S.—United States v. Ness, 230 Fed. 950, 145 C. C. A. 144; Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 8 C. C. A. 635. **Ga.**—Wright v. State, 16 Ga. App. 216, 84 S. E. 975. **Mo.**—Leonard v. Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646. **N. Y.**—Hunt v. Hunt, 72 N. Y. 217, 229, 28 Am. Rep. 129. **Okla.**—Hobbs v. German-American Doctors, 14 Okla. 236, 78 Pac. 356. **Pa.**—Bigham v. Hendri, 16 Atl. 618. **Utah.**—Snyder v. Pike, 30 Utah 102, 83 Pac. 692.

[a] **Other Statements.**—(1) It is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. United States v. Ness, 230 Fed. 950, 145 C. C. A. 144; Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316, 8 C. C. A. 635. (2) It is not confined to cases in which the particular facts constitute a good cause of action or ground for relief, but it includes every issue within the scope of the general power vested in the court by the law of its organization to deal with the abstract question. United States v. Ness, 230 Fed. 950, 145 C. C. A. 144; Foltz v. St. Louis, Ry. Co., 60 Fed. 316, 8 C. C. A. 635.

[b] It is the power to act upon the general, and so to speak, the abstract question, and to determine and adjudge

whether the particular facts presented call for the exercise of the abstract power. Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

43. Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129.

44. How acquired, see *infra*, IV, B, 3.

45. Hobbs v. German-American Doctors, 14 Okla. 236, 78 Pac. 356.

46. *Ex parte* Woods, 3 Ark. 532.

47. Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181.

48. Curtiss v. Brown, 29 Ill. 201, 231; Scott v. Whitlow, 20 Ill. 310.

49. Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181.

[a] Hence a statute conferring power upon a court for certain specified purposes or in designated cases confers jurisdiction in such cases or for such purposes. Kendall v. United States, 12 Pet. (U. S.) 524, 9 L. ed. 1181.

50. Curtiss v. Brown, 29 Ill. 201, 231.

51. Curtiss v. Brown, 29 Ill. 201, 231; Scott v. Whitlow, 20 Ill. 301; State v. North American L., etc. Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

[a] Though a court of chancery has jurisdiction to enjoin a judgment and its decree would not be void for want of jurisdiction, yet it is not always bound to act where it has authority to act. Scott v. Whitlow, 20 Ill. 310.

[b] But where, from the terms of the grant, it is evidently the intention

it may render in the premises,⁵² or where the court is not in condition to do full justice,⁵³ it will refuse to exercise jurisdiction.

2. **Practice Distinguished.**—Jurisdiction is to be distinguished from practice or procedure.⁵⁴

3. **Exercise and Excess of Jurisdiction Distinguished.**—Jurisdiction is to be distinguished from the exercise of jurisdiction.⁵⁵ When jurisdiction has attached, all that follows is but the exercise of jurisdiction,⁵⁶ any movement by the court is the exercise of jurisdiction.⁵⁷

Excess of jurisdiction, as distinguished from absence of jurisdiction, means that an act, though within the general power of the judge, is not authorized and is void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in the case are wanting.⁵⁸

to confer jurisdiction without limit as to persons or subject-matter, or to confer complete jurisdiction within certain limits, and the exercise of all the power intended to be conferred is necessary in order that the purposes of the grant may be accomplished, but it happens that the grant falls short in an essential particular, by reason of want of power in the grantor, it follows that the jurisdiction as conferred is incomplete, or inadequate; and the question arises whether, if, in a particular case the purposes of the grant cannot thereby be accomplished, such jurisdiction should be exercised at all. *State v. North American Land & Timber Co.*, 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

52. *State v. North American etc. Co.*, 106 La. 621, 631, 31 So. 172, 87 Am. St. Rep. 309; *Condon v. Mutual Reserve Fund L. Assn.*, 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149.

[a] Applying this rule the courts of some states refuse to exercise visitatorial powers over foreign corporations and will not entertain suits having in view the regulation of the internal affairs of such corporations. **La.**—*State v. North American L., etc. Co.*, 106 La. 621, 633, 31 So. 172, 87 Am. St. Rep. 309. **Md.**—*North State, etc. Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039. **Va.** *Taylor v. Mut., etc. Life Assn.*, 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621.

53. *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416.

54. *Mahoning Valley R. Co. v. Santoro*, 93 Ohio St. 53, 112 N. E. 190.

[a] **Jurisdiction relates to the forum**, the court, or judge that may hear

and determine a legal cause or controversy, while practice or procedure relates to the form or manner of conducting the suit. *Mahoning Valley Ry. Co. v. Santoro*, 93 Ohio St. 53, 112 N. E. 190.

55. **U. S.**—*Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283; *Decatur v. Paulding*, 14 Pet. 599, 10 L. ed. 609. **Cal.**—*Chase v. Christianson*, 41 Cal. 253. **Ga.**—*Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274. **Ore.**—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

56. **Cal.**—*Chase v. Christianson*, 41 Cal. 253. **Ga.**—*Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274. **Ohio.**—*Sheldon's Lessee v. Newton*, 3 Ohio St. 494. **Ore.** *Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620. **Tex.**—*Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523.

[a] If the tribunal applied to can grant the relief sought for any cause, then any question about cause is not a question of jurisdiction but of the proper exercise of jurisdiction. *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274.

[b] Determination by the court as to whether such a case is made by petitioner as entitles him to the relief sought is exercise of jurisdiction. *Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523.

57. **U. S.**—*Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283. **Ohio.**—*Sheldon's Lessee v. Newton*, 3 Ohio St. 494. **Okla.**—*Roth v. Union National Bank*, 160 Pac. 505.

58. *Broom v. Douglass*, 175 Ala. 268, 57 So. 860, Ann. Cas. 1914C, 1155, 44 L. R. A. (N. S.) 164.

4. Inherent Jurisdiction and Power.—The difference between the jurisdiction of courts and their inherent powers is very important.⁵⁹ Courts possess implied and resulting powers from general grants of jurisdiction, but they have no inherent jurisdiction,⁶⁰ if, by that, is meant a power which a court may exercise without a law authorizing it.⁶¹

Statutes sometimes give a court general equity jurisdiction,⁶² and such court has the same jurisdiction as the high court of chancery of England.⁶³ This is called the inherent jurisdiction of the chancery court, and that which has subsequently vested by act of the legislature is called the statutory jurisdiction.⁶⁴

II. ESSENTIALS.—A. GENERALLY.—What shall be an element of jurisdiction, except as this may be controlled by constitutional safeguards is to be determined by the legislature;⁶⁵ and every fact which it so declares shall exist before a court can lawfully hear and determine a cause is a jurisdictional fact, an element of jurisdiction in the particular case.⁶⁶ To constitute jurisdiction there are three essentials, first, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties, must be present; and third, the point decided must be, in substance and effect, within the issue;⁶⁷ but it must be understood, however, that

59. *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254.

60. **U. S.**—*United States v. Hudson*, 7 Cranch 32, 3 L. ed. 259. **Fla.**—*McNealy v. Gregory*, 13 Fla. 417. **Ohio.** *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254. **Tex.**—*Messner v. Giddings*, 65 Tex. 301.

[a] The power to maintain order, (1) to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court or the purpose of its creation fails. Without such power no other could be exercised. *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254. (2) As to such powers, however, as are necessary to the orderly and efficient exercise of jurisdiction, from both their nature and their ancient exercise, they are sometimes regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254; *Montesano L., etc. Co. v. Portland Iron Works*, 78 Ore. 53, 152 Pac. 244.

61. *Messner v. Giddings*, 65 Tex. 301.

62. *Kelly & Co. v. Conner*, 122 Tenn. 339, 360, 123 S. W. 622, 25 L. R. A. (N. S.) 201.

63. *Kelley & Co. v. Conner*, 122 Tenn. 339, 360, 123 S. W. 622, 25 L. R. A. (N. S.) 201.

64. *Kelly & Co. v. Conner*, 122 Tenn. 339, 360, 123 S. W. 622, 25 L. R. A. (N. S.) 201. See generally 8 **STANDARD PROC.** 391, et seq.

65. *Stewart v. Anderson*, 70 Tex. 588, 598, 8 S. W. 295.

66. *Stewart v. Anderson*, 70 Tex. 588, 597, 8 S. W. 295.

67. See the following: **U. S.**—*Reynolds v. Stockton*, 140 U. S. 254, 268, 11 Sup. Ct. 773, 35 L. ed. 464; *Jorgenson Co. v. Rapp*, 157 Fed. 732, 85 C. C. A. 364; *In re Casey*, 195 Fed. 322, 328. **Ark.**—*Rankin v. Schofield*, 81 Ark. 440, 98 S. W. 674; *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913; *Falls v. Wright*, 55 Ark. 562, 18 S. W. 1044, 29 Am. St. Rep. 74; *St. Louis, etc. Ry. Co. v. State*, 55 Ark. 200, 17 S. W. 806. **Colo.**—*Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379. **Ind.**—*McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161. **Kan.**—*Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609. **Me.**—*City of Rockland v. Inhab. of*

the power to pronounce the resulting judgment constitutes a part of the subject-matter over which the jurisdiction extends.⁶⁸ Some authorities have stated the essentials of jurisdiction as being a court created by law, organized and sitting;⁶⁹ authority given such court to hear and determine causes of the kind in question;⁷⁰ power given such court by law to render a judgment such as it assumes to render;⁷¹ authority over the parties to the case, acquired by their appearance or the service of process on them, if the judgment is to bind them personally and not merely as a judgment in rem;⁷² authority over the thing adjudicated upon by its being located within the court's territory, and by actually seizing it if liable to be carried away, if the judgment is to be in rem;⁷³ and authority to decide the particular question involved, which, if the other essential elements of jurisdiction exist, is acquired by the question being submitted to it by the parties for decision.⁷⁴

B. LEGALLY EXISTING COURT.—One of the first essentials of jurisdiction is that the court assuming to act has a legal existence.⁷⁵ Even

Hurricane Isle, 106 Me. 169, 76 Atl. 286. **Minn.**—*Sache v. Wallace*, 101 Minn. 169, 112 N. W. 386, 118 Am. St. Rep. 612, 11 L. R. A. (N. S.) 803. **Mont.**—*Sloan v. Byers*, 37 Mont. 503, 97 Pac. 855. **Mo.**—*McManus v. Muench*, 217 Mo. 124, 117 S. W. 25, 129 Am. St. Rep. 536; *Robinson v. Levy*, 217 Mo. 498, 117 S. W. 577; *Charles v. White*, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674, 21 L. R. A. (N. S.) 481; *Stark v. Kirchgraber*, 186 Mo. 633, 85 S. W. 868, 105 Am. St. Rep. 629; *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595, 24 Am. St. Rep. 366; *Nenno v. Chicago*, R. I. & P. R. Co., 105 Mo. App. 540, 80 S. W. 24. **N. J.**—*Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215; *Munday v. Vail*, 34 N. J. L. 418. **Okla.** *Roth v. Union Nat. Bank*, 160 Pac. 505. **P. R.**—*American Ry. Co. v. Hernandez*, 8 Porto Rico 492. **Tenn.**—*Isham v. Sienknecht*, 59 S. W. 779. **W. Va.** *Waldron v. Harvey*, 54 W. Va. 608, 613, 46 S. E. 603, 102 Am. St. Rep. 959; *St. Lawrence B. & M. Co. v. Holt*, 51 W. Va. 352, 41 S. E. 351.

See also 14 STANDARD PROC. 777, et seq.; also *infra*, IX, C, and D.

68. **U. S.**—*In re Bonner*, 151 U. S. 242, 257, 14 Sup. Ct. 323, 38 L. ed. 149. **Cal.**—*Crew v. Pratt*, 119 Cal. 139, 51 Pac. 38. **Minn.**—*State v. Reed*, 132 Minn. 295, 156 N. W. 127.

69. See *infra*, II, B.

70. *Roth v. Union Nat. Bank* (Okla.), 160 Pac. 505.

71. *Roth v. Union Nat. Bank*

(Okla.), 160 Pac. 505.

72. *Roth v. Union Nat. Bank* (Okla.), 160 Pac. 505.

73. *Roth v. Union Nat. Bank* (Okla.), 160 Pac. 505.

74. *Roth v. Union Nat. Bank* (Okla.), 160 Pac. 505.

75. **U. S.**—*Hickman v. Jones*, 9 Wall. 197, 19 L. ed. 551; *Rose v. Himely*, 4 Cranch 241, 268, 2 L. ed. 608. **Cal.** *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732. **Miss.**—*Scully v. Lowenstein*, 56 Miss. 652. **N. C.**—*State v. Hall*, 142 N. C. 710, 55 S. E. 806. **Ohio.** *Sheldon's Lessee v. Newton*, 3 Ohio St. 494. **Okla.**—*Roth v. Union Nat. Bank*, 160 Pac. 505. **Ore.**—*Hanley v. City of Medford*, 56 Ore. 171, 108 Pac. 188.

See also 15 STANDARD PROC. 418, et seq.

[a] **Plea Denying Existence of Court.**—There is no such thing known to the science of pleading as a plea denying the very existence of the court before which the plea is filed, and, in the nature of things, there cannot be, for no court can pass upon the validity of its own constitution and organization. It must always decide that it is a court, because the moment it is admitted that it does not exist, and has never existed, as a legal entity, so as to speak, it is at once settled that it never had the power to decide anything, not even the plea denying that it ever was a court. How can a body, having no legal existence, and consequently no judicial power or authority,

if the court has a legal existence, if at the particular time the particular judgment was rendered the court was not in session, it is but the act of the judge, not the court, and is a nullity.⁷⁶

C. NECESSARY PARTIES.⁷⁷ — Though it is said in some early cases that the absence of necessary parties renders the court without jurisdiction,⁷⁸ unless they come within the exception dispensing with all necessary parties where they are numerous,⁷⁹ the want of proper or necessary parties does not deprive the court of jurisdiction as to the parties before the court,⁸⁰ however necessary they may be to a complete adjudication;⁸¹ but the principle of due process of law precludes

decide anything? *State v. Hall*, 142 N. C. 710, 714, 55 S. E. 806.

76. *Doss v. Waggoner*, 3 Tex. 515; *Johnston v. Hunter*, 50 W. Va. 52, 40 S. E. 448.

[a] **Limitations of Jurisdiction.** When the law prescribes the time and place for the holding of court, then time and place are limitations of jurisdiction as essential as are subject-matter and parties. *Hanley v. Medford*, 56 Ore. 171, 108 Pac. 188.

77. As to parties generally, see the title "Parties."

Acquisition of jurisdiction over person, see *infra*, IV, B, 3.

78. U. S.—*Tobin v. Walkinshaw*, 1 McAll. 26, 23 Fed. Cas. No. 14,068. Ky.—*Clay's Admr. v. Edwards' Trustee*, 84 Ky. 548, 2 S. W. 147. Tex.—*Toler v. Ayres*, 1 Tex. 398.

79. *Tobin v. Walkinshaw*, 1 McAll. 26, 23 Fed. Cas. No. 14,068.

[a] **Proceedings in such case are not void**, though may be irregular. *Franklin Union No. 4 v. People*, 121 Ill. App. 647, *affirmed*, 220 Ill. 355, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001.

80. U. S.—*Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 237, 22 Sup. Ct. 308, 46 L. ed. 499. Ill.—*Franklin Union No. 4 v. People*, 121 Ill. App. 647, *affirmed*, 220 Ill. 355, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001. Ia.—*Denmead v. Parker*, 145 Iowa 581, 124 N. W. 780; *Tod v. Crisman*, 123 Iowa 693, 99 N. W. 686. N. Y.—*Keyes v. Ellensohn*, 82 Hun 13, 30 N. Y. Supp. 1035, 63 N. Y. St. 227, *affirmed*, 144 N. Y. 700, 39 N. E. 857. Wis.—*Board of Supervisors v. Mineral Point R. Co.*, 24 Wis. 93.

[a] **The reason of this is obvious.** Jurisdiction exists wherever there is a suit, the subject-matter of which is

cognizable in a court of chancery, and parties are before the court whose rights in relation to such adjudication between the parties, until reversed or set aside, does not depend upon the fact that the power of the court may have been erroneously exercised in making it. If there be necessary parties wanting, whose absence may render the adjudication fruitless or ineffectual, because the rights of such parties cannot be determined, that may be good cause for arresting proceedings or dismissing the suit, but it does not deprive the court of the power to proceed. *Tod v. Crisman*, 123 Iowa 693, 701, 99 N. W. 686.

81. *Tod v. Crisman*, 123 Iowa 693, 700, 99 N. W. 686.

[a] It does not follow, however, that a decree entered in the absence of necessary parties is not binding on those before the court. The rule laid down by the authorities is that in no case does the court's jurisdiction over subject-matter and the parties properly before it depend upon the absence of other parties, however necessary these may be to a complete adjudication. Undoubtedly those who have not been made parties may collaterally dispute the decree and deny its validity, and probably it should not be regarded as an obstacle to them in obtaining any relief to which they may be entitled. But its efficacy between the parties before the court does not depend upon the fact that others may or ought to have been made parties. Their absence is not a defect involving the jurisdiction of the court over the parties who are present, or over the subject-matter of the suit, in so far as those parties are concerned. The court may nevertheless proceed to a decree, and such decree, though rendered in violation of the rules and

the court from adjudicating upon the rights of persons not parties to the litigation.⁸² Their absence is not a defect involving the jurisdiction of the court over the parties who are present, or over the subject-matter of the suit, in so far as those parties are concerned,⁸³ but the court should direct that the necessary parties be brought in, and refuse to proceed to a determination of the controversy so as to affect their rights, until they are brought in,⁸⁴ though where it appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court,⁸⁵ or that when made parties the jurisdiction of the court will thereby be defeated, to grant leave to amend would be useless and the cause will be dismissed.⁸⁶

D. POINTS DECIDED MUST BE WITHIN ISSUES.—Courts have no jurisdiction to adjudicate matters not involved in the issues in causes pending before the court;⁸⁷ but must have properly before it the particular question it assumes to decide,⁸⁸ any decree or judgment relating to matters beyond the issues being void.⁸⁹ An exception to this rule exists, however, where the parties, by agreement, in open court, permit

practice of equity in such cases, is not void as between the parties to it. It is irregular, but not void. It binds the parties to it until set aside in some direct proceeding for that purpose. *Tod v. Crisman*, 123 Iowa 693, 700, 99 N. W. 636.

82. *New Orleans Waterworks v. New Orleans*, 164 U. S. 471, 480, 17 Sup. Ct. 161, 41 L. ed. 518; *Mallow v. Hinde*, 12 Wheat. 193, 198, 6 L. ed. 599; *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147, 152. See generally the titles "Homesteads and Exemptions;" "Husband and Wife;" "Mortgages;" "Parties."

83. *Tod v. Crisman*, 123 Iowa 693, 700, 99 N. W. 636.

84. *Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 246, 22 Sup. Ct. 308, 46 L. ed. 499; *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147; *Mahr v. Norwich Union, etc. Co.*, 127 N. Y. 452, 28 N. E. 391; *Peyser v. Wendt*, 87 N. Y. 322; *Sherman v. Parish*, 53 N. Y. 483; *Powell v. Finch*, 5 Duer (N. Y.) 666. See generally the title "Parties."

85. *Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 246, 22 Sup. Ct. 308, 46 L. ed. 499.

86. *Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 236, 22 Sup. Ct. 308, 46 L. ed. 499; *California v. Southern Pac. Co.*, 157 U. S. 229, 15 Sup. Ct. 591, 39 L. ed. 683.

87. *U. S.—Clark v. Arizona Mut. Sav. & L. Assn.*, 217 Fed. 640, *affirmed*

in 220 Fed. 1, 135 C. C. A. 577. *Colo.* *Russell v. Shurtleff*, 28 Colo. 414, 65 Pac. 27, 89 Am. St. Rep. 216; *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105. *Ind.—Hutts v. Martin*, 134 Ind. 587, 33 N. E. 676. *Mo.—State ex rel. Ponath v. Muench*, 230 Mo. 236, 130 S. W. 282; *State ex rel. McManus v. Muench*, 217 Mo. 124, 117 S. W. 25; *Charles v. White*, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674, 21 L. R. A. (N. S.) 481. *Okla.—Roth v. Union Nat. Bank*, 160 Pac. 505. *Tenn.—Isham v. Siengknecht*, 59 S. W. 779. *W. Va.—Waldron v. Harvey*, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

See also *supra*, II, A.

[a] Persons by becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests which they choose to draw in question that a power of judicial decision arises. *Munday v. Vail*, 34 N. J. L. 418.

88. *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105.

89. See the following: *U. S.—Clark v. Arizona Mut. Sav. & L. Assn.*, 217 Fed. 640, *affirmed* in *Farmers' & M. Bank v. Arizona Mut. Sav. & L. Assn.*, 220 Fed. 1, 135 C. C. A. 577. *Minn.* *State v. Reed*, 132 Minn. 295, 156 N. W. 127. *Mo.—Charles v. White*, 214 Mo. 187, 112 S. W. 545, 127 Am. St. Rep. 674, 21 L. R. A. (N. S.) 481.

matters to be adjudicated not involved in the issues in the cause.⁹⁰ Yet from this it by no means follows that if it wrongly decides a question within the issues, it thereby exceeds its jurisdiction.⁹¹

III. NECESSITY FOR JURISDICTION AND ITS EXERCISE.

A. IN GENERAL. — The first and fundamental requisite to the validity of a judgment is that it should have been rendered by a court having jurisdiction,⁹² for without jurisdiction the courts can do nothing.⁹³ Thus, in order that the judgment rendered may be binding in personam, it is essential that the court rendering the judgment have jurisdiction of the person and of the subject-matter,⁹⁴ and of the par-

Wash.—State *ex rel.* Bogle *v.* Superior Court, 63 Wash. 96, 114 Pac. 905. **W. Va.**—Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

See also 14 STANDARD PROC. 780, et seq.; 15 STANDARD PROC. 42, et seq.; 422, et seq.

90. Hutts *v.* Martin, 134 Ind. 587, 33 N. E. 676. See 15 STANDARD PROC. 43.

[a] In such case the judgment rests upon the agreement of the parties and not upon the pleadings in the cause. Hutts *v.* Martin, 134 Ind. 587, 33 N. E. 676; State *ex rel.* Bogle *v.* Superior Court, 63 Wash. 96, 114 Pac. 905.

91. People *v.* Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105.

92. Darrough *v.* First Nat. Bank (Okla.), 156 Pac. 191.

93. Darrough *v.* First Nat. Bank (Okla.), 156 Pac. 191.

94. See the following: **U. S.**—*Ex parte* Reed, 100 U. S. 13, 23, 25 L. ed. 538; Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565; Windsor *v.* McVeigh, 93 U. S. 274, 23 L. ed. 914; Thompson *v.* Whitman, 18 Wall. 457, 21 L. ed. 897; Griffith *v.* Frazier, 8 Cranch 9, 3 L. ed. 471. **Ala.**—Woolf *v.* McGaugh, 175 Ala. 299, 57 So. 754; Louisville & N. R. Co. *v.* Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331; Huntsville Grocery Co. *v.* Johnson, 13 Ala. App. 488, 69 So. 967. **Ill.**—Johnson *v.* Miller, 50 Ill. App. 60. **Ind.**—Robertson *v.* State, 109 Ind. 79, 10 N. E. 582, 643; Sowers *v.* Edmunds, 76 Ind. 123; Babbitt *v.* Doe *ex dem.* Brush, 4 Ind. 355. **Ia.**—Griffith *v.* Milwaukee Harvester Co., 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573. **Ky.**—Chesapeake, O. & S. W. R. Co. *v.* Heath's Admr., 87 Ky. 651, 658, 9 S. W. 832. **Mich.**—Booth

v. Connecticut Life Ins. Co., 43 Mich. 299, 5 N. W. 381. **Mo.**—Hope *v.* Blair, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366. **N. Y.**—Mahr *v.* Norwich Union, etc. Co., 127 N. Y. 452, 461, 28 N. E. 391. **Ohio.**—Spoors *v.* Cowen, 44 Ohio St. 497, 9 N. E. 132; Spier *v.* Corll, 33 Ohio St. 236; Sheldon's Lessee *v.* Newton, 3 Ohio St. 494; Buchanan *v.* Roy's Lessee, 2 Ohio St. 251; Strauss *v.* Adams, 6 Ohio Dec. 115, 4 Ohio N. P. 109; Laughlin *v.* Vogelsong, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200, reversed on another point in 51 Ohio St. 421, 38 N. E. 111. **Okla.**—Waldock *v.* Atkins, 158 Pac. 587; Crutcher *v.* Block, 19 Okla. 246, 91 Pac. 895; Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356; Bockfinger *v.* Foster, 10 Okla. 488, 62 Pac. 799; Hockaday *v.* Jones, 8 Okla. 156, 56 Pac. 1054. **Ore.**—Willamette R. E. Co. *v.* Hendrix, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800; Goodale *v.* Coffee, 24 Ore. 346, 33 Pac. 990. **Tenn.**—Isham *v.* Sienknecht, 59 S. W. 779. **Tex.**—Crawford *v.* McDonald, 88 Tex. 626, 33 S. W. 325; Texas, etc. R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52. **Va.**—Staunton, etc. Co. *v.* Haden, 92 Va. 201, 23 S. E. 285; Blanton *v.* Carroll, 86 Va. 539, 10 S. E. 329; Seamster *v.* Blackstock, 83 Va. 232, 2 S. E. 36, 5 Am. St. Rep. 262; Dillard *v.* Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124; Lavell *v.* McCurdy's Exrs., 77 Va. 763. **W. Va.**—Powhatan Coal & C. Co. *v.* Ritz, 60 W. Va. 395, 56 S. E. 257, 9 L. R. A. (N. S.) 1225; Roberts *v.* Hickory Camp Coal, etc. Co., 58 W. Va. 276, 52 S. E. 182; Hartigan *v.* Board of Regents, 49 W. Va. 14, 38 S. E. 698; Mayer *v.* Adams, 27 W. Va. 244.

See also 14 STANDARD PROC. 777, et seq.; 15 STANDARD PROC. 440, et seq.

[a] It cannot act upon persons who

ticular question which it assumes to decide,⁹⁵ and if either is non-existent the judgment is void,⁹⁶ being in legal effect no judgment at

are not legally before it, upon one who is not a party to the suit, upon a plaintiff who has not invoked its arbitrament, or upon a defendant who has never been notified of the proceedings. It cannot adjudicate upon a subject which does not fall within its province as defined or limited by law. Neither can it go beyond the issues, and pass upon a matter which they neither submitted nor intended to submit for its determination. *Isham v. Sienknecht* (Tenn.), 59 S. W. 779.

As to jurisdiction over particular persons, see such titles as "Insane Persons," etc.

95. *Isham v. Sienknecht* (Tenn.), 59 S. W. 779.

96. See the following: **U. S.**—*Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Thompson v. Whitman*, 18 Wall. 457, 21 L. ed. 897; *Earle v. McVeigh*, 91 U. S. 503, 23 L. ed. 398; *Hickey's Lessee v. Stewart*, 3 How. 750, 11 L. ed. 814; *Walden v. Craig*, 14 Pet. 147, 10 L. ed. 393. **Ala.**—*Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331; *Lassiter v. State*, 106 Ala. 292, 17 So. 725; *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Lamar v. Commissioners' Court*, 21 Ala. 772. **Ark.** *Grimmett v. Askew*, 48 Ark. 151, 2 S. W. 707; *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242; *McLain v. Taylor*, 9 Ark. 358; *Pelham v. Page*, 6 Ark. 148; *McKnight v. Smith*, 5 Ark. 409. **Cal.**—*Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; *Lyons v. Roach*, 84 Cal. 27, 23 Pac. 1026; *Ex parte Hollis*, 59 Cal. 407; *Fraser v. Freelon*, 53 Cal. 644; *People v. O'Neil*, 47 Cal. 109; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *McMinn v. Whelan*, 27 Cal. 300. **Colo.**—*Arthur v. Israel*, 15 Colo. 147, 25 Pac. 81, 22 Am. St. Rep. 381, 10 L. R. A. 693; *Clayton v. Clayton*, 4 Colo. 410. **Conn.**—*Sears v. Terry*, 26 Conn. 273; *Wood v. Watkinson*, 17 Conn. 500, 44 Am. Dec. 562; *Holcomb v. Phelps*, 16 Conn. 127; *Strong v. Strong*, 8 Conn. 408. **D. C.**—*United States v. West*, 34 App. Cas. 12. **Fla.** *McGehee v. Wilkins*, 31 Fla. 83, 12 So. 228. **Ga.**—*Beasley v. Lennox-Haldeman Co.*, 116 Ga. 13, 42 S. E.

385; *McClendon v. Hernando Phosphate Co.*, 100 Ga. 219, 28 S. E. 152; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189; *Wilson v. Sullivan*, 81 Ga. 238, 245, 7 S. E. 274; *Gray v. Hodge*, 50 Ga. 262; *Towns v. Springer*, 9 Ga. 130; *Adams v. Lamar*, 8 Ga. 83; *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300. **Ill.**—*Dickey v. Chicago*, 152 Ill. 468, 38 N. E. 932; *McCartney v. Osburn*, 118 Ill. 403, 9 N. E. 210; *Munroe v. People*, 102 Ill. 406; *Johnson v. Logan*, 68 Ill. 313; *Huls v. Buntin*, 47 Ill. 396; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439. **Ind.**—*Nicholson v. Stephens*, 47 Ind. 185; *Packard v. Mendenhall*, 42 Ind. 598; *State v. Hudson*, 37 Ind. 198; *Rice v. Loomis*, 28 Ind. 399; *Beard v. Beard*, 21 Ind. 321; *Ashley v. Laird*, 14 Ind. 222, 77 Am. Dec. 67. **Ia.**—*Kline v. Kline*, 57 Iowa 386, 10 N. W. 825, 42 Am. Rep. 47; *Clark v. Little*, 41 Iowa 497; *Melhop v. Doane*, 31 Iowa 397, 7 Am. Rep. 147; *Osborn v. Cloud*, 23 Iowa 104, 92 Am. Dec. 413. **Kan.**—*Matter of Dill*, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505; *Hargis v. Morse*, 7 Kan. 415; *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446; *Looney v. Reeves*, 5 Kan. App. 279, 48 Pac. 606. **Ky.** *Berry v. Berry*, 6 Bush 594; *Jackson v. Speed*, 2 Duv. 426; *Mattingly's Heirs v. Corbit*, 7 B. Mon. 376; *Graham v. Sublett*, 6 J. J. Marsh. 44; *Manifee's Heirs v. Hyneman*, 3 T. B. Mon. 406. **La.**—*Edwards v. Edwards*, 21 La. Ann. 610. **Me.**—*Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630. **Md.** *Wilmer v. Picka*, 118 Md. 543, 85 Atl. 778; *Wilmer v. Epstein*, 116 Md. 140, 81 Atl. 379; *Grover & Baker Sewing Machine Co. v. Radcliffe*, 66 Md. 511, 8 Atl. 265; *Dorsey's Lessee v. Garey*, 30 Md. 489; *Cockey v. Cole*, 28 Md. 276, 92 Am. Dec. 684; *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 636. **Mass.**—*Stone v. Wainwright*, 147 Mass. 201, 17 N. E. 301; *Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705. **Mich.** *Hamilton v. Rogers*, 67 Mich. 135, 34 N. W. 278; *Noyes v. Hillier*, 65 Mich. 636, 32 N. W. 872; *Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 454; *Eberstein v. Oswalt*, 47 Mich. 254, 10 N. W. 360; *Austin v. Register of Deeds*, 41

all.⁹⁷ It does not estop even assenting parties,⁹⁸ and may be impeached

Mich. 723, 49 N. W. 923. **Miss.**—Cocke v. Brewer, 68 Miss. 775, 9 So. 823; *Ex parte* Wimberly, 57 Miss. 437; Brown v. Levee Comrs., 50 Miss. 468; Jenkins v. State, 33 Miss. 382; Foute v. McDonald, 27 Miss. 610; Boone v. Poin-dexter, 12 Smed. & M. 640. **Mo.**—Fischer v. Siekmann, 125 Mo. 165, 28 S. W. 435; Brown v. Woody, 64 Mo. 547; Stamps v. Bridwell, 57 Mo. 22; Hewitt v. Weatherby, 57 Mo. 276; State v. St. Louis, 1 Mo. App. 503. **Mont.** Davidson v. Clark, 7 Mont. 100, 14 Pac. 663. **N. H.**—Eastman v. Dearborn, 63 N. H. 364; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111; Gay v. Smith, 38 N. H. 171; Nichols v. Smith, 26 N. H. 298; State v. Richmond, 26 N. H. 232; Morse v. Presby, 25 N. H. 299. **N. J.**—Hauser v. Farrell (N. J. L.), 46 Atl. 784. **Nev.** *Ex parte* Gardner, 22 Nev. 280, 39 Pac. 570; Leonard v. Peacock, 8 Nev. 157. **N. Y.**—Mahr v. Norwich Union, etc. Co., 127 N. Y. 452, 461, 28 N. E. 391; Bartlett v. Spicer, 75 N. Y. 528; Lange v. Benedict, 73 N. Y. 12, 29 Am. Rep. 80; Schwinger v. Hickok, 53 N. Y. 280. **N. C.**—Springer v. Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; Stancill v. Gay, 92 N. C. 462; McKee v. Angel, 90 N. C. 60. **Ohio.** Kingsborough v. Tousley, 56 Ohio St. 451, 47 N. E. 541; Cincinnati, etc. R. Co. v. Village of Belle Centre, 48 Ohio St. 273, 27 N. E. 464; Rothwell v. Winterstein, 42 Ohio St. 249; Wehrle v. Wehrle, 39 Ohio St. 365; Murdock v. Lantz, 34 Ohio St. 589; Endell v. Leibrock, 33 Ohio St. 254. **Okla.**—Darrough v. First Nat. Bank, 156 Pac. 191. **Ore.**—Holton v. Holton, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779; Willamette R. E. Co. v. Hendrix, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800; Foshier v. Narver, 24 Ore. 441, 34 Pac. 21, 41 Am. St. Rep. 874; Woodward v. Baker, 10 Ore. 491. **Pa.** Fowler v. Eddy, 110 Pa. 117, 1 Atl. 789. **S. C.**—Turner v. Malone, 24 S. C. 398; James v. Smith, 2 S. C. 183, 188. **Tenn.**—Finley v. Gaut, 8 Baxt. 148; Rockhold v. Blevins, 6 Baxt. 115; Williams v. Harris, 4 Sneed 332; Hughes v. Bryan's Lessee, 6 Yerg. 471. **Tex.** Banco Minero v. Ross, 106 Tex. 522, 172 S. W. 711; Goodman v. Henley, 80 Tex. 499, 16 S. W. 432; Martin v. Cobb, 77 Tex. 544, 14 S. W. 162;

Scott v. Streepy, 73 Tex. 547, 11 S. W. 532; Glass v. Smith, 66 Tex. 548, 2 S. W. 195; Murchison v. White, 54 Tex. 78; Norwood v. Cobb, 15 Tex. 500. **Utah.**—Ducheneau v. Ireland, 5 Utah 108, 13 Pac. 87. **Vt.**—Vaughn v. Congdon, 56 Vt. 111, 48 Am. Rep. 758; Price v. Hickok, 39 Vt. 292; Collamer v. Page, 35 Vt. 387; Skinner v. McDaniel, 4 Vt. 418. **Va.**—Blanton v. Carroll, 86 Va. 539, 10 S. E. 329; Dorr v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106; Wade v. Hancock, 76 Va. 620; Underwood v. McVeigh, 23 Gratt. (64 Va.) 409. **Wash.**—Paxton v. Daniell, 1 Wash. 19, 23 Pac. 441. **W. Va.** Roberts v. Hickory Camp Coal Co., 58 W. Va. 276, 52 S. E. 182; St. Lawrence B. & M. Co. v. Holt, 51 W. Va. 352, 41 S. E. 351; Crumlish's Admr. v. Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 45 Am. St. Rep. 872, 23 L. R. A. 120; Chapman v. Maitland, 22 W. Va. 329. **Wis.**—Fladland v. Delaplaine, 19 Wis. 459; Falkner v. Guild, 10 Wis. 563; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269. **Wyo.**—Wolcott v. Territory, 1 Wyo. 67. **Eng.**—*Ex parte* Kinning, 4 C. B. 507, 56 E. C. L. 507, 136 Eng. Reprint 605; Ferguson v. Mahon, 11 Ad. & El. 179, 39 E. C. L. 117, 113 Eng. Reprint 382; Buchanan v. Buckner, 9 East 192, 103 Eng. Reprint 546.

See also 15 STANDARD PROC. 420, et seq.

[a] Legislature has no power to make a void judgment entered by a court without jurisdiction valid. **Cal.** Pryor v. Downey, 50 Cal. 388, 19 Am. Rep. 656, *explaining* Walpole v. Elliott, 18 Ind. 258, 81 Am. Dec. 358. **Ill.** McDaniel v. Correll, 19 Ill. 226, 68 Am. Dec. 587. **Pa.**—Lane v. Nelson, 79 Pa. 407. **Wis.**—Nelson v. Rountree, 23 Wis. 367.

97. U. S.—Dewing v. Perdicaries, 96 U. S. 193, 24 L. ed. 654. **Ala.**—Las-siter v. State, 106 Ala. 292, 17 So. 725. **Mass.**—Oliver v. Houdlet, 13 Mass. 237, 7 Am. Dec. 134. **N. Y.**—Matter of Walker, 136 N. Y. 20, 32 N. E. 633. **Va.**—Anthony v. Kasey, 83 Va. 338, 5 S. E. 176, 5 Am. St. Rep. 277; Wade v. Hancock, 76 Va. 620.

98. Matter of Will of Walker, 136 N. Y. 20, 32 N. E. 633; Chemung Canal Bank v. Judson, 8 N. Y. 254, Seld. Notes 49. See also 15 STANDARD PROC.

collaterally whenever and wherever it is sought to enforce or rely upon the same;⁹⁹ especially where it affirmatively appears upon the face of the judgment record that the court did not have jurisdiction of the defendant is the judgment at all times open to either a direct or a collateral attack.¹ This rule has reference to both courts of

415, and generally the title "Res Judicata."

99. See the following: **U. S.**—Earle v. McVeigh, 91 U. S. 503, 23 L. ed. 598; Mail Co. v. Flanders, 12 Wall. 130, 20 L. ed. 249; Harris v. Hardeman, 14 How. 334, 14 L. ed. 444. **Cal.**—Hahn v. Kelly, 34 Cal. 391. **D. C.**—United States v. West, 34 App. Cas. 12. **Ohio.** Spoons v. Cowen, 44 Ohio St. 497, 9 N. E. 132; Wehrle v. Wehrle, 39 Ohio St. 365; Bailey v. Young, 20 Ohio Cir. Ct. 546, 11 Ohio Cir. Dec. 257; Laughlin v. Vogelsong, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200, reversing on another point, 51 Ohio St. 421, 38 N. E. 111. **Tenn.**—Pierce v. Bowers, 8 Baxt. 353; Finley v. Gaut, 8 Baxt. 148, 151; Sherrell v. Goodrum, 3 Humph. 419. **Tex.**—Withers v. Patterson, 27 Tex. 491, 86 Am. Dec. 643. **Va.**—Dillard v. Central Virginia Iron Co., 82 Va. 734, 1 S. E. 124; Wade v. Hancock, 76 Va. 620; Withers v. Fuller, 30 Gratt. (71 Va.) 547. **W. Va.**—Roberts v. Hickory Camp Coal, etc. Co., 58 W. Va. 276, 52 S. E. 182; St. Lawrence, B. & M. Co. v. Holt, 51 W. Va. 352, 41 S. E. 351.

See also 15 STANDARD PROC. 415, et seq.

1. See the following: **Cal.**—Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007; Pioneer Land Co. v. Maddux, 109 Cal. 633, 42 Pac. 295, 50 Am. St. Rep. 67; *In re Eichhoff's Estate*, 101 Cal. 600, 26 Pac. 11; Smith v. Los Angeles, etc. R. Co., 99 Cal. xix, 34 Pac. 242; Arroyo Ditch & Water Co. v. Superior Court, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91; Hyde v. Redding, 74 Cal. 493, 16 Pac. 380; Junkans v. Bergin, 64 Cal. 203, 30 Pac. 627; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742. **Colo.**—Atchison, T. & S. F. R. Co. v. Nicholls, 8 Colo. 188, 6 Pac. 512; San Juan, etc. Co. v. Finch, 6 Colo. 214; Clayton v. Clayton, 4 Colo. 410, 416. **Conn.**—Morey v. Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611. **Ga.**—Hobby v. Bunch, 83 Ga. 1, 13, 10 S. E. 113, 20 Am. St. Rep. 301; Head v. Bridges, 67 Ga. 227. **Ill.**—Benefield v. Albert, 132 Ill. 665, 671, 24 N. E. 634; Senichka v. Lowe, 74 Ill. 274; Swear-

ngen v. Gulick, 67 Ill. 208; Osgood v. Blackmore, 59 Ill. 261; Goudy v. Hall, 30 Ill. 109; Whitney v. Porter, 23 Ill. 445; Davis v. Hamilton, 53 Ill. App. 94. **Ind.**—Thompson v. McCorkle, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334; White County v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; Pressley v. Harrison, 102 Ind. 14, 23, 1 N. E. 188. **Ia.**—Baker v. Chapline, 12 Iowa 204; Seely v. Reid, 3 G. Gr. 374. **Kan.**—Pray v. Jenkins, 47 Kan. 599, 28 Pac. 716; Matter of Dill, 32 Kan. 668, 5 Pac. 39, 49 Am. Rep. 505. **Mass.**—Mercier v. Chace, 9 Allen 242; Jochumsen v. Suffolk Sav. Bank, 3 Allen 87; Peters v. Peters, 8 Cush. 529; Martin v. Com., 1 Mass. 347. **Mich.**—Wilson v. Arnold, 5 Mich. 98; Greenvault v. Farmers' & Mechanics' Bank, 2 Dougl. 498. **Mo.**—Russell v. Grant, 122 Mo. 161, 26 S. W. 958, 43 Am. St. Rep. 563; Bell v. Brinkman, 24 S. W. 205; Laney v. Sweeney, 105 Mo. 360, 16 S. W. 832; Laney v. Garbee, 105 Mo. 355, 16 S. W. 831, 24 Am. St. Rep. 391; McClanahan v. West, 100 Mo. 309, 13 S. W. 674; Cloud v. Pierce City, 86 Mo. 357; Presbyterian Church v. McElhinney, 61 Mo. 540. **Neb.**—Lininger v. Glenn, 33 Neb. 187, 49 N. W. 1128. **N. M.**—Smith v. Montoya, 3 N. M. 39, 1 Pac. 175. **N. Y.**—Risley v. Phenix Bank, 83 N. Y. 313, 38 Am. Rep. 421; Kamp v. Kamp, 59 N. Y. 212; Hart v. Seixas, 21 Wend. 40; Corwithe v. Griffing, 21 Barb. 9; Savage v. Olmstead, 2 Redf. 478; Sloane v. Martin, 24 N. Y. Supp. 661. **N. C.**—State v. Ridley, 114 N. C. 827, 19 S. E. 149; Williams v. Whitaker, 110 N. C. 393, 14 S. E. 924. **Okl.**—Roth v. Union Nat. Bank, 160 Pac. 505. **Ore.**—Northeast v. Lemery, 8 Ore. 316; Tustin v. Gaunt, 4 Ore. 305; Hunsaker v. Coffin, 2 Ore. 107. **S. C.**—Martin v. Bowie, 37 S. C. 102, 15 S. E. 736; Turner v. Malone, 24 S. C. 398, 401. **Tenn.**—Pope v. Harrison, 16 Lea 82. **Tex.**—Lyne v. Sanford, 82 Tex. 58, 19 S. W. 847, 27 Am. St. Rep. 852; Martin v. Cobb, 77 Tex. 544, 14 S. W. 162; Stewart v. Anderson, 70 Tex. 588, 8 S. W. 295; Paul v. Willis, 69 Tex.

general and special jurisdiction,² with this difference that the jurisdiction of a court of general jurisdiction will be presumed until the contrary appears, whereas that of an inferior court must be shown.³ Notwithstanding the court may have jurisdiction over the subject-matter and the person, this does not validate any judgment that may be rendered in the cause.⁴ A judgment may be valid to the extent of the jurisdiction and invalid beyond,⁵ as where the court enters a decree in excess of the authority vested in the court.⁶ On the other hand, if the court which rendered the judgment had jurisdiction of the class of cases to which it belongs, its decision though erroneous is valid and binding until reversed or set aside by some appropriate proceeding.⁷ Such jurisdiction must exist at the time the jurisdiction is invoked or exercised. That it is subsequently conferred does not validate prior proceedings.⁸

B. RIGHT TO DECIDE OWN JURISDICTION.—1. In General.—It is necessary that every court should so far entertain a case as to determine whether it has jurisdiction. To this extent it must adjudicate,

261, 7 S. W. 357; *Parker v. Spencer*, 61 Tex. 155; *Treadway v. Eastburn*, 57 Tex. 209; *Murchison v. White*, 54 Tex. 78; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Bohl v. Brown*, 2 Wills. Civ. Cas., §538. **Vt.**—*Ingals t. Brooks*, 29 Vt. 398, 401; *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361. **Va.**—*Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124; *Wade v. Hancock*, 76 Va. 620. **W. Va.**—*Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447. **Wis.**—*Blodgett v. Hitt*, 29 Wis. 169; *Ely v. Tallman*, 14 Wis. 28; *Falkner v. Guild*, 10 Wis. 563; *Matter of Booth*, 3 Wis. 157.

2. *Moorman v. Arthur*, 90 Va. 455, 18 S. E. 869; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. 329; *Underwood v. McVeigh*, 23 Gratt. (64 Va.) 409.

2. *Blanton v. Carroll*, 86 Va. 539, 10 S. E. 329; *Underwood v. McVeigh*, 23 Gratt. (64 Va.) 409. See also *infra*, III, D, 1, a, and 15 STANDARD PROC. 426, et seq.

4. *Ex parte Lange*, 18 Wall. (U. S.) 163, 177, 21 L. ed. 872.

5. *Wade v. Hancock*, 76 Va. 620. See 15 STANDARD PROC. 421, et seq.

[a] A decree ordering a sale of all of a certain person's interest in lands is void as to the excess, where the statute merely provides for a forfeiture during such person's life. *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, 19 L. ed. 696.

6. *Ex parte Lange*, 18 Wall. (U. S.)

163, 177, 21 L. ed. 872; *Day v. Micou*, 18 Wall. (U. S.) 156, 21 L. ed. 869; *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, 19 L. ed. 696.

7. **U. S.**—*Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931. **Ga.**—*Wilson v. Sullivan*, 81 Ga. 238, 245, 7 S. E. 274. **Ohio.**—*Hoffman v. Fleming*, 66 Ohio St. 143, 64 N. E. 63; *Julier v. Julier*, 62 Ohio St. 90, 56 N. E. 661, 78 Am. St. Rep. 697; *Reynolds v. Stansbury*, 20 Ohio 344, 55 Am. Dec. 459; *Newman's Lessee v. Cincinnati*, 18 Ohio 323, 329. **Va.**—*Adams v. Jennings*, 103 Va. 579, 49 S. E. 982; *Building, Light & W. Co. v. Fray*, 96 Va. 559, 32 S. E. 58; *Harman v. Stearns*, 95 Va. 58, 27 S. E. 601; *Preston v. Kindrick*, 94 Va. 760, 27 S. E. 588, 64 Am. St. Rep. 777; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249. **W. Va.**—*Starr v. Sampselle*, 55 W. Va. 442, 47 S. E. 255; *First Nat. Bank v. Hyer*, 46 W. Va. 13, 32 S. E. 1000; *Withrow v. Smithson*, 37 W. Va. 757, 17 S. E. 316, 19 L. R. A. 762; *Davis v. Point Pleasant*, 32 W. Va. 289, 9 S. E. 228.

See also 15 STANDARD PROC. 488, and the title "Res Judicata."

8. **U. S.**—*Conolly v. Taylor*, 2 Pet. 556, 565, 7 L. ed. 518. **Kan.**—*Carney v. Taylor*, 4 Kan. 178. **La.**—*Edwards v. Marin*, 28 La. Ann. 567; *Champlin v. Bakewell*, 21 La. Ann. 353. **Mass.**—*Buck v. Dowley*, 16 Gray 555. **Mich.**—*Hart v. Henderson*, 17 Mich. 218. **Mo.**—*Tippack v. Briant*, 63 Mo. 580.

and may determine its own jurisdiction;⁹ and its decision thereon concludes the parties to the record.¹⁰ This rule is applicable to all courts,¹¹ irrespective of whether the court is an appellate court,¹² a court of general jurisdiction,¹³ or an inferior court,¹⁴ or board;¹⁵ and for this purpose may hear affidavits to determine same.¹⁶

The question of lack of jurisdiction is always open for determination, even though there may be in the case prior rulings of the same

9. **U. S.**—*Republic Oil Co. v. Missouri*, 224 U. S. 270, 32 Sup. Ct. 406, 56 L. ed. 760, Ann. Cas. 1913D, 936; *Toy Toy v. Hopkins*, 212 U. S. 542, 29 Sup. Ct. 416, 53 L. ed. 644; *Brougham v. Oceanic Steam Nav. Co.*, 205 Fed. 857, 126 C. C. A. 321; *United States v. Sessions*, 205 Fed. 502, 123 C. C. A. 570; *Holmes v. Oregon & C. R. Co.*, 5 Fed. 523, 6 Sawy. 276. **Cal.**—*McCauley v. Fulton*, 44 Cal. 355. **Ga.**—*Ford v. Harris*, 130 Ga. 273, 60 S. E. 835. **Ill.**—*Citizens' Horse Ry. Co. v. Belleville*, 47 Ill. App. 388, 411; *Bannon v. People*, 1 Ill. App. 496. **Ind.**—*Stone v. Elliott*, 182 Ind. 454, 106 N. E. 710; *Baltimore, etc. R. Co. v. Freeze*, 169 Ind. 370, 82 N. E. 761; *State v. Wenzel*, 77 Ind. 428; *Pittsburgh, etc. R. Co. v. Peck*, 44 Ind. App. 62, 88 N. E. 627. **Ind. Ter.**—*Tootle v. McClellan*, 7 Ind. Ter. 64, 103 S. W. 766, 12 L. R. A. (N. S.) 941. **Ky.**—*Ackerson v. Semple*, 163 Ky. 395, 173 S. W. 1153. **La.**—*State v. Voorhies*, 34 La. Ann. 1142. **Md.**—*Oberlander v. Emmel*, 104 Md. 259, 64 Atl. 1025. **Mass.**—*Gray v. Dean*, 136 Mass. 128. **Miss.**—*Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101. **Mo.**—*Springfield S. W. R. Co. v. Schweitzer*, 246 Mo. 122, 151 S. W. 128. **Neb.**—*Radil v. Sawyer*, 85 Neb. 235, 122 N. W. 980. **N. Y.**—*King v. Poole*, 36 Barb. 242; *Gormly v. McIntosh*, 22 Barb. 271. **Okla.**—*Washburn v. Delaney*, 30 Okla. 789, 120 Pac. 620. **Ore.**—*Eagle Cliff Fishing Co. v. McGowan*, 70 Ore. 1, 137 Pac. 766. **Pa.**—*Silver v. Schuykill*, 32 Pa. 356. **P. I.**—*Gala v. Cui*, 25 Phil. Isl. 522. **Tex.**—*Lindsey v. Luckett*, 20 Tex. 516. **W. Va.**—*Mayer v. Adams*, 27 W. Va. 244. **Wis.**—*State v. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941. **Can.**—*In re Sproule*, 12 Can. Sup. Ct. 140; *Loppky v. Hofby*, 12 Manitoba 335; *Doll v. Howard*, 11 Manitoba 21.

[a] It must inquire into the existence of facts, either of notice to one of the parties or of some other pre-

liminary condition, upon which the law imposes on him the power and the duty. In so deciding, it, of course acts judicially. *State v. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941.

[b] Although a court holds that it has no jurisdiction in reference to the subject-matter, it is acting within its jurisdiction in making such determination. *Burke v. Territory*, 2 Okla. 499, 37 Pac. 829.

10. *Stone v. Elliott*, 182 Ind. 454, 106 N. E. 710; *Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28; *Soules v. Robinson*, 158 Ind. 97, 62 N. E. 999, 92 Am. St. Rep. 301; *Cunningham v. Tuley*, 154 Ind. 270, 56 N. E. 27; *Evansville Ice & Cold Storage Co. v. Winsor*, 148 Ind. 682, 48 N. E. 592; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Doll v. Howard*, 11 Manitoba (Can.) 21. See generally the title "Res Judicata."

11. *Dowdy v. Wamble*, 110 Mo. 289, 19 S. W. 489; *Memphis St. R. Co. v. Byrne*, 119 Tenn. 278, 320, 104 S. W. 460, highest court of a state may decide when its constitutional jurisdiction is encroached upon.

12. *Jones v. Coffin*, 96 Ark. 332, 131 S. W. 873; *Fahs v. Darling*, 82 Ill. 142. **Jurisdiction of appellate courts**, see *infra*, VI.

13. **Cal.**—*McCauley v. Fulton*, 44 Cal. 355. **Ill.**—*Bannon v. People*, 1 Ill. App. 496. **Miss.**—*Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101.

As to courts of general original jurisdiction, see *infra*, V.

14. **Cal.**—*In re Grove Street*, 61 Cal. 438. **Ind.**—*Mullikin v. Bloomington*, 72 Ind. 161; *Evansville, I. & C. Straight Line R. Co. v. Evansville*, 15 Ind. 395; *Strohmier v. Stumph*, Wils. 304. **S. C.**—*State v. Scott*, 1 Bailey 294.

15. *In re Grove Street*, 61 Cal. 438. 16. *Simmons v. Fisher*, 46 Tex. 126. Compare *Robinson v. Harrison*, 9 Ohio S. & C. Pl. Dec. 701, 7 Ohio N. P. 273, holding that if the issue is raised by answer, as to the jurisdiction of the

or another judge sustaining the jurisdiction.¹⁷ The right to exercise such power, however, does not authorize a court to reach out and assume jurisdiction in each and every case to which its attention may be called.¹⁸ When a statute prescribes that some fact must exist before jurisdiction can attach in any court, such fact must exist before there can be jurisdiction, and the court cannot acquire jurisdiction by erroneously deciding that the fact exists, and that it has jurisdiction.¹⁹ If a court should decide that it has power to try a cause and render a judgment, where by law it has no such power, that decision does not give the power,²⁰ especially where the constitution of the state denies such jurisdiction to it,²¹ and notwithstanding, subsequent to the commencement of the suit, the jurisdiction of the court is enlarged.²²

2. Authority After Determining Court Has No Jurisdiction.

When a court has determined that it has no jurisdiction of the subject-matter of an action, it cannot properly consider any other question raised in the case,²³ and is without authority to render judgment on

court, an issue of fact arises, upon the trial of which the parties are entitled to a jury, and which cannot, therefore, be tried upon affidavits, even with the consent of the parties. The proper practice in such cases is to have the case set down for trial upon competent evidence.

[a] The question (1) as to whether a cause of action arose within the state so as to give the court jurisdiction is to be determined from the petition or complaint without respect to affidavits. *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 Misc. 230, 33 N. Y. Supp. 1081, 67 N. Y. St. 784. See also *infra*, III, C. (2) But the court is not bound to dismiss a cause merely because the defendant alleges the amount in controversy is beyond the jurisdiction of the court. It has a right to inquire into the correctness of the averment. *State v. Voorhies*, 34 La. Ann. 1142.

17. *Sheldon v. Wabash R. Co.*, 105 Fed. 785.

18. *City of Indianapolis v. Hawkins*, 180 Ind. 382, 103 N. E. 10.

19. *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555.

[a] There is a clear distinction between the finding of a jurisdictional fact and the decision of a court, that, as a matter of law, it has jurisdiction over a cause of action, where it has none. In the one case it has authority to try the facts. In the other case it has no authority at all, though it de-

cides that it has. *Wanzer v. Howland*, 10 Wis. 8.

[b] **Conclusiveness of Decision.** Where general jurisdiction is given to a court over any subject, and that jurisdiction depends in the particular case, upon facts which must be brought before the court for its determination upon evidence, and where it is required to act upon such evidence, its decision upon the question of its jurisdiction is conclusive until reversed, revoked or vacated, so far as to protect its officers and all other innocent persons who act upon the faith of it. *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555. See generally the title "**Res Judicata**."

20. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; *Wanzer v. Howland*, 10 Wis. 8.

21. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100.

22. *Mora v. Kuzac*, 21 La. Ann. 754.

23. *Ia.—Stough v. Chicago & Northwestern Ry. Co.*, 71 Iowa 641, 33 N. W. 149. *Ky.—Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. 282. *Mass. Gray v. Dean*, 136 Mass. 128. *Nev. Ex parte Gardner*, 22 Nev. 280, 39 Pac. 570, any order made is equally without jurisdiction.

[a] It becomes the court, in all cases, to stay proceedings, whenever it is made manifest that it has not jurisdiction in the case. Whenever this knowledge is obtained, it matters not whether it be by an inspection of its

any other pleas or exceptions in the case,²⁴ or to determine the title to the property in controversy, or to assess damages for its value;²⁵ and the court should express no opinion upon the merits of the controversy;²⁶ though it may make such orders as are necessary to put the parties in the same position they were prior to the suit,²⁷ and to have the case stricken from the docket.²⁸ Even the appellate court has no jurisdiction except to reverse the illegal proceedings below where the trial court had no jurisdiction. It cannot remand the cause to the trial court for further proceedings,²⁹ except to dismiss or strike the case from the docket.³⁰

C. TESTS OF JURISDICTION.³¹—The test of the jurisdiction of the court to grant relief is not whether good cause for granting the relief exists,³² but whether the tribunal assuming to act had power to enter upon the inquiry in the particular case, or grant the relief for any cause,³³ and this must be sought for in the general nature of the

proceedings, or is suggested by an *amicus curiae*. *Chalmers v. Hack*, 19 Me. 124. As to stay of proceedings, see generally the title "**Supersedeas and Stay of Proceedings.**"

24. *Lavergne v. Roussel*, 139 La. 915, 72 So. 453.

25. *Wheeler & Wilson Mfg. Co. v. Whitecomb*, 62 N. H. 411.

26. *Taylor v. Mutual, etc. Life Assn.*, 97 Va. 60, 73, 33 S. E. 385, 45 L. R. A. 621.

27. *Elliott v. Peirsol's Lessee*, 1 Pet. (U. S.) 328, 7 L. ed. 164; *Close v. Hannig* (Tex.), 17 S. W. 350, 4 Wills. Civ. Cas. §331.

[a] A court having no jurisdiction of a cause may set aside orders improperly made before the want of jurisdiction was discovered and restore things to the state in which they were before the improper orders were made. *Mail Co. v. Flanders*, 12 Wall. (U. S.) 130, 20 L. ed. 249.

[b] Where an equity court takes the fund from a defendant, pending litigation, and afterwards becomes satisfied it cannot grant relief, and dismisses the bill, it still has power to retain the bill for the purpose of repairing the wrong. *Bank of Mississippi v. Duncan*, 52 Miss. 740.

28. *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; *Fritts v. Camp*, 94 Cal. 393, 29 Pac. 867; *Aubrey v. Almy*, 4 Ohio St. 524.

[a] Court should of its own motion dismiss the cause. *Welborne v. State*, 114 Ga. 793, 40 S. E. 857; *Cutts v. Scandrett*, 108 Ga. 620, 34 S. E. 186;

Powell v. Cheshire, 70 Ga. 357, 48 Am. Rep. 572.

29. *Austell v. Atlanta*, 100 Ga. 182, 27 S. E. 983; *Western Union Tel. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517.

Jurisdiction of appellate courts, see *infra*, VI.

30. See the title "**Mandate and Proceedings Thereafter.**"

31. As to whether court is one of general or special or limited jurisdiction, see *supra*, I, G.

Amount in controversy or value of property as a test of jurisdiction, see *infra*, XII.

32. *United States v. Ness*, 230 Fed. 950, 145 C. C. A. 144; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274.

33. U. S.—*United States v. Ness*, 230 Fed. 950, 145 C. C. A. 144; *Foltz v. St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 8 C. C. A. 635. Cal.—*Chase v. Christianson*, 41 Cal. 253. Ga.—*Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274. Ill.—*Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; *Johnson v. Miller*, 50 Ill. App. 60. N. Y.—*People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 570, 19 Am. Rep. 211; *Colton v. Beardsley*, 38 Barb. 29, 51. Ohio.—*Spinning v. Ohio, etc. Trust Co.*, 2 Disn. 336, 346, 13 Ohio Dec. 206.

[a] It matters not what the general powers and jurisdiction of a court may be; if it acts without authority in the particular case its judgments and orders are mere nullities, not merely voidable, but void. *Elliott v. Peirsol's Lessee*, 1 Pet. (U. S.) 328, 7 L. ed. 164; *People ex rel. Tweed v. Liscomb*, 60

powers of the court or the general laws defining its jurisdiction.³⁴ It does not depend upon whether its conclusion in the course of it is right or wrong,³⁵ nor whether its methods were regular.³⁶ So also, the jurisdiction of the court can never depend upon its decision upon the merits of the case brought before it, but depends upon its right to hear and decide it at all.³⁷ The question is, whether on the case before the court, their action is judicial or extra judicial; with or without authority of law to render judgment or decree upon the rights of the litigant parties.³⁸ If the law confers the power to render a judgment or decree in the particular case, then the court has jurisdiction.³⁹ It does not relate to the rights of the parties, as between them-

N. Y. 559, 568, 19 Am. Rep. 211. See also *supra*, III, A.

[b] The highest test of its jurisdiction is whether the court has lawful power to enforce its judgment or decree in the particular case. *Texas & P. R. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

34. *Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356.

Sources of jurisdiction, see *infra*, IV, A.

35. **U. S.**—*United States v. Ness*, 230 Fed. 950, 145 C. C. A. 144; *Foltz v. St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 8 C. C. A. 635. **Cal.**—*Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Chase v. Christianson*, 41 Cal. 253. **Colo.** *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105. **Ill.** *Johnson v. Miller*, 50 Ill. App. 60. **Mo.** *Schubach v. McDonald*, 179 Mo. 163, 182, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136. **N. Y.**—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129.

[a] The remedy where the court has merely made an erroneous decision in a case within its general jurisdiction is by writ of error or other process of review. *Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 559, 19 Am. Rep. 211. See generally the titles, "Appeals;" "Writ of Error."

36. *Kelly v. People*, 115 Ill. 583, 4 N. E. 644, 56 Am. Rep. 184; *Johnson v. Miller*, 50 Ill. App. 60, 70.

37. **U. S.**—*United States v. Morse*, 218 U. S. 493, 21 Sup. Ct. 37, 54 L. ed. 1123, 21 Ann. Cas. 782; *Inley v. United States*, 150 U. S. 512, 14 Sup. Ct. 158, 37 L. ed. 1163; *In re Sawyer*, 124 U. S. 200, 221, 8 Sup. Ct. 482, 31 L. ed. 402; *Des Moines Nav. & R. Co. v. Iowa*

Homestead Co., 123 U. S. 552, 8 Sup. Ct. 217, 31 L. ed. 202; *Cornett v. Williams*, 20 Wall. 226, 22 L. ed. 254; *Ex parte Watkins*, 7 Pet. 568, 8 L. ed. 786; *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. ed. 300; *United States v. Ness*, 230 Fed. 950, 145 C. C. A. 144; *King v. McAndrews*, 111 Fed. 860, 863, 50 C. C. A. 29; *Otis v. Rio Grande*, 1 Woods, 279, 18 Fed. Cas. No. 10,613. **Cal.**—*Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565; *Central Pac. R. Co. v. Placer County*, 43 Cal. 365; *Dahlgren v. Superior Court*, 8 Cal. App. 622, 97 Pac. 681. **Ill.**—*Franklin Union No. 4 v. People*, 220 Ill. 355, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001; *O'Brien v. People*, 216 Ill. 354, 364, 75 N. E. 108, 108 Am. St. Rep. 219; *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 31 N. E. 420, 33 Am. St. Rep. 331; *St. Louis & Sandoval Coal & Min. Co. v. Sandoval Coal & Min. Co.*, 111 Ill. 32. **Md.**—*Hamilton v. Annapolis & E. R. R. Co.*, 1 Md. Ch. 107. **Mo.**—*Musick v. Kansas City*, etc. R. Co., 114 Mo. 309, 315, 21 S. W. 491; *Hope v. Blair*, 105 Mo. 85, 93, 16 S. W. 595, 24 Am. St. Rep. 366; *State v. Southern Ry. Co.*, 100 Mo. 59, 13 S. W. 398; *Rosenheim v. Hartsock*, 90 Mo. 357, 365, 2 S. W. 473; *State v. Weatherby*, 45 Mo. 17; *Evans v. Haefner*, 29 Mo. 141, 147. **N. Y.**—*Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Colton v. Beardsley*, 38 Barb. 29, 52. **Okla.**—*Roth v. Union Nat. Bank*, 160 Pac. 505; *Parmenter v. Ray*, 158 Pac. 1183.

38. *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 9 L. ed. 1233; *Roth v. Union Nat. Bank (Okla.)*, 160 Pac. 505; *Parmenter v. Ray (Okla.)*, 158 Pac. 1183.

39. **U. S.**—*Applegate v. Lexington & Carter County M. Co.*, 117 U. S. 255, 6 Sup. Ct. 742, 29 L. ed. 892; *Grignon's*

selves, but to the power of the court,⁴⁰ and if there is a lack of power, whether because intentionally withheld, or because of the incapacity of the grantor to confer it, the jurisdiction is limited in the one case and incomplete or inadequate in the other.⁴¹ The jurisdiction of the subject-matter of any controversy in any court must be determined in the first instance by the allegations in the complaint or petition as the case may be,⁴² made in good faith,⁴³ and does not depend upon the existence of a sustainable cause of action,⁴⁴ or by the evidence subsequently adduced;⁴⁵ but upon the performance by the party of the prerequisites authorizing it to determine whether one exists or

Lessee v. Astor, 2 How. 319, 11 L. ed. 283; *State of Rhode Island v. State of Massachusetts*, 12 Pet. 657, 9 L. ed. 1233; *United States v. Arredondo*, 6 Pet. 691, 8 L. ed. 547. **Ark.**—*Trammell v. Town of Russellville*, 34 Ark. 105, 36 Am. Rep. 1. **Ill.**—*O'Brien v. People*, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966. **Mo.** *Hope v. Blair*, 105 Mo. 85, 16 S. W. 595, 24 Am. St. Rep. 366. **Okla.**—*Roth v. Union Nat. Bank*, 160 Pac. 505; *Parmenter v. Ray*, 158 Pac. 1183.

40. **Cal.**—*Dahlgren v. Superior Court*, 8 Cal. App. 622, 97 Pac. 681. **N. Y.**—*Fisher v. Hepburn*, 48 N. Y. 41; *People v. Sturdevant*, 9 N. Y. 263, 59 Am. Dec. 536. **Ohio.**—*Handy v. Insurance Co.*, 37 Ohio St. 366.

[a] "In *people v. Sturdevant*, (9 N. Y. 263) Judge Johnson says: 'Jurisdiction does not relate to the rights of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity either in the plaintiff or in any one else.'" *Fisher v. Hepburn*, 48 N. Y. 41.

41. *State v. North American L. & T. Co.*, 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

42. **U. S.**—*Manier v. Trumbo*, 30 Fed. Cas. No. 18,309. **Ark.**—*Turner v. Cotton*, 123 Ark. 40, 184 S. W. 415. **Cal.**—*Ransome-Crummey Co. v. Martenstein*, 167 Cal. 406, 139 Pac. 1060. **Ind.** *Lake Shore, etc. R. Co. v. Clough*, 182 Ind. 178, 184, 104 N. E. 975, 105 N. E. 903. **Miss.**—*Boone v. Poindexter*, 12 Smed. & M. 640. **N. J.**—*Jersey City v.*

Gardner, 33 N. J. Eq. 622. **N. Y.** *Piekelko v. Lake View Brewing Co.*, 65 Misc. 365, 119 N. Y. Supp. 847. **Ohio.**—*Gaw v. Glassboro Novelty G. Co.*, 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 32. **Ore.**—*Eagle Cliff Fishing Co. v. McGowan*, 70 Ore. 1, 137 Pac. 766. **Tenn.**—*Ridgely v. Bennett*, 13 Lea 210; *Young v. Young*, 12 Lea 335; *Kindell v. Titus*, 9 Heisk. 727.

See also *infra*, IV, B, 2, b.

[a] **Allegations Determine Jurisdiction.**—When a party appears before a judicial tribunal and alleges that a certain right is denied him and the law has given the tribunal the power to enforce that right—his adversary being notified—it must proceed to determine the truth or falsity of his allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction, necessarily, has to be determined from the allegations, assuming them to be true. *Gaw v. Glassboro Novelty G. Co.*, 20 Ohio Cir. Ct. 416, 11 Ohio Cir. Dec. 32, quoting from *Van Fleet's Collateral Attack*, §60.

[b] The jurisdiction of a court to entertain a cause, and the right of the plaintiff in such cause to finally prevail, present essentially different questions; the former is determined from an inspection of the record, the other results from a consideration of the facts as established by the proof. *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057.

43. *Gardiner v. Royer*, 167 Cal. 238, 139 Pac. 75.

44. *Fischer v. Langbein*, 103 N. Y. 84, 8 N. E. 251; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Perry v. Morse*, 57 Vt. 509.

45. **Ark.**—*Turner v. Cotton*, 123 Ark.

not.⁴⁶ But behind all this, there must be power in the court, conferred by law, to act in a real case of the character of the one supposed by the pleading or complaint.⁴⁷ The defense which the defendant sets up in his answer has no influence in determining the question of jurisdiction.⁴⁸ If the petitioner presents such a case in his petition that on a demurrer the court would render a judgment in his favor, it is an undoubted case of jurisdiction,⁴⁹ for jurisdiction is the power to consider and decide one way or the other as the law may require.⁵⁰ Whether a complaint does or does not state a cause of action, is, so far as concerns the question of jurisdiction, of no importance.⁵¹ If the court has jurisdiction over the general subject to which the particular case belongs, the fact that the complaint does not state a cause of action does not go to the jurisdiction;⁵² it merely goes to the character of the judgment that should be rendered.⁵³

D. NECESSITY FOR JURISDICTION APPEARING OF RECORD. — 1. **Courts of General Jurisdiction.**⁵⁴ — a. *In General.* — If the court is one of

40, 184 S. W. 415. Cal.—Ransome-Crummey Co. v. Martenstein, 167 Cal. 406, 139 Pac. 1060; Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689. Ore. Eagle Cliff Fishing Co. v. McGowan, 70 Ore. 1, 137 Pac. 766.

46. Fischer v. Langbein, 103 N. Y. 54, 8 N. E. 251.

47. Thomas v. People, 107 Ill. 517, 47 Am. Rep. 458.

48. Boone v. Poindexter, 12 Smed. & M. (Miss.) 640; Neihardt v. Kilmer, 12 Neb. 35, 10 N. W. 531. See also Jersey City v. Gardner, 33 N. J. Eq. 622.

49. U. S.—Grignon's Lessee v. Astor, 2 How. 319, 11 L. ed. 283. Ala.—Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13. Okla.—Roth v. Union Nat. Bank, 160 Pac. 505.

50. Central Pac. R. Co. v. Placer County, 43 Cal. 365; Auto Transit Co. v. City of Ft. Worth (Tex.), 182 S. W. 685.

Definitions of jurisdiction, see generally *supra*, I, B.

51. Ill.—Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176, 110 Am. St. Rep. 248, 4 L. R. A. (N. S.) 1001; O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966. Minn.—State v. McMahon, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675. Mo.—Schubach v. McDonald, 179 Mo. 163, 182, 78 S. W. 1020, 101 Am. St. Rep. 452, 65 L. R. A. 136; Wunningham v. Trueblood, 149 Mo. 572, 51 S. W. 399; State v. Scarritt, 128 Mo. 321, 339, 340, 30 S. W. 1026. N. Y.—Hunt v. Hunt, 72 N. Y. 217, 28

Am. Rep. 129; People *ex rel.* Tweed v. Liscomb, 60 N. Y. 559, 19 Am. Rep. 211. Okla.—Parker v. Lynch, 7 Okla. 631, 56 Pac. 1082.

[a] If the court has general jurisdiction of the subject matter, the bill if defective is amendable and such proceedings if amendable are not void. O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966; Rosenheim v. Hartsock, 90 Mo. 357, 2 S. W. 473.

52. U. S.—United States v. Ness, 230 Fed. 950, 145 C. C. A. 144. Ill. O'Brien v. People, 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219, 3 Ann. Cas. 966. Ind.—Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567.

[a] An insufficient complaint at law, or a defective petition in bankruptcy, accompanied by proper service of process on the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle the complainant to any relief, or may not be accompanied by some copy or certificate required by a statute or rule of court. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to jurisdiction of the suit or proceeding. United States v. Ness, 230 Fed. 950, 145 C. C. A. 144.

53. Parker v. Lynch, 7 Okla. 631, 56 Pac. 1082.

54. As to courts of general original jurisdiction, see *infra*, V.

general jurisdiction the facts necessary to confer jurisdiction need not affirmatively appear of record, jurisdiction of the person and subject-matter being presumed in the absence of evidence to the contrary on the record;⁵⁵ and this rule obtains equally, whether their proceed-

55. See the following: **U. S.**—Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Harvey v. Tyler, 2 Wall. 328, 17 L. ed. 871. **Ark.**—Trice v. Crittenden, 7 Ark. 159. **Cal.**—*In re* Eichhoff's Estate, 101 Cal. 600, 36 Pac. 11; Drake v. Duvenick, 45 Cal. 455; Mahoney v. Middleton, 41 Cal. 41; Hahn v. Kelly, 34 Cal. 391, 94 Am. Dec. 742; Carpentier v. Oakland, 30 Cal. 439. **Conn.**—Stone v. Hawkins, 56 Conn. 111, 14 Atl. 297; Coit v. Haven, 30 Conn. 190, 198, 79 Am. Dec. 244; Sears v. Terry, 26 Conn. 273, 280. **Haw.**—Mills v. Cathcart, 19 Hawaii 387. **Ill.**—Anderson v. Gray, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; Wallace v. Cox, 71 Ill. 548; Osgood v. Blackmore, 59 Ill. 261; Pensoneau v. Heinrich, 54 Ill. 271; The Tug Montauk v. Walker, 47 Ill. 335; Dunbar v. Hallowell, 34 Ill. 168; Wells v. Mason, 5 Ill. 84. **Ind.**—Shoemaker v. South Bend Spark Arrester Co., 135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332; Nichols v. State, 127 Ind. 406, 26 N. E. 839; O'Brien v. State, 125 Ind. 38, 25 N. E. 137, 9 L. R. A. 323; Langsdale v. Woollen, 120 Ind. 16, 21 N. E. 659; Bateman v. Miller, 118 Ind. 345, 21 N. E. 292; Royse v. Turnbaugh, 117 Ind. 539, 20 N. E. 485; Cassidy v. Miller, 106 Ind. 69, 5 N. E. 713; Jackson v. State, 104 Ind. 516, 3 N. E. 863; Quarl v. Abbott, 102 Ind. 233, 240, 1 N. E. 476, 52 Am. Rep. 662; Young v. Wells, 97 Ind. 410; McCormick v. Webster, 89 Ind. 105; Cavanaugh v. Smith, 84 Ind. 380; Bloomfield Ry. Co. v. Burruss, 82 Ind. 83; Kinnaman v. Kinnaman, 71 Ind. 417. **Ia.**—Coughran v. Gilman, 81 Iowa 442, 46 N. W. 1005; Weider v. Overton, 47 Iowa 538; State v. Winstrand, 37 Iowa 110; State v. Clark, 30 Iowa 168; Morrow v. Weed, 4 Iowa 77, 66 Am. Dec. 122; Cooper v. Sunderland, 3 Iowa 114, 66 Am. Dec. 52; Bridgman v. Wilcut, 4 Greene 563. **Kan.**—Matter of Dill, 32 Kan. 668, 691, 5 Pac. 39, 49 Am. Rep. 505; Dexter v. Cochran, 17 Kan. 447, 450; Haynes v. Cowen, 15 Kan. 637; Butcher v. Brownsville Bank, 2 Kan. 70, 83 Am. Dec. 446. **Ky.**—Anderson's Committee v. Anderson, 161 Ky. 18, 170 S. W. 213, L. R. A. 1915C, 581. **Mich.**—Arnold v. Nye, 23 Mich. 286. **Minn.**—Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689; Holmes v. Campbell, 12 Minn. 221. **Miss.**—Ames v. Williams, 72 Miss. 760, 17 So. 762; James Cannon v. Cooper, 39 Miss. 784, 789, 80 Am. Dec. 101. **Mo.**—Davidson v. Schmidt, 256 Mo. 18, 164 S. W. 577; State v. Baker, 246 Mo. 357, 152 S. W. 46; Hamer v. Cook, 118 Mo. 476, 24 S. W. 180; McClanahan v. West, 100 Mo. 309, 13 S. W. 674; St. Louis v. Ianigan, 97 Mo. 175, 10 S. W. 475; Schad v. Sharp, 95 Mo. 573, 8 S. W. 549; Gates v. Tusten, 89 Mo. 13, 14 S. W. 827; State v. Williamson, 57 Mo. 192; Schell v. Leland, 45 Mo. 289; State v. Fulton (Mo. App.), 184 S. W. 938, county court. **N. H.**—Wingate v. Haywood, 40 N. H. 437. **N. J.**—State v. Passaic County Agricultural Society, 54 N. J. L. 260, 23 Atl. 680. **N. Y.**—Maples v. Mackey, 89 N. Y. 146; Bearns v. Gould, 77 N. Y. 455; Hart v. Seixas, 21 Wend. 40; Foot v. Stevens, 17 Wend. 483; Mills v. Martin, 19 Johns. 7; Wheeler v. Raymond, 8 Cow. 311; Bolton v. Jacks, 6 Robt. 166, 198; Ray v. Rawley, 1 Hun 614. **Ohio.**—Morgan's Lessee v. Burnett, 18 Ohio 535. **Ore.**—Strong v. Barnhart, 6 Ore. 93, 103; Tustin v. Gaunt, 4 Ore. 305; Fulton v. Earhart, 4 Ore. 61; GrosLouis v. Northcut, 3 Ore. 394. **Pa.**—Wetherill v. Stillman, 65 Pa. 105. **R. I.**—Slocum v. Providence Steam, etc. Co., 10 R. I. 112. **S. C.**—*Ex parte* Pearson, 79 S. C. 302, 60 S. E. 706. **Tex.**—Williams v. Ball, 52 Tex. 603, 36 Am. Rep. 730; Lawler's Heirs v. White, 27 Tex. 250; Horan v. Wahrenberger, 9 Tex. 313, 58 Am. Dec. 145; Dickson v. Moore, 9 Tex. Civ. App. 514, 30 S. W. 76, *affirmed*, 93 Tex. 728. **Vt.**—Huntington v. Charlotte, 15 Vt. 46. **Va.**—Pulaski v. Stuart, 28 Gratt. 872; Cox v. Thomas, 9 Gratt. 323. **W. Va.**—Rutter & Co. v. Sullivan, 25 W. Va. 427. **Wis.**—Falkner v. Guild, 16 Wis. 563. **Eng.**—Peacock v. Bell, 1 Saund. 73, 85 Eng. Reprint 84.

See 15 STANDARD PROC. 426, et seq.

[a] "The rule itself is founded upon the idea that the peace and good order of society require that a matter once

ings be by the course of the common law or by statute law,⁵⁶ or be in the acquisition of jurisdiction of the person of defendant, by making either active or constructive service of the summons on him;⁵⁷ and the same rule applies as to the regularity of subsequent proceedings in the exercise of its jurisdiction.⁵⁸

The United States courts are courts of general jurisdiction within the above rules, notwithstanding their jurisdiction is limited by the constitution of the United States and the laws passed in pursuance thereof.⁵⁹

b. *Courts With Special Powers.*—A court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction.⁶⁰ In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction.⁶¹ The jurisdiction in such cases, both as to the subject-matter of the judgment, and as to the persons to be affected by it, must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it.⁶² The qualifications here made, however, that the spe-

litigated and determined shall be regarded as determined for all time, or that rights of person and property, once determined, ought not to be again put in jeopardy. A cognate principle underlies the criminal law and finds expression in the constitutional provision that no man's life or liberty shall be twice put in jeopardy for the same offense. . . . This limitation is founded upon the trust and confidence which the law puts in that class of courts which it does not place in other courts which are inferior or not of record, or not of general, but limited or special jurisdiction. This discrimination is in turn founded upon considerations of the wisest policy, which are obvious to all. Courts of record are presided over by men of experience and learned in the law, assisted by counsel also of experience and learning, who, in the discharge of their duties to their clients, necessarily act as the advisers of the court. Their proceedings are conducted with solemnity and deliberation and in strict conformity with established modes, with which long experience has made court and bar familiar, and above all they are taken down and made a matter of record at or about the time they transpire. Of inferior courts, as a general rule, none of these things can be affirmed." *Hahn v. Kelly*, 34 Cal. 391, 409, 94 Am. Dec. 742.

56. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

[a] The use of the words "superior" and "inferior," or "limited" and "general," and "proceeding according to the course of the common law," in the statement of the rule in question, however apt they may have once been, are less so at this time and place, and their duties, in view of our system and mode of procedure, would be better performed by the terms "courts of record" and "courts and tribunals not of record." If anything further is added, the phrase "proceeding according to the course of the statute which regulates proceedings in civil cases" should be employed instead of the phrase under consideration, for the statute has superseded the common law, without however abrogating the rule in hand, the conditions being changed but not the principle. *Hahn v. Kelly*, 34 Cal. 391, 414, 94 Am. Dec. 742.

57. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

58. *Housh v. People*, 66 Ill. 178.

59. See 15 STANDARD PROC. 438, and generally the title "United States Courts."

60. See *infra*, V, B, 3.

61. *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. ed. 959.

62. See the following: *U. S.*—*Galpin v. Page*, 18 Wall. 350, 367, 21 L. ed.

cial powers conferred are not exercised according to the course of the common law, is important.⁶³ When the special powers conferred are brought into action according to the course of that law, that is, in the usual form of common law and chancery proceedings, by regular process and personal service where a personal judgment or decree is asked, or by seizure or attachment of the property where a judgment in rem is sought, the same presumption of jurisdiction will usually attend the judgments of the courts as in cases falling within its general powers, and jurisdiction need not affirmatively appear of record.⁶⁴

c. *In Summary Proceedings.*—In order to give the court jurisdiction in summary proceedings in derogation of the common law, everything necessary to give such jurisdiction should appear of rec-

- 959; *Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221; *Cowdrey v. Caneadea*, 16 Fed. 532, 21 Blatchf. 351. **Ala.**—*Chandler v. Hanna*, 73 Ala. 390; *Phillips v. Ash's Heirs*, 63 Ala. 414; *Janney v. Buell*, 55 Ala. 408; *Foster v. Glazener*, 27 Ala. 391. **Ark.**—*Griffin v. Boswell*, 124 Ark. 234, 187 S. W. 165; *Beakley v. Ford*, 123 Ark. 383, 185 S. W. 796; *Ex parte Tipton*, 123 Ark. 389, 185 S. W. 798; *St. Louis, I. M. & S. Ry. Co. v. Dudgeon*, 64 Ark. 108, 40 S. W. 786. **Cal.**—*Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *McDonald v. Katz*, 31 Cal. 167. **Ill.**—*Cobe v. Guyer*, 237 Ill. 516, 86 N. E. 1071; *Illinois Cent. R. Co. v. People ex rel. Seaton*, 189 Ill. 119, 59 N. E. 609; *Watts v. Dull*, 184 Ill. 86, 56 N. E. 303, 75 Am. St. Rep. 141; *Payson v. People*, 175 Ill. 267, 51 N. E. 588; *Wenner v. Thornton*, 98 Ill. 156, 168; *Haywood v. Collins*, 60 Ill. 328; *Donlon v. Hettinger*, 57 Ill. 348; *Foley v. Foley*, 61 Ill. App. 577; *Joiner v. Drainage Comrs.*, 17 Ill. App. 607; *Gibbon v. Bryan*, 3 Ill. App. 298. **Ind.**—*Markel v. Evans*, 47 Ind. 326. **Ia.**—*Cooper v. Sunderland*, 3 Iowa 114, 66 Am. Dec. 52; *Tiffany v. Gloves*, 3 G. Gr. 387; *Wright v. Marsh*, 2 G. Gr. 94. **Ky.**—*Newcomb's Exrs. v. Newcomb*, 13 Bush 544, 26 Am. Rep. 222. **Me.**—*Penobscot R. Co. v. Weeks*, 52 Me. 456. **Md.**—*Expressman's Mut. B. Assn. v. Hurlock*, 120 Md. 107, 87 Atl. 834; *Mears v. Adreon*, 31 Md. 229; *Risewick v. Davis*, 19 Md. 82; *Boarman v. Patterson*, 1 Gill 372; *Bend v. Susquehanna Bridge, etc. Co.*, 6 Har. & J. 128, 130, 14 Am. Dec. 261. **Mass.**—*Com. v. Blood*, 97 Mass. 538. **Miss.**—*Stamper v. King*, 51 Miss. 728; *Root v. McFerrin*, 37 Miss. 17, 75 Am. Dec. 49. **Minn.**—*Ullman v. Lion*, 8 Minn. 381, 83 Am. Dec. 783. **Mo.**—*Ramsey v. Huck*, 267 Mo. 333, 184 S. W. 966; *Bell v. Brinkman*, 123 Mo. 270, 27 S. W. 374; *Eaton v. St. Charles*, 76 Mo. 492; *Kansas City, St. J. & C. B. Ry. Co. v. Campbell*, 62 Mo. 583; *Babb v. Bruere*, 23 Mo. App. 604; *Sedgwick v. Missouri, etc. R. Co.*, 17 Mo. App. 105; *Wertz v. Wertz*, 11 Mo. App. 26. **N. H.**—*Carleton v. Washington Ins. Co.*, 35 N. H. 162; *Haywood v. Charlestown*, 34 N. H. 23, 26; *Eaton v. Badger*, 33 N. H. 228; *Morse v. Presby*, 25 N. H. 299, 382; *Sanborn v. Fellows*, 22 N. H. 473. **N. J.**—*Bergen Turnpike Co. v. State*, 25 N. J. L. 554; *State v. Lewis*, 22 N. J. L. 564. **N. Y.**—*Smith v. Fowle*, 12 Wend. 9; *Burckle v. Eckhart*, 3 Denio 279, *affirmed* in 3 N. Y. 132. **Ohio.**—*Adams' Lessee v. Jeffries*, 12 Ohio 253, 40 Am. Dec. 477; *Maxsom's Lessee v. Sawyer*, 12 Ohio 195. **Ore.**—*Odell v. Campbell*, 9 Ore. 298; *John v. Marion County*, 4 Ore. 46. **P. R.**—*The Bonnie Fruit Co. v. Davila*, 7 Porto Rico 430. **Tenn.**—*Whitmore v. Johnson's Heirs*, 10 Humph. 610; *Kindell v. Titus*, 9 Heisk. 727; *Jones v. Read*, 1 Humph. 335. **Tex.**—*Williams v. Ball*, 52 Tex. 603, 36 Am. Rep. 730. **Va.**—*Dinwiddie v. Stuart*, 28 Gratt. (69 Va.) 526.
- See *infra*, III, D, 2; and 15 STANDARD PROC. 432, et seq.
63. *Cobe v. Guyer*, 237 Ill. 516, 86 N. E. 1071.
64. See the following: **U. S.**—*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Harvey v. Tyler*, 2 Wall. 328, 17 L. ed. 871; *Voorhees v. Jackson*, 10 Pet. 449, 9 L. ed. 490. **Ill.**—*Cobe v. Guyer*, 237 Ill. 516, 86 N. E. 1071; *Farmers' etc. Ins. Co. v. Buckles*, 49 Ill. 482. **N. Y.**—*Sharp v. Speir*, 4 Hill 76.
- See 15 STANDARD PROC. 433.

ord,⁶⁵ whether the judgment be by default or otherwise.⁶⁶

2. **Courts of Limited and Inferior Jurisdiction.**—The jurisdictional facts necessary to give a court of special and limited jurisdiction a right to act must appear in the record of its proceedings, or such proceedings will be considered mere nullities,⁶⁷ especially in criminal proceedings, such as a preliminary examination before a justice of

65. **U. S.**—*Thatcher v. Powell*, 6 Wheat. 119, 5 L. ed. 221. **Ala.**—*Levert v. Planters, etc. Bank*, 8 Port. 103; *Bates v. Planters' & Merchants' Bank*, 8 Port. 99. **Ia.**—*Morrow v. Weed*, 4 Iowa 77, 66 Am. Dec. 122.

66. *Lyon v. State Bank*, 1 Stew. (Ala.) 442.

67. See the following: **U. S.**—*Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Voorhees v. Jackson*, 10 Pet. 449, 9 L. ed. 490, *affirming* 1 McLean 221, 2 Fed. Cas. No. 939; *United States Bank v. Moss*, 6 How. 31, 12 L. ed. 331; *Brown v. Keene*, 8 Pet. 112, 8 L. ed. 885; *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. ed. 300; *Mayhew v. Davis*, 4 McLean 213, 16 Fed. Cas. No. 9347; *Grignon's Lessee v. Astor*, 2 How. 319, 11 L. ed. 283; *Kempe's Lessee v. Kennedy*, 5 Cranch 173, 3 L. ed. 70. **Ala.**—*Ferguson v. Comrs. Court*, 187 Ala. 645, 65 So. 1028; *Mayfield v. Court of County Comrs.*, 148 Ala. 548, 41 So. 932; *Flowers v. Grant*, 129 Ala. 275, 30 So. 94; *Chamblee v. Cole*, 128 Ala. 649, 30 So. 630; *Stanfill v. Court of County Revenue*, 80 Ala. 287. **Ark.**—*Little Rock Brick Wks. v. Hoyt*, 87 Ark. 313, 112 S. W. 880; *McClure v. Hill*, 36 Ark. 268; *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *Trice v. Crittenden*, 7 Ark. 159. **Cal.**—*Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838; *Jolley v. Foltz*, 34 Cal. 321; *King v. Randlett*, 33 Cal. 318; *Doll v. Feller*, 16 Cal. 432; *Lowe v. Alexander*, 15 Cal. 296. **Conn.**—*Woodmont Assn. v. Milford*, 65 Conn. 517, 84 Atl. 307; *Culver's Appeal*, 48 Conn. 165; *Sears v. Terry*, 26 Conn. 273. **Del.**—*Proctor v. State*, 5 Harr. 387; *Carey v. Russel*, 2 Harr. 280. **Fla.**—*McGehee v. Wilkins*, 31 Fla. 83, 86, 12 So. 228; *Epping, Bellas & Co. v. Robinson*, 21 Fla. 36; *Jacksonville v. L'Engle*, 20 Fla. 344; *Donald v. McKinnon*, 17 Fla. 746; *Hay's Admx. v. McNealy*, 16 Fla. 406, 409. **Ga.**—*Perkins v. Attaway*, 14 Ga. 27; *Gray v. McNeal*, 12 Ga. 424; *Tift v. Griffin*, 5 Ga. 185. **Ill.**—*Anderson v. Gray*, 134 Ill. 550, 25 N. E. 843, 23 Am. St. Rep. 696; *Shufeldt v. Buck-*

ley, 45 Ill. 223; *White v. Primm*, 36 Ill. 416; *Galena & C. U. R. Co. v. Pound*, 22 Ill. 399; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439. **Ind.**—*Smith v. Clausmeier*, 136 Ind. 115, 35 N. E. 904, 43 Am. St. Rep. 311; *State v. Rogers*, 131 Ind. 453, 31 N. E. 199; *Lewis v. Rowland*, 131 Ind. 103, 29 N. E. 922; *Hopper v. Lucas*, 86 Ind. 43; *Wilkinson v. Moore*, 79 Ind. 397. **Ia.**—*Anderson v. Wilson*, 142 Iowa 158, 120 N. W. 677; *State v. Waterman*, 79 Iowa 360, 44 N. W. 677; *Goodrich v. Brown*, 30 Iowa 291; *Mills v. Hamaker*, 11 Iowa 206; *Rowan v. Lamb*, 4 Greene 468. **Ky.**—*Anderson's Committee v. Anderson*, 161 Ky. 18, 170 S. W. 213, L. R. A. 1915C, 581; *Taylor v. Moore*, 112 Ky. 330, 65 S. W. 612; *Triplett v. Waring*, 5 Dana 448; *Grant v. Tams*, 7 Mon. 218; *Tompert v. Lithgow*, 1 Bush 176. **Me.**—*State v. Pownal*, 10 Me. 24. **Md.**—*Mueller v. Michaels*, 101 Md. 188, 60 Atl. 485; *Shivers v. Wilson*, 5 Har. & J. 130, 9 Am. Dec. 497; *Wickes v. Caulk*, 5 Har. & J. 36. **Mass.**—*Ros-siter v. Peck*, 3 Gray 538; *Piper v. Pearson*, 2 Gray 120, 61 Am. Dec. 438; *Smith v. Rice*, 11 Mass. 507, 513; *Albee v. Ward*, 8 Mass. 79, 86; *Hunt v. Hapgood*, 4 Mass. 117, 122; *Com. v. Hearne*, 2 Mass. 102. **Mich.**—*Gadsby v. Stimer*, 79 Mich. 260, 44 N. W. 606; *Denison v. Smith*, 33 Mich. 155; *Goodrich v. Burdick*, 26 Mich. 39; *Platt v. Stewart*, 10 Mich. 260; *Rash v. Whitney*, 4 Mich. 495. **Minn.**—*Ullman v. Lion*, 8 Minn. 381, 83 Am. Dec. 783. **Miss.**—*Bolivar County v. Coleman*, 71 Miss. 832, 15 So. 107; *Scott v. Porter*, 44 Miss. 364; *Cannon v. Cooper*, 39 Miss. 784, 80 Am. Dec. 101; *Cason v. Cason*, 31 Miss. 578; *Byrd v. State*, 1 How. 163. **Mo.**—*Davidson v. Schmidt*, 256 Mo. 18, 164 S. W. 577; *Rohland v. St. Louis, etc. R. Co.*, 89 Mo. 180, 1 S. W. 147; *Haggard v. Atlantic, etc. R. Co.*, 63 Mo. 302; *Gibson v. Vaughan*, 61 Mo. 418; *Jeffries v. Wright*, 51 Mo. 215, 221; *Edmonson v. Kite*, 43 Mo. 176; *Hans-berger v. Pacific R. Co.*, 43 Mo. 196;

the peace,⁶⁸ though the legislature may change this rule and declare the

State *v.* Metzger, 26 Mo. 65; State *v.* Forest, 177 Mo. App. 245, 162 S. W. 706; State *v.* Wiethaupt, 165 Mo. App. 634, 148 S. W. 429. **Mont.**—Deer Lodge *v.* At, 3 Mont. 168. **Neb.**—Kuker *v.* Beindorff, 63 Neb. 91, 88 N. W. 190; Muller *v.* Plue, 45 Neb. 701, 64 N. W. 232. **N. H.**—Manning *v.* Cogan, 49 N. H. 331; Eastern R. Co. *v.* Concord, etc. R. Co., 47 N. H. 108; Tebbetts *v.* Tilton, 31 N. H. 273; Morse *v.* Presby, 25 N. H. 299; Gorriell *v.* Whittier, 3 N. H. 265. **N. J.**—State *v.* Jersey City, 36 N. J. L. 188; Hopper *v.* Chamberlain, 34 N. J. L. 220; State *v.* Union, 32 N. J. L. 343; Nixon *v.* Ruple, 30 N. J. L. 58; Carron *v.* Martin, 26 N. J. L. 594, 69 Am. Dec. 584; Perrine *v.* Farr, 22 N. J. L. 356. **N. Y.**—Frees *v.* Ford, 6 N. Y. 176, 1 Code Rep. (N. S.) 413; People *v.* Koeber, 7 Hill 59; Seaman *v.* Duryea, 10 Barb. 523; Hart *v.* Seixas, 21 Wend. 40; Bowman *v.* Seaman, 152 App. Div. 690, 137 N. Y. Supp. 568; Edgerley *v.* Blackburn, 140 App. Div. 419, 125 N. Y. Supp. 353; Maltin *v.* Royal Petticoat Co., 147 N. Y. Supp. 545. **N. C.**—State *v.* Magness, 26 N. C. 217. **Ohio.**—Reynolds *v.* Stansbury, 20 Ohio 344, 55 Am. Dec. 459; Edmiston *v.* Edmiston, 2 Ohio 251. **Ore.**—Dean *v.* Washington Nav. Co., 59 Ore. 91, 115 Pac. 284; Tompkins *v.* Clackamas, 11 Ore. 364, 4 Pac. 1210; Dick *v.* Wilson, 10 Ore. 490; State *v.* Officer, 4 Ore. 180; Johns *v.* Marion County, 4 Ore. 46. **Pa.**—State *v.* Hinchman, 27 Pa. 479; Camp *v.* Wood, 10 Watts 118. **P. I.**—Aznar *v.* Rodriguez, 6 Phil. Isl. 659. **S. C.**—Harvey *v.* Huggins, 2 Bailey L. 252; McKenzie *v.* Ramsay, 1 Bailey L. 457. **Tenn.**—Brien *v.* Hart, 6 Humph. 131; Kilcrease's Heirs *v.* Blythe, 6 Humph. 378; Walker *v.* Wynne, 3 Yerg. 62; Crockett *v.* Parkison, 3 Coldw. 219; Hamilton *v.* Burum, 3 Yerg. 355; Hopper *v.* Fisher, 2 Head 253. **Tex.**—Guilford *v.* Love, 49 Tex. 715; Walker *v.* Myers, 36 Tex. 203, 252; Easley *v.* McClinton, 33 Tex. 288; Withers *v.* Patterson, 27 Tex. 491, 86 Am. Dec. 643; Bohl *v.* Brown, 2 Wills. Civ. Cas., §538; Laeroix *v.* Evans, 1 White & W. Civ. Cas., §673. **Utah.** Matter of Wiseman, 1 Utah 39. **Vt.** Hewes *v.* Andover, 16 Vt. 510; Walbridge *v.* Hall, 3 Vt. 114; Hendrick *v.* Cleaveland, 2 Vt. 329; Clapp *v.* Beardsley, 1 Aik. 168. **Va.**—Western Union

Tel. Co. *v.* Bright, 90 Va. 778, 20 S. E. 146; Devaughn *v.* Devaughn, 19 Gratt. (60 Va.) 556; Ballard *v.* Thomas, 19 Gratt. (60 Va.) 14; Hill *v.* Pride, 4 Call (10 Va.) 107. **W. Va.**—Yates *v.* Taylor County Ct., 47 W. Va. 376, 35 S. E. 24; Mayer *v.* Adams, 27 W. Va. 244. **Wis.**—Crawford *v.* La Clere, 3 Pin. 325, 4 Chand. 56; Bridge *v.* Bracken, 3 Pin. 73, 3 Chand. 75. **Eng.**—Ladbroke *v.* James, Willes 199, 125 Eng. Reprint 1130; Rex *v.* Liverpool, 4 Burr. 2244, 98 Eng. Reprint 170; Dempster *v.* Purnell, 3 Man. & G. 375, 42 E. C. L. 201, 133 Eng. Reprint 1189; Rowland *v.* Veale, 1 Cowp. 19, 98 Eng. Reprint 944; Brown *v.* Compton, 8 T. R. 424, 431, 101 Eng. Reprint 1469; Davison *v.* Gill, 1 East 64, 71, 102 Eng. Reprint 25; Taylor *v.* Clemson, 11 Cl. & F. 610, 8 Jur. 833, 8 Eng. Reprint 1233. **Can.**—Renaud *v.* Thibert, 27 Ont. L. 57, 3 Ont. W. N. 1649, 22 Ont. W. R. 923; Beaton *v.* Sjolander, 9 Brit. Col. 439.

See *supra*, III, D, 1, b; and 15 STANDARD PROC. 433, et seq.

[a] **Though Such Jurisdictional Facts Did in Truth Actually Exist.**—Such judgments could not be made valid by proving afterwards, when they were relied on, that such jurisdictional facts existed, though they had not been made to appear on the face of the record. Mayer *v.* Adams, 27 W. Va. 244, 256.

[b] **Conversely** if the facts, which give the inferior court jurisdiction, are a part of the record, the decisions generally agree that this will prevent the judgment from being a nullity, even though in point of fact these jurisdictional facts had no existence. Mayer *v.* Adams, 27 W. Va. 244, 256, and then all reasonable intendments will be made in favor of the regularity of the sentences or decrees of such court. Commissioner's Court *v.* Thompson, 18 Ala. 694; Key *v.* Vaughn, 15 Ala. 497.

[c] **The record need not necessarily show the evidence** upon which the court acted. Trice *v.* Crittenden, 7 Ark. 159.

[d] **The Jurisdictional Facts Need Not Necessarily Appear from the Pleadings.**—It suffices that the jurisdictional facts appear from the evidence. Martin *v.* Tellotte, 115 La. 769, 40 So. 41.

68. State *v.* Metzger, 26 Mo. 65.

contrary rule to prevail, without any infringement of constitutional rights.⁶⁹

This rule is applicable to the question of jurisdiction as to the subject-matter, but not as to the person,⁷⁰ and ordinarily includes all courts not of record,⁷¹ such as justice's courts,⁷² as well as quasi-judicial tribunals with special power for adjudicating in particular cases.⁷³ Probate courts are sometimes considered as courts of special and limited jurisdiction within the above rules, depending somewhat upon the matter before the court;⁷⁴ but such courts are generally considered as courts of general jurisdiction, whose jurisdictional facts need not appear of record.⁷⁵

69. *Angell v. Angell*, 14 R. I. 541; *Rutter & Co. v. Sullivan*, 25 W. Va. 427.

[a] Such a provision takes away no rights of the defendant, and is the exercise of a power regulating the rules of evidence. *Rutter & Co. v. Sullivan*, 25 W. Va. 427.

70. *Cason v. Cason*, 31 Miss. 578.

71. *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742.

72. See the following: *Ark.*—*Dunagan v. Shaffer*, 48 Ark. 476, 3 S. W. 522; *Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550; *Reeves v. Clarke*, 5 Ark. 27. *Cal.*—*Rowley v. Harvard*, 23 Cal. 401; *Lowe v. Alexander*, 15 Cal. 296; *Van Etten v. Jilson*, 6 Cal. 19. *Ill.* *Evans v. Bouton*, 85 Ill. 579. *Ind.* *Hopper v. Lucas*, 86 Ind. 43; *Wilkinson v. Moore*, 79 Ind. 397; *Jolly v. Ghering*, 40 Ind. 139; *Willey v. Strickland*, 8 Ind. 453; *Straughan v. Inge*, 5 Ind. 157. *Ky.*—*Stewart v. Thomson*, 97 Ky. 575, 31 S. W. 133, 53 Am. St. Rep. 431, 36 L. R. A. 582. *Me.*—*Inman v. Whiting*, 70 Me. 445; *State v. Hall*, 49 Me. 412; *Lane v. Crosby*, 42 Me. 327; *Matter of Hersom*, 39 Me. 476; *State v. Hartwell*, 35 Me. 129. *Md.* *Fahey v. Mottu*, 67 Md. 250, 10 Atl. 68. *Mass.*—*Com. v. Fay*, 126 Mass. 235. *Mich.*—*Wight v. Warner*, 1 Dougl. 384. *Mo.*—*Kellogg v. Linger*, 60 Mo. App. 571; *McQuoid v. Lamb*, 19 Mo. App. 153. *Nev.*—*Victor Mill & M. Co. v. Justice Court*, 18 Nev. 21, 1 Pac. 831; *Little v. Currie*, 5 Nev. 90; *McDonald v. Prescott*, 2 Nev. 109, 90 Am. Dec. 517; *Paul v. Armstrong*, 1 Nev. 82; *Mallett v. Uncle Sam Gold*, etc. Min. Co., 1 Nev. 188, 90 Am. Dec. 484. *N. Y.*—*Stone v. Miller*, 62 Barb. 430. *Tenn.*—*Gibbs v. Bourland*, 6 Yerg. 481.

See 15 STANDARD PROC. 434; and gen-

erally the title "Justices of the Peace."

73. *Cal.*—*Hahn v. Kelley*, 34 Cal. 391, 94 Am. Dec. 742, board of supervisors. *Ky.*—*Tompert v. Lithgow*, 1 Bush 176. *N. J.*—*Carron v. Martin*, 26 N. J. L. 594, 69 Am. Dec. 584; *Obert v. Hammel*, 18 N. J. L. 73.

See also 15 STANDARD PROC. 434, et seq.

74. See the following: *Ala.*—*Goodwin v. Sims*, 86 Ala. 102, 5 So. 587, 11 Am. St. Rep. 21; *Bruce's Exrx. v. Strickland's Admr.*, 47 Ala. 192. *Ark.* *Beakley v. Ford*, 123 Ark. 383, 185 S. W. 796; *St. Louis, I. M. & S. Ry. Co. v. Dudgeon*, 64 Ark. 108, 110, 40 S. W. 786; *Morris v. Dooley*, 59 Ark. 483, 487, 28 S. W. 30, 430; *Hindman v. O'Connor*, 54 Ark. 627, 643, 16 S. W. 1052, 13 L. R. A. 490; *Gibney v. Crawford*, 51 Ark. 34, 9 S. W. 309. *Conn.* *Sears v. Terry*, 26 Conn. 273; *Wattles v. Hyde*, 9 Conn. 10. *Me.*—*Fowle v. Coe*, 63 Me. 245; *Overseers of Poor v. Gullifer*, 49 Me. 360, 77 Am. Dec. 265. *Mass.*—*Sigourney v. Sibley*, 21 Pick. 101, 32 Am. Dec. 248; *Coffin v. Cottle*, 9 Pick. 287; *Hathaway v. Clark*, 5 Pick. 490; *Smith v. Rice*, 11 Mass. 507; *Cutts v. Haskins*, 9 Mass. 543; *Sumner v. Parker*, 7 Mass. 79, 82. *Miss.*—*Root v. McFerrin*, 37 Misc. 17, 75 Am. Dec. 49; *Commercial Bank v. Martin*, 9 Smed. & M. 613; *Planters' Bank v. Johnson*, 7 Smed. & M. 449. *Vt.*—*Holden v. Scanlin*, 30 Vt. 177.

See also 15 STANDARD PROC. 437; and generally the title "Probate Courts."

75. See the following: *Ala.*—*Sims v. Waters*, 65 Ala. 442. *Ark.*—*Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183; *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217. *Ga.* *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488. *Ill.*—*People v. Medart*, 166

3 Pleading Jurisdictional Facts.—This subject is treated elsewhere in this work.⁷⁶

4. Presumption as to Jurisdiction.—This subject is fully treated elsewhere.⁷⁷

E. WHERE COURT HAS JURISDICTION OF PART OF DEMAND ONLY. Where a court has jurisdiction of the general class of actions to which the proceeding belongs, and of the parties thereto and has the power to grant the principal relief sought, the mere fact that relief beyond the jurisdiction of the court is sought does not oust the jurisdiction of the court of the entire case.⁷⁸ Nor does the mere fact that a party asks a greater measure of relief than can be given without personal service deprive the court of jurisdiction to grant such relief as is proper under constructive notice.⁷⁹ If a court renders a judgment or decree which is within its authority as to part only, but includes also that which is not within its power, the excess will be a nullity, and if the valid and invalid parts are independent of each other, the whole will not be void, but only such part as is in excess of the powers of the court.⁸⁰

Ill. 348, 46 N. E. 1095, *affirming* 63 Ill. App. 111; *Seelye v. People*, 146 Ill. 189, 32 N. E. 458 (*affirming* 40 Ill. App. 449); *Bostwick v. Skinner*, 80 Ill. 147; *People v. Gray*, 72 Ill. 343; *Barnett v. Wolf*, 70 Ill. 76; *Moffitt v. Moffitt*, 69 Ill. 641. **Ind.**—*Babbitt v. Doe ex dem. Brush*, 4 Ind. 355; *Doe v. Harvey*, 5 Blackf. 487, 3 Ind. 104; *Doe v. Wise*, 5 Blackf. 402; *Doe v. Smith*, 1 Ind. 451. **Miss.**—*Gillespie v. Hauenstein*, 72 Miss. 838, 17 So. 602; *State v. Bowen*, 45 Miss. 347; *Scott v. Porter*, 44 Miss. 364; *Pollock v. Buie*, 43 Miss. 140; *Donald v. McWhorter*, 40 Miss. 231; *Frisby v. Harrison*, 30 Miss. 452. **Mo.**—*Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Murphy v. De France*, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861; *Rowden v. Brown*, 91 Mo. 429, 4 S. W. 129; *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86. **N. H.** *Kimball v. Fisk*, 39 N. H. 110, 75 Am. Dec. 213. **Nev.**—*Deegan v. Deegan*, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742. **N. Y.**—*Harrison v. Clark*, 87 N. Y. 572; *Bearns v. Gould*, 77 N. Y. 455; *Jackson v. Crawford*, 12 Wend. 533; *Murzynowski v. Delaware, etc. R. Co.*, 15 N. Y. Supp. 841, 39 N. Y. St. 299. **Ohio.**—*Cincinnati, etc. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464; *King v. Bell*, 36 Ohio St. 460; *Shroyer v. Richmond*, 16 Ohio St. 455. **Pa.** *Singerly v. Swain*, 33 Pa. 102, 75 Am. Dec. 581. **Tenn.**—*Townsend v. Townsend*, 4 Coldw. 70, 94 Am. Dec. 185. **Tex.**—*Lyne v. Sanford*, 82 Tex. 58, 19

S. W. 847, 27 Am. St. Rep. 852; *Murchison v. White*, 54 Tex. 78; *Giddings v. Steele*, 28 Tex. 732, 91 Am. Dec. 336. **Vt.**—*Holden v. Scanlin*, 30 Vt. 177. **Va.**—*Schultz v. Schultz*, 10 Gratt. (51 Va.) 358, 60 Am. Dec. 335.

See also 15 STANDARD PROC. 435, et seq., and the title "Probate Courts."

[a] In regard to minors, just as in matters of general equity, the chancery court exercises a jurisdiction conferred by the constitution—a general jurisdiction—and its records need not show the facts authorizing the exercise of such jurisdiction in a particular case. *Ames v. Williams*, 72 Miss. 760, 17 So. 762.

[b] Orphan's court in New Jersey is not a court of limited jurisdiction. *Newby v. Blakely*, 85 N. J. L. 728, 90 Atl. 318; *Obert v. Hammel*, 18 N. J. L. 73; *Pittenger's Admr. v. Pittenger*, 3 N. J. Eq. 156.

Necessity for recital where court one of general jurisdiction, see *supra*, III, D, 1, a.

76. See 6 STANDARD PROC. 674.

77. See generally 15 STANDARD PROC. 60, 426, et seq., and 9 ENCY. OF EV. 927, 933, et seq.

78. **Ind.**—*McLeod v. Applegate*, 127 Ind. 349, 26 N. E. 830; *Levi v. Hare*, 8 Ind. App. 571, 36 N. E. 369. **La.** *State v. Ogden*, 35 La. Ann. 738; *Taylor v. Hollander*, 4 Mart. (N. S.) 535. **Okla.** *Antene v. Jensen*, 148 Pac. 727.

79. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

80. *American Ins. Co. v. Fisk*, 1

F. DUTY TO EXERCISE JURISDICTION.⁸¹—Where the exercise of jurisdiction is discretionary with the court, it may refuse to entertain jurisdiction where sufficient reasons for not assuming it are shown;⁸² and a court which is not in a position to do complete justice between the parties should refuse to exercise its jurisdiction.⁸³ But a court cannot decline to exercise a jurisdiction imposed upon it, if the cause is properly before the court.⁸⁴ Nor has it a right to prevent suitors before it from insisting on its retention of jurisdiction in cases not properly removed from it.⁸⁵ It is bound to solve doubtful questions

Paige (N. Y.) 90; *Roth v. Union Nat. Bank* (Okla.), 160 Pac. 505. See also 15 STANDARD PROC. 421, et seq.

Authority of court after determination that it has no jurisdiction, see *supra*, III, B, 2.

81. Acquisition and divestiture of jurisdiction generally, see *infra*, IV.

Jurisdiction by consent or waiver, see *infra*, IV, C.

Where fraud in obtaining jurisdiction, see *infra*, IV, E.

82. Ala.—*Sessoms Grocery Co. v. International Sugar Feed Co.*, 188 Ala. 232, 66 So. 479. Cal.—*People v. Kern*, 47 Cal. 205. Mo.—*State v. Branch*, 28 Mo. App. 131. Tex.—*Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349. Can.—*In re Knox*, 17 Ont. L. R. 175, 12 Ont. W. R. 499.

[a] Although the highest court of a state has original jurisdiction of the cause, where its jurisdiction is appellate mostly, it is not bound to exercise such original jurisdiction, where the suit could with more propriety be prosecuted in a lower court. *People v. Blackman*, 1 Denio (N. Y.) 632. As to original jurisdiction of appellate courts, see *infra*, VI, C.

[b] But the courts will not drive a party to seek redress in the courts of another state, when a less circuitous and better remedy can be given in our own courts at less cost. *Richardson v. Williams*, 56 N. C. 116. Exercise of jurisdiction upon causes of action arising beyond the state, see *infra*, X, D.

83. *Bank of North America v. Rindge*, 154 Mass. 203, 27 N. E. 1015, 26 Am. St. Rep. 240, 13 L. R. A. 56; *Post v. Toledo, etc. R. Co.*, 144 Mass. 341, 11 N. E. 540, 59 Am. Rep. 86.

[a] Outcome of Suit Cannot Affect. Jurisdiction is not to be declined merely because it is not foreseen with certainty that the outcome will help the

plaintiff, however. *Geneva Furniture Mfg. Co. v. Karpén & Bros.*, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. ed. 1295.

[b] Peril of Contrary Decree in Another State.—A court whose decree will leave a party in peril of being subjected to another and, maybe, directly opposite decree or judgment in regard to the same property, in a different jurisdiction, is not in a condition to do complete justice in the case, and should, therefore, decline to entertain jurisdiction. *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416.

84. U. S.—*Raich v. Truax*, 219 Fed. 273. Ark.—*Ex parte Jones*, 2 Ark. 93. Cal.—*Dunphy v. Belden*, 57 Cal. 427; *Hyatt v. Allen*, 54 Cal. 353. Fla.—*McNealy v. Gregory*, 13 Fla. 417, 435. Idaho.—*State v. Raaf*, 16 Idaho 411, 101 Pac. 747. Mo.—*State ex rel. York v. Locker*, 266 Mo. 384, 181 S. W. 1001; *State ex rel. Pacific Mut. L. Ins. Co. v. Grimm*, 239 Mo. 135, 143 S. W. 483; *Vail v. Dinning*, 44 Mo. 210. N. Y.—*Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555.

[a] Cannot refuse to try until judgment in another and separate action in another state. *Dunphy v. Belden*, 54 Ill. 427.

[b] A federal court after obtaining jurisdiction of a cause cannot turn a case over for adjudication to a state court subsequently intervening. *McClellan v. Carland*, 217 U. S. 268, 282, 30 Sup. Ct. 501, 54 L. ed. 762; *Chicot v. Sherwood*, 148 U. S. 529, 534, 13 Sup. Ct. 695, 37 L. ed. 546. As to federal courts, see the title "United States Courts."

85. *Mabley v. Judge of Superior Court*, 41 Mich. 31, 37, 1 N. W. 985; *Murphy v. Granger*, 32 Mich. 358; *Granger v. Wayne Circuit Judge*, 27 Mich. 406.

As to removal of causes, see generally the title "Removal of Causes."

of law, and cannot refer them to the legislature.⁸⁶

IV. ACQUISITION AND DIVESTITURE OF JURISDICTION.

A. SOURCES OF JURISDICTION. — 1. In General. — Jurisdiction is not self-creative, and the law establishing a court is the sole warrant for its authority, beyond which it cannot legally go.⁸⁷ In other words, courts have no jurisdiction other than such as are conferred upon them by law,⁸⁸ jurisdiction being neither a matter of sympathy nor favor on the one hand,⁸⁹ or governed by the merits of the case on the other hand.⁹⁰ Jurisdiction over the subject-matter is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers or in authority specially conferred.⁹¹ It is always conferred by law and does not rest solely upon the averments in a pleading,⁹² though such are taken into consideration in determining whether the court has jurisdiction.⁹³

Courts of statutory origin only can exercise such powers only as are directly conferred upon them by legislative enactment, and such

86. *Terrel's Heirs v. Cropper*, 9 Mart. O. S. (La.) 353, 13 Am. Dec. 309.

87. *Howard v. Lacroix*, McGloin (La.) 16.

[a] **The exercise of a power by a court** (1) does not prove its rightful exercise (*Ex parte Woods*, 3 Ark. 532), (2) or its rightful existence (*Voorhees v. The Bank of the United States*, 10 Pet. [U. S.] 450, 9 L. ed. 490), (3) especially where the exercise of jurisdiction in the particular case was not challenged (*Tefft, Weller & Co. v. Munshuri*, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. ed. 118), (4) neither custom, prescription, long usage, or precedent can give a court jurisdiction independent of statutory provisions. *Clarke v. Com.*, 1 Munf. (15 Va.) 160.

[b] **Jurisdiction of an inferior court cannot be established by its assumption thereof**, no matter how long persisted in. *Van Loon v. Lyons*, 61 N. Y. 22.

88. **U. S.**—*Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. ed. 931. **Cal.** *Hyatt v. Allen*, 54 Cal. 353. **Okla.** *Ozark Oil Co. v. Berryhill*, 43 Okla. 523, 143 Pac. 173. **P. R.**—*Bayron v. Garcia*, 17 Porto Rico 512; *Ex parte Bou*, 7 Porto Rico 133. **Tenn.**—*Tipton v. Harris*, Peck 414. **Tex.**—*Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 295; *Messner v. Giddings*, 65 Tex. 301, 309; *Cowan v. Nixon*, 28 Tex. 230. **Va.** *Thornton v. Smith*, 1 Wash. 81. **Wash.** *Mann v. Wright*, 81 Wash. 358, 142 Pac. 697. **W. Va.**—*Norfolk, etc. R. Co.*

v. Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414.

[a] **Authority to transfer a case** is not authority to confer jurisdiction. The conferring of jurisdiction belongs to the law making power of the state. If, without the express power to transfer, a court should find itself in possession of a case of which it had no jurisdiction, the only thing it could do would be to dismiss it or strike it from its docket. *State ex rel. Dunham v. Nixon*, 232 Mo. 98, 102, 133 S. W. 336. As to transfer of causes, see generally the title "**Transfer of Causes.**"

89. *Reid v. United States*, 211 U. S. 529, 29 Sup. Ct. 171, 53 L. ed. 313. the courts are bound to take notice of the limits of their authority, and it is no part of the defendant's duty to help in obtaining an unauthorized judgment by surprise.

90. *People v. Dist. Court*, 37 Colo. 440, 86 Pac. 322; *Petsch v. Mowry*, 1 Cin. Superior R. (Ohio) 36.

Tests of jurisdiction, see generally *supra*, III, C.

91. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931; *Hall v. Hall*, 12 W. Va. 1, 15. See also *infra*, IV, A, 3.

92. **Cal.**—*Grannis v. Superior Ct.*, 146 Cal. 245, 79 Pac. 891, 106 Am. St. Rep. 23. **Ill.**—*Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458. **N. C.** *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708.

93. See *supra*, III, C.

as may be incidentally necessary to the execution of these powers.⁹⁴ They cannot assume jurisdiction not granted,⁹⁵ and have no authority to go beyond the limits of the law of their creation,⁹⁶ no matter how urgent summary action may seem.⁹⁷ If the jurisdiction given to a court by the statute is a special and limited jurisdiction, it cannot be enlarged by intendment so as to embrace objects not expressed;⁹⁸ but must be restricted to the authority specially conferred, in the cases expressly provided for.⁹⁹

The state legislatures have no power to lessen or increase the jurisdiction of the federal courts,¹ and conversely, the United States has no power to enlarge the jurisdiction of the state courts;² nor can the United States coerce it to exercise any judicial powers but those sanctioned by the laws and constitutions of the state,³ though if congress vests the jurisdiction of violations of their laws in the state courts, and this jurisdiction is within the constitution and laws of the state, the defendant cannot object to the want of jurisdiction.⁴

2. Inherent Jurisdiction.⁵ — Mere averment or assertion of a claim or demand will not create a cause of action which the court can adjudicate, when neither law nor equity recognize that the facts upon which the claim or demand is based furnish the basis for any relief.⁶

3. Constitutional and Statutory Provisions. — a. *In General.* Under our system of constitutional government, the authority of state courts to take jurisdiction of the subject-matter of an action is derived from an express grant thereof in the constitution of the state

94. *Smith v. Howard*, 86 Me. 203, 29 Atl. 1008, 41 Am. St. Rep. 537, unless authority for the exercise of jurisdiction in a given case can be found in the statute, given either expressly or by implication, the proceeding is void.

Necessity for court having jurisdiction, see generally *supra*, III.

As to constitutional and statutory provisions, see *infra*, IV, A, 3.

95. **U. S.**—*United States v. Hudson*, 7 Cranch 32, 3 L. ed. 259. **Ark.**—*Ex parte Jones*, 2 Ark. 93. **Cal.**—*Hyatt v. Allen*, 54 Cal. 353. **Fla.**—*McNealy v. Gregory*, 13 Fla. 417. **La.**—*Chiapella v. Moni*, 5 La. 380. **Mo.**—*Vail v. Dinning*, 44 Mo. 210; *O'Fallon v. Elliott*, 1 Mo. 364. **Tenn.**—*Hartley v. United States*, 3 Hayw. 45. **Tex.**—*Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

[a] **Rule of court cannot confer jurisdiction** where none exists by law. **La.**—*Bell v. O'Rourke*, 11 La. 124, wherein rule of court sought to confer appellate jurisdiction. **Ohio.**—*Dayton, etc. R. Co. v. Marshall*, 11 Ohio St. 497. **W. Va.**—*Clark v. Lee*, 85 S. E. 64.

Validity of judgment where jurisdiction exceeded, see generally 15 STANDARD PROC. 421, et seq.

96. *McNealy v. Gregory*, 13 Fla. 417; *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708.

97. *People v. District Court*, 37 Colo. 440, 86 Pac. 322.

98. *Baker v. Chisholm*, 3 Tex. 157.

As to courts of limited and inferior jurisdiction, see generally *infra*, VIII; also the title "Justices of the Peace."

99. *Baker v. Chisholm*, 3 Tex. 157.

1. *Simon v. Southern R. Co.*, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. ed. 492.

As to jurisdiction of federal courts, see generally the title "United States Courts."

2. *United States v. Campbell*, Tapp. 29.

3. *Hartley v. United States*, 3 Hayw. (Tenn.) 45.

4. *Hartley v. United States*, 3 Hayw. (Tenn.) 45.

5. **Distinguished from powers**, see *supra*, I, K, 4.

6. *Western U. Tel. Co. v. Arnold*, 97 Tex. 365, 77 S. W. 249.

and laws made in harmony with the provisions thereof,⁷ and the common law so far as it is not repugnant to, or in conflict with the constitution and laws of the United States and of the particular state.⁸ Accordingly, unless authority for the court to assume jurisdiction of the particular matter under consideration is found in the constitution and the statutes enacted in conformity therewith,⁹ or the common law,¹⁰ not necessarily by some express provision or enactment, but by some provision where the right to exercise the power invoked is fairly implied, or where it may be necessarily inferred from the nature and constitution of the tribunal itself,¹¹ the authority does not exist. Under constitutional and statutory provisions giving a court equity jurisdiction, reference must be had to the equity jurisdiction which the high courts of chancery in England exercised.¹²

b. *Validity of Statutes Conferring Jurisdiction.*—Since a court's jurisdiction is necessarily dependent upon the legislative power of the sovereign under whose authority it is constituted,¹³ when the latter ceases the former must fail with it.¹⁴ Where the jurisdiction of the

7. See the constitutions of the various states and the following cases: **Cal.**—*Zander v. Coe*, 5 Cal. 230; *Caulfield v. Hudson*, 3 Cal. 389. **Fla.**—*McNealy v. Gregory*, 13 Fla. 417. **Ill.**—*Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458. **Kan.**—*In re Jewett*, 69 Kan. 830, 77 Pac. 567. **Miss.**—*McWillie v. Van Vacter*, 35 Miss. 428, 72 Am. Dec. 127. **Mo.**—*State ex rel. Dunham v. Nixon*, 232 Mo. 98, 133 S. W. 336; *Vail v. Dinning*, 44 Mo. 210. **N. M.**—*State ex rel. Harvey v. Medler*, 19 N. M. 252, 142 Pac. 376. **N. Y.**—*Flynn v. Central R. Co. of N. J.*, 142 N. Y. 439, 37 N. E. 514. **N. C.**—*Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; *Rencher v. Anderson*, 93 N. C. 105. **N. Y.**—*Flynn v. Central R. Co.*, 142 N. Y. 439, 37 N. E. 514. **Ohio.**—*Smith v. Western Union Tel. Co.*, 79 Ohio St. 89, 86 N. E. 478, 128 Am. St. Rep. 675, *affirming* 7 N. P. (N. S.) 609 (probate courts); *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 60 Am. St. Rep. 691, 36 L. R. A. 254. **Okla.**—*Ozark Oil Co. v. Berryhill*, 43 Okla. 523, 143 Pac. 173. **Tex.**—*Messner v. Giddings*, 65 Tex. 301; *Cowan v. Nixon*, 28 Tex. 230. **Utah.**—*Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462. **Va.**—*Teel v. Yancey*, 23 Gratt. (64 Va.) 691; *Griffin's Exr. v. Cunningham*, 20 Gratt. (61 Va.) 31. **Wash.**—*In re Waugh*, 32 Wash. 50, 72 Pac. 710; *State v. Superior Ct.*, 14 Wash. 604, 45 Pac. 23, 33 L. R. A. 674; *Howe v. Barto*, 12 Wash. 627, 41 Pac. 908. **Wis.**—*Melia v. Sim-*

mons, 45 Wis. 334, 30 Am. Rep. 746.

8. *Larson v. Salt Lake City*, 34 Utah 318, 324, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

9. **Cal.**—*Arroyo Ditch & Water Co. v. Superior Court*, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91. **Dak.**—*St. Paul, etc. Co. v. Coleman*, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87. **Ind.**—*Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448. **Ky.**—*Phoenix Ins. Co. v. Com.*, 5 Bush 68, 96 Am. Dec. 331. **Me.**—*Soutter v. Atwood*, 34 Me. 153, 56 Am. Dec. 647. **Mo.**—*Vail v. Dinning*, 44 Mo. 210. **N. C.**—*Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. **Tex.**—*Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643. **W. Va.**—*Norfolk & Western R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414.

10. *Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

11. See *infra*, IV, B, 1.

12. *Pasadena v. Superior Ct.*, 157 Cal. 781, 109 Pac. 620, 21 Ann. Cas. 1355; *Bacon v. Bacon*, 150 Cal. 477, 89 Pac. 317; *Rosenberg v. Frank*, 58 Cal. 387; *People v. Davidson*, 30 Cal. 379, 390.

13. *Divine v. Unaka Nat. Bank*, 125 Tenn. 98, 107, 140 S. W. 747, 39 L. R. A. (N. S.) 586. See also *supra*, IV, A, 1; IV, A, 3.

14. *Divine v. Unaka Nat. Bank*, 125 Tenn. 98, 107, 140 S. W. 747, 39 L. R. A. (N. S.) 586.

courts is governed by constitutional provisions,¹⁵ the legislature cannot limit, abridge or take away the jurisdiction of such constitutional courts:¹⁶ but the legislature may invest such courts with additional jurisdiction,¹⁷ as long as such extension is in harmony with its character and not a usurpation of the constitutional powers of any other court.¹⁸ Where the state constitutions have prescribed the powers of each of the courts created therein and have provided that the legislature may give to certain of these courts additional jurisdiction, such additional jurisdiction may be conferred upon the courts so enumerated;¹⁹ but if no such provision is made in the constitution, the legislature cannot confer upon one of these courts jurisdiction not given it by the constitution.²⁰ Other constitutional provisions providing that specified courts shall have original jurisdiction of certain causes have been construed as not preventing the legislature from conferring concurrent jurisdiction upon another court.²¹ In other states the constitution merely specifies the courts and leaves it to the legislature to prescribe the jurisdiction thereof.²² But except as limited by the federal constitution,²³ and the constitution of the state, the legislature has power to define the jurisdiction of the courts.²⁴

15. See *supra*, IV., A, 3, a.

16. **Ala.**—*State v. Sayre*, 118 Ala. 1, 26, 24 So. 89. **Cal.**—*Zander v. Coe*, 5 Cal. 230. **Ill.**—*People v. Peoria & P. U. R. Co.*, 273 Ill. 440, 113 N. E. 68. **Mich.**—*Atkins v. Boerstler*, 46 Mich. 552, 9 N. W. 850; *People v. Cir. Judge*, 37 Mich. 474. **Miss.**—*Montross v. State*, 61 Miss. 429; *Bank of Mississippi v. Duncan*, 52 Miss. 740. **Mo.** *State ex rel. York v. Locker*, 266 Mo. 384, 391, 181 S. W. 1001; *Vail v. Dinning*, 44 Mo. 210. **Mont.**—*State v. District Court*, 13 Mont. 370, 34 Pac. 298. **N. J.**—*Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 424. **N. Y.**—*Flynn v. Central R. Co.*, 142 N. Y. 439, 37 N. E. 514; *Mussen v. Ausable Granite Works*, 63 Hun 367, 18 N. Y. Supp. 267, 43 N. Y. St. 609. **N. C.**—*Rencher v. Anderson*, 93 N. C. 105. **Ohio.**—See *Union Sav. Bank & Tr. Co. v. Western Union Tel. Co.*, 79 Ohio St. 89, 86 N. E. 478, 128 Am. St. Rep. 675.

17. *State v. District Court*, 13 Mont. 370, 34 Pac. 298; *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 424.

18. *Harris v. Vanderveer's Exr.*, 21 N. J. Eq. 424.

19. *Ex parte Cox*, 44 Fla. 537, 33 So. 509, 61 L. R. A. 734.

20. **U. S.**—*Marbury v. Madison*, 1 Cranch 137, 2 L. ed. 60. **Ark.**—*Ex parte Jones*, 2 Ark. 93. **Cal.**—*Zander v. Coe*, 5 Cal. 230; *Caulfield v. Hudson*, 3 Cal. 389. **Fla.**—*Ex parte Cox*, 44 Fla. 537,

33 So. 509, 61 L. R. A. 734; *Singer Mfg. Co. v. Spratt*, 20 Fla. 122. **Kan.** *Auditor of State v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 7 Am. Rep. 575. **Mo.**—*Vail v. Denning*, 44 Mo. 210. **N. J.** *Flanagan v. Plainfield*, 44 N. J. L. 118. **Tenn.**—*State v. Gannaway*, 16 Lea 124; *State v. Bank of East Tenn.*, 5 Sneed 573. **Tex.**—*Gibson v. Templeton*, 62 Tex. 555; *Ex parte Whitlow*, 59 Tex. 273; *Ex parte Towles*, 48 Tex. 413.

21. **U. S.**—*Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419. **Kan.** *Morris v. Bunyan*, 58 Kan. 210, 48 Pac. 864. **Okla.**—*Burks v. Walker*, 25 Okla. 353, 109 Pac. 544. **Utah.**—*Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935. **Wis.**—*Lamberton v. Pereles*, 87 Wis. 449, 58 N. W. 776, 23 L. R. A. 824.

22. **Ohio.**—*State v. Johnson*, 13 Ohio 176. **Okla.**—*Burks v. Walker*, 25 Okla. 353, 109 Pac. 544. **Tenn.**—*Chattanooga v. Keith*, 115 Tenn. 588, 94 S. W. 62; *McElwee v. McElwee*, 97 Tenn. 649, 37 S. W. 560; *Railway Co. v. Wilson County*, 89 Tenn. 597, 15 S. W. 446. **Utah.**—*Mill v. Brown*, 31 Utah 473, 88 Pac. 609, 120 Am. St. Rep. 935.

23. *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 52 L. ed. 143, *affirming* 73 Ohio St. 1, 75 N. E. 818.

24. **Fla.**—*State v. Hocker*, 35 Fla. 19, 16 So. 614; *Thebaut v. Canova*, 11

B. HOW JURISDICTION IS ACQUIRED.—1. **Generally.**—Jurisdiction may be conferred on a court by necessary implication as effectually as by express terms.²⁵ There is no set form of words required to confer jurisdiction.²⁶ Where a new jurisdiction is created by statute, without prescribing its form of proceeding, such jurisdiction may pursue its own forms and regulations, if not inconsistent with the laws of the land;²⁷ but if the mode of acquiring and exercising that jurisdiction by the court upon which it is conferred is prescribed by statute, a substantial compliance therewith is essential to the validity of the judgment.²⁸

2. **Over the Subject-Matter.**—a. *Court Cannot Act Sua Sponte.* A court cannot act sua sponte; some party must, in some way, call upon it to act.²⁹

b. *Necessity for Action, Suit or Written Pleadings.*—Assuming the court has power to hear and determine the particular case, in order to confer actual jurisdiction of the particular case, or subject-matter thereof, the jurisdictional power of the court must be invoked by such measures and in such manner as is required by the local law of the tribunal,³⁰ and can be invoked only by some method known to the law.³¹ Before jurisdiction may be exercised there must be a cause legally before the court,³² which ordinarily requires its presenta-

Fla. 143, 162. **Ill.**—*Western Stone Co. v. Earnshaw*, 200 Ill. 220, 65 N. E. 661, affirming 98 Ill. App. 538. **Mo.** *State ex rel. Dunham v. Nixon*, 232 Mo. 98, 133 S. W. 336. **Ohio.**—*Travis v. State*, 12 Ohio C. C. (N. S.) 374, affirmed, 82 Ohio St. 439, 92 N. E. 1125.

25. *State v. Slover*, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; *Larson v. Salt Lake City*, 34 Utah 318, 324, 97 Pac. 483, 23 L. R. A. (N. S.) 462.

26. *State v. Slover*, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102.

27. *Pilotage Comrs. v. Low*, R. M. Charl. (Ga.) 298.

28. **U. S.**—*Williamson v. Berry*, 8 How. 495, 12 L. ed. 1170. **Nev.**—*Paul v. Armstrong*, 1 Nev. 82. **N. Y.**—*In re Valentine*, 72 N. Y. 184, 3 Abb. N. C. 285; *Battell v. Torrey*, 65 N. Y. 294; *Stanton v. Ellis*, 12 N. Y. 575, 64 Am. Dec. 512; *People v. Board of Police*, 6 Abb. Pr. 162; *Bloom v. Burdick*, 1 Hill 130, 37 Am. Dec. 299. **Ore.**—*Odell v. Campbell*, 9 Ore. 298. **Va.**—*Coleman v. Virginia Stave & H. Co.*, 112 Va. 61, 70 S. E. 545; *Pulaski v. Stuart*, 28 Gratt. (69 Va.) 872; *Ratcliff v. Polly*, 12 Gratt. (53 Va.) 528.

[a] But whenever a mode of acquiring jurisdiction, not in accordance with the general course of the common law, has been prescribed by statutes, that

mode must be strictly followed. *Willamette Real Estate Co. v. Hendrix*, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800.

29. **Ill.**—*Johnson v. Miller*, 50 Ill. App. 60. **La.**—*Townsend's Succession*, 37 La. Ann. 114. **Miss.**—*Dowd v. Morgan*, 3 Miss. 587.

Necessity for action, suit or written pleadings, see *infra*, IV, B, 2, b.

30. **U. S.**—*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. **Colo.**—*Morse v. People*, 43 Colo. 118, 95 Pac. 285; *Newman v. Bullock*, 23 Colo. 217, 47 Pac. 379; *Bassick Min. Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. 65. **N. C.** *First Nat. Bank v. Wilson*, 80 N. C. 200. **S. C.**—*Gibbes v. Morrison*, 39 S. C. 369, 17 S. E. 803. **Tenn.**—*Isham v. Sienknecht*, 59 S. W. 779; *Randolph v. Merchants Nat. Bank*, 9 Lea 63.

Court Cannot Act Sua Sponte.—See *supra*, IV, B, 2, a.

31. *City of Indianapolis v. Hawkins*, 180 Ind. 382, 103 N. E. 10. See also *supra*, IV, B, 1.

32. **Cal.**—*Ex parte Cohen*, 6 Cal. 318. **Ia.**—*Holmes v. Hull*, 48 Iowa 177. **Me.** *Hatch v. Allen*, 27 Me. 85, 95.

[a] **Judgment on Counterclaim After Settlement.**—Upon settlement of cause by one defendant and dismissal by plaintiff, the court has no jurisdiction

tion by way of a suit,³³ and not merely by agreement,³⁴ which suit must be commenced in order to enable the court to take any judicial action in the cause,³⁵ in the manner provided for by the statute creating it.³⁶ Ordinarily jurisdiction of the subject-matter is acquired by the filing of a declaration or complaint,³⁷ containing a statement in good faith of a cause of action, which is, on its face, within the jurisdiction of the court,³⁸ whether the claim ultimately be held good or bad;³⁹ but the fact that the petition or complaint fails to state a cause of action,⁴⁰

to render judgment upon a counterclaim thereafter filed, as no action was pending at the time of the filing of the counterclaim. *Holmes v. Hull*, 48 Iowa 177.

33. **Ky.**—*Clay's Admr. v. Edwards' Trustee*, 84 Ky. 548, 554, 2 S. W. 147. **Me.**—*Hatch v. Allen*, 27 Me. 85, 95. **Ohio.**—*Baltimore & O. R. Co. v. Larwill*, 83 Ohio St. 108, 116, 93 N. E. 619, 34 L. R. A. (N. S.) 1195.

[a] **Complaint, Declaration, Petition or Claim Cannot Be Dispensed With.**—*In re Christiansen*, 17 Utah 412, 53 Pac. 1003, 70 Am. St. Rep. 794, 41 L. R. A. 504. See 6 STANDARD PROC. 642.

[b] **The court has no jurisdiction in the case of a mere memorial**, alleging that the acts of co-ordinate branches of the government are irregular, unlawful and unconstitutional, and praying the judgment of the court thereupon, especially when no process connected with the memorial has been served upon anyone adversely interested or otherwise, and no department of the government or officer thereof has appeared voluntarily and claimed to be heard. *Ex parte Davis*, 41 Me. 38.

[c] **The surrogate can no more institute a proceeding than the judge of any other court can institute a suit.** He must wait until some person interested comes before him and, upon proper allegations, invokes the exercise of his jurisdiction; and then he has not the option to exercise it—he must exercise it. *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555.

34. *Hatch v. Allen*, 27 Me. 85, 95.

[a] **Agreed statement must be made in a cause legally before the court in order to authorize the court to take cognizance thereof.** *Hatch v. Allen*, 27 Me. 85, 95. See the title "Agreed Case."

Jurisdiction by consent or waiver, see *infra*, IV, C.

35. *Ex parte Cohen*, 6 Cal. 318.

36. *State v. Wilkins*, 67 N. H. 164, 29 Atl. 693.

37. **Colo.**—*Empire Ranch & Cattle Co. v. Coldren*, 51 Colo. 115, 122, 117 Pac. 1005; *Powell v. Nat. Bank of Com.*, 19 Colo. App. 57, 74 Pac. 536. **Idaho.**—*State v. Raaf*, 16 Idaho 411, 101 Pac. 747. **Ia.**—*Groves v. Richmond*, 56 Iowa 69, 73, 8 N. W. 752. **Wash.**—*Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005; *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205.

See 6 STANDARD PROC. 642, et seq.; also *supra*, III, C.

38. **U. S.**—*Geneva Furniture Mfg. Co. v. Karpen & Bros.*, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. ed. 1295; *The Fair v. Kohler Die & S. Co.*, 228 U. S. 22, 33 Sup. Ct. 410, 57 L. ed. 716. **Cal.**—*In re James' Est.*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60. **N. C.**—*Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578.

39. *Geneva Furniture & Mfg. Co. v. Karpen & Bros.*, 238 U. S. 254, 35 Sup. Ct. 788, 59 L. ed. 1295; *The Fair v. Kohler Die & S. Co.*, 228 U. S. 22, 33 Sup. Ct. 410, 57 L. ed. 716; *In re James' Est.*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60.

40. **Cal.**—*In re James Est.*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60. **Kan.**—*Head v. Daniels*, 38 Kan. 1, 15 Pac. 911; *Rowe v. Palmer*, 29 Kan. 337. **Mo.**—*Winningham v. Trueblood*, 149 Mo. 572, 51 S. W. 399; *Gray v. Bowles*, 74 Mo. 419, 424; *Babb v. Bruere*, 23 Mo. App. 604. **Ore.**—*Altman v. School Dist. No. Six*, 35 Ore. 85, 56 Pac. 291, 76 Am. St. Rep. 468; *Norman v. Zieber*, 3 Ore. 197. **Wis.**—*Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. 662.

[a] **Changing Void Proceeding to Efficacious One.**—The allowing of the insertion of an allegation of the residence of the plaintiff into the complaint in a divorce case was "substantially to change the cause of suit"

or is defectively verified,⁴¹ or does not contain a prayer for relief,⁴² does not deprive the court of jurisdiction, though jurisdiction over the subject-matter of a suit cannot be acquired by a mere amendment subsequent to the final submission of the cause.⁴³ Especially is it true in criminal cases, that jurisdiction can only be acquired in the manner prescribed by law therefor,⁴⁴ and where formal accusation is essential for every trial for crime.⁴⁵ Without it the court acquires no jurisdiction to proceed, even with the consent of the parties.⁴⁶ But the power of a court of superior and general jurisdiction to pronounce judgment, when proceeding according to the course of the common law, does not necessarily depend upon the existence, or the filing of written pleadings by the parties.⁴⁷ Under some statutes the court acquires jurisdiction to determine a matter within its jurisdiction without formal pleadings where the parties in interest appear upon an agreed statement of facts,⁴⁸ or appear and submit their evidence and request the court to adjudicate their rights.⁴⁹

3. Over Persons.—a. *Plaintiff.*—The court acquires jurisdiction of the plaintiff when he applies for its power and assistance to compel the defendant to render him his rights under the law,⁵⁰ and this continues while the suit is pending, but not after judgment rendered;⁵¹ but this aid must be sought according to prescribed forms,⁵² and after invoking the action of the court upon a given state of facts he is

under a statute allowing the court to permit amendments to pleadings and proceedings when they do not substantially change the cause of action or defense, since it changed a void proceeding to something efficacious. *Holton v. Holton*, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779. See generally the title "**Amendments and Jeofails.**"

41. *Frankfurth v. Anderson*, 61 Wis. 107, 20 N. W. 662.

42. *Powell v. Nat. Bank of Com.*, 19 Colo. App. 57, 74 Pac. 536.

43. *Holton v. Holton*, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779.

Time to amend, see generally the title "**Amendments and Jeofails.**"

44. *Colo.*—*Morse v. People*, 43 Colo. 118, 95 Pac. 285. *Ga.*—*Wright v. State*, 16 Ga. App. 216, 84 S. E. 975. *Vt.* *State v. Wakefield*, 60 Vt. 618, 15 Atl. 181.

45. *Morse v. People*, 43 Colo. 118, 95 Pac. 285; *State v. Wakefield*, 60 Vt. 618, 15 Atl. 181.

46. *Morse v. People*, 43 Colo. 118, 95 Pac. 285, and where the law requires a particular form of accusation, that form of accusation is essential.

47. *Johnson v. Miller*, 50 Ill. App. 60.

That judgments must conform to the pleadings, see 15 STANDARD PROC. 38, et seq.

48. *Bedford v. Ruby*, 17 Neb. 97, 22 N. W. 76; *State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905. See generally the title "**Agreed Case.**"

49. *State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905.

50. *Colo.*—*Powell v. Nat. Bank of Com.*, 19 Colo. App. 57, 74 Pac. 536. *Ill.*—*Roby v. South Park Comrs.*, 215 Ill. 200, 74 N. E. 125; *Schroeder v. Merchants' & M. Ins. Co.*, 104 Ill. 71. *Mich.*—*Cofrode v. Circuit Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. *P. R.*—*Matos v. Moris*, 7 Porto Rico 202. *Tex.*—*Glass v. Smith*, 66 Tex. 548, 2 S. W. 195; *Hill v. Osborne*, 60 Tex. 390. *Wis.*—*Comstock v. Boyle*, 134 Wis. 613, 114 N. W. 1110, 126 Am. St. Rep. 1033.

51. *Cline v. Green*, 1 Blackf. (Ind.) 53.

52. *Schroeder v. Merchants & Mechanics' Ins. Co.*, 104 Ill. 71.

estopped to deny that jurisdiction because of the claimed untruthfulness of his representations.⁵³

b. *Defendant.*—(I.) *In General.*—Every state has the right to prescribe the manner in which its own courts shall acquire and exercise jurisdiction over the defendant to a cause,⁵⁴ subject only to constitutional limitations,⁵⁵ which usually make notice to the defendant and an opportunity to be heard an indispensable prerequisite to the exercise of jurisdiction,⁵⁶ even in proceedings in rem;⁵⁷ and if not

53. *Schutte v. Douglas* (Conn.), 97 Atl. 906.

54. *Campbell v. Wilson*, 6 Tex. 379.

55. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. ed. 959; *Furgeson v. Jones*, 17 Ore. 204, 211, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620.

56. See the following: **U. S.**—*Hovey v. Elliott*, 167 U. S. 409, 418, 17 Sup. Ct. 841, 42 L. ed. 215; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Walden's Lessee v. Craig's Heirs*, 14 Pet. 147, 10 L. ed. 393; *Wheeler v. Walton, etc. Co.*, 65 Fed. 720. **Ala.**—*Foster v. Glazener*, 27 Ala. 391. **Cal.**—*First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, Ann. Cas. 626; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Mulligan v. Smith*, 59 Cal. 206; *Altschul v. Polack*, 55 Cal. 633. **Colo.**—*People v. District Court*, 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768. **Conn.**—*Dorrance v. Raynsford*, 67 Conn. 1, 34 Atl. 706, 52 Am. St. Rep. 266. **Ga.** *Comrs. of Pilotage v. Low, R. M. Charl.* 298. **Ind.**—*State v. Ennis*, 74 Ind. 17; *Mitchell's Admr. v. Gray*, 18 Ind. 123. **Kan.**—*Cohen v. Trowbridge*, 6 Kan. 385. **Ky.**—*Jones v. Kenny*, Hard. 96. **La.**—*Slocumb v. Bowie*, 13 La. 10; *Zacharie v. Blandin*, 4 La. 154; *Wall v. Wilson*, 2 La. 169; *Caldwell v. Glenn*, 6 Rob. 9; *McNairy v. Bell*, 5 Rob. 418. **Me.**—*West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730. **Miss.**—*New Orleans, etc. Co. v. Hemphill*, 35 Miss. 17; *Hunt v. Johnson, Freem. Ch.* 282. **Mo.**—*In re Letcher*, 190 S. W. 19; *State ex rel. Deems v. Holtcamp*, 245 Mo. 655, 670, 151 S. W. 153; *State v. Walbridge*, 119 Mo. 383, 394, 24 S. W. 457, 41 Am. St. Rep. 663. **N. H.**—*Moore v. Maryland Casualty Co.*, 73 N. H. 518, 63 Atl. 490, 111 Am. St. Rep. 647. **N. J.**—*Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730, 55 Atl. 997; *Karr*

v. Karr, 19 N. J. Eq. 427. **N. Y.** *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; *White v. Glover*, 138 App. Div. 797, 123 N. Y. Supp. 482. **N. C.**—*Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. **Ohio.**—*Pelton v. Platner*, 13 Ohio 209, 42 Am. Dec. 197; *Laughlin v. Vogelsong*, 5 Ohio Cir. Ct. 407, 3 Ohio Cir. Dec. 200, reversed on another point in 51 Ohio St. 421, 38 N. E. 111. **Ore.**—*Furgeson v. Jones*, 17 Ore. 204, 20 Pac. 842, 11 Am. St. Rep. 808, 3 L. R. A. 620; *Woodward v. Baker*, 10 Ore. 491. **S. C.**—*Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683. **Tenn.**—*Newman v. Campbell*, Mart. & Y. 63. **Tex.**—*Stuart v. Anderson*, 70 Tex. 588, 8 S. W. 295; *Battle, Heck & Co. v. Carter*, 44 Tex. 485; *El Paso & S. W. Co. v. Chisholm* (Tex. Civ. App.), 180 S. W. 156. **Va.**—*Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106; *Underwood v. McVeigh*, 23 Gratt. (64 Va.) 409.

See also *infra*, IV, B, 3, b, (II), (A).

[a] Though attorney appointed by court to represent non-resident, judgment against such party for costs unsecured by a lien is a personal judgment and invalid where non-resident not personally served and there is no voluntary appearance. *Pool v. Lamou* (Tex. Civ. App.), 28 S. W. 363, action for partition of lands.

[b] After striking out appearance of a party (*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914), or refusal to allow an appearance (*Altschul v. Polack*, 55 Cal. 633), the court is without jurisdiction to pass on the right of such party.

57. **U. S.**—*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. **Cal.**—*Mulligan v. Smith*, 59 Cal. 206. **Vt.**—*Woodruff v. Taylor*, 20 Vt. 65. **Va.**—*Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106.

expressly provided for in the statutory provisions is necessarily implied.⁵⁸ Accordingly the legislatures of the various states prescribe the process through which persons or things may be brought within the jurisdiction of the court and subject to its exercise,⁵⁹ and these must be substantially complied with.⁶⁰

(II.) **Service of Process or Appearance.**—(A.) IN ACTIONS IN PERSONAM. "Due process of law" requires that service of process shall always be made,⁶¹ though the form and mode of service of process by which parties defendant are brought into court, whether it be an inferior or superior court, so as to give the court jurisdiction of their persons, are matters of legislative discretion.⁶² Ordinarily, jurisdiction over the defendant is acquired by personal notice or actual service of process as the law provides within the territorial limits of the state,⁶³ unless

See also *infra*, IV, B, 3, b, (II), (B).

[a] This rule is applicable and pertinent whether the proceeding be one before a court of admiralty and prize in an in rem proceeding, or proceedings in rem before a domestic court. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

[b] The seizure in a suit in rem only brings the property seized within the custody of the court and informs the owner of that fact. Where notice is thus given the owner has a right to appear and be heard and hence some notification of the proceedings beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. The manner of notification is immaterial, but the notification itself is indispensable. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

As to proceedings in rem, see generally the title "Proceedings in Rem."

58. *Comrs. of Pilotage v. Low*, R. M. Charl. (Ga.) 298; *State ex rel. Deems v. Holtecamp*, 245 Mo. 655, 670, 151 S. W. 153; *State v. Walbridge*, 119 Mo. 383, 394, 24 S. W. 457, 41 Am. St. Rep. 663.

59. See the statutes, and *Handy v. Ins. Co.*, 37 Ohio St. 366; *Stewart v. Anderson*, 70 Tex. 588, 593, 8 S. W. 295, and generally the title "Process."

60. III.—*Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457. *Minn.*—*D'Autremont v. Anderson Iron Co.*, 104 Minn. 165, 116 N. W. 357, 124 Am. St. Rep. 615, 15 Ann. Cas. 114, 17 L. R. A. (N. S.) 236. *Nev.*—*Paul v. Armstrong*, 1 Nev. 82. *S. D.*—*Lower v. Wilson*, 9 S. D. 252, 68 N. W. 545, 62 Am. St.

Rep. 865. *Tex.*—*Stewart v. Anderson*, 70 Tex. 588, 595, 8 S. W. 295.

See generally the titles "Process;" "Service of Process and Papers."

61. *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402.

See generally the title "Service of Process and Papers."

62. *McCauley v. Fulton*, 44 Cal. 355; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402. See generally the titles "Process;" "Service of Process and Papers."

63. U. S.—*Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918; *Walden v. Craig*, 14 Pet. 147, 10 L. ed. 393. *Cal.*—*Brown v. Lawson*, 51 Cal. 615; *Gillis v. Barnett*, 38 Cal. 393; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742. *Ind.*—*State v. Ennis*, 74 Ind. 17. *Ky.*—*Chesapeake, O. & S. W. R. Co. v. Heath's Admr.*, 87 Ky. 651, 9 S. W. 832. *Md.*—*Wilmer v. Picka*, 118 Md. 543, 85 Atl. 778; *Wilmer v. Epstein*, 116 Md. 140, 81 Atl. 379. *Mo.*—*State v. Muench*, 217 Mo. 124, 117 S. W. 25, 129 Am. St. Rep. 536. *Mont.*—*Choate v. Spencer*, 13 Mont. 127, 32 Pac. 651, 40 Am. St. Rep. 425, 20 L. R. A. 424; *Davidson v. Clark*, 7 Mont. 100, 14 Pac. 663. *N. Y.*—*Hunt v. Hunt*, 72 N. Y. 217, 237, 28 Am. Rep. 129; *Barnes v. Harris*, 4 N. Y. 374. *N. C.*—*First Nat. Bank v. Wilson*, 80 N. C. 200. *Ohio.*—*Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448. *Pa.*—*Com. v. Bangs*, 22 Pa. Super. 403. *S. C.*—*Wren v. Johnson*, 62 S. C. 533, 40 S. E. 937. *S. D.*—*Knittle v. Ellenbusch*, 159 N. W. 893. *Tenn.*—*Straus v. Weil*, 5 Coldw. 120. *Tex.*—*Williams v. Warren*, 82 Tex. 319, 18 S. W. 560; *Stewart v.*

the constitution or statutes of a state restricts the service of process of a court to smaller territorial limits;⁶⁴ and from the time of service, the defendant is in court and charged with notice of whatever action the court has taken during the pendency of the cause.⁶⁵ Such personal service cannot be dispensed with in actions in personam, strictly judicial in character and proceeding according to the course of the common law,⁶⁶ whether the action is local or transitory,⁶⁷ unless there is a waiver thereof by a voluntary appearance of the defendant.⁶⁸

Where there has been no personal service, in the absence of a seizure of property or debts upon which the judgment of the court is to operate, power to render any judgment is lacking as the court has acquired no jurisdiction;⁶⁹ any judgment rendered in such a case is

Anderson, 70 Tex. 588, 8 S. W. 295; Glass v. Smith, 66 Tex. 548, 2 S. W. 195; Flournoy v. Healy, 31 Tex. 590. Va.—Spiller v. Wells, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878; Craig v. Hoge, 95 Va. 275, 28 S. E. 317. Wash. State *ex rel.* Bogle v. Superior Court, 63 Wash. 96, 114 Pac. 905; Cunningham v. Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

See generally the titles "Process;" "Service of Process and Papers."

[a] The court will not declare that jurisdiction was not acquired over the person of a defendant who accepted service of a summons, no facts appearing to negative the force of such acceptance. People's Bldg., etc. Assn. v. Mayfield, 42 S. C. 424, 20 S. E. 290.

[b] When the party is in the state, however transiently, and the summons is actually served upon him there, the jurisdiction of the court is complete, as to the person of the defendant. Peabody v. Hamilton, 106 Mass. 217.

[c] Jurisdiction is not avoided by the fact that the process is served on board a foreign mail vessel arriving from a foreign port and not yet moored in her dock. Peabody v. Hamilton, 106 Mass. 217.

64. Fla.—Sanchez v. Haynes, 35 Fla. 619, 18 So. 27. Ill.—Wilcox v. Conklin, 255 Ill. 604, 99 N. E. 669; Holmes v. Fihlenburg, 54 Ill. 203; People v. Evans, 18 Ill. 362, service beyond city. N. J.—Burns v. Yost, 47 N. J. L. 222; Wellman v. Bergmann, 44 N. J. L. 613. N. Y.—Landers v. Staten Island R. Co., 53 N. Y. 450, 14 Abb. Pr. (N. S.) 346; Porter v. Lord, 4 Duer 682, 4 Abb. Pr. 43, 13 How. Pr. 254; Rockwell v. Raymond, 5 N. Y. Supp. 642.

Place of service, see the title "Service of Process and Papers."

65. University of North Carolina v. Lassiter, 83 N. C. 38; Woodward v. Baker, 10 Ore. 491. See generally the title "Service of Process and Papers."

66. Cal.—Waller v. Weston, 125 Cal. 201, 57 Pac. 892; Drake v. Duvenick, 45 Cal. 455; *In re* Culp, 2 Cal. App. 70, 83 Pac. 89. Del.—Odessa Loan Assn. v. Dyer, 2 Boyce 457, 81 Atl. 469. Me.—*Ex parte* Davis, 41 Me. 38, 59. Mich.—Frost v. Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560. R. I.—Boston & P. R. Corp. v. New York & N. E. R. Co., 12 R. I. 220. Va.—Raub v. Otterback, 89 Va. 645, 16 S. E. 933. Wis.—Renier v. Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562.

[a] Where (1) a resident of the forum is temporarily absent from the state, service by publication has been held sufficient to authorize a personal judgment against such defendant. Fernandez v. Casey, 77 Tex. 452, 14 S. W. 149. (2) But this rule seems to be contrary to the principles enunciated by the supreme court of the United States. See Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. ed. 931.

67. Chesapeake, O. & S. W. R. Co. v. Heath's Admr., 87 Ky. 651, 659, 9 S. W. 832.

68. See *infra*, this section, and generally 2 STANDARD PROC. 522, et seq.

69. U. S.—Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Wheeler v. Walton & Whann Co., 65 Fed. 720. Ga.—Comrs. of Pilotage v. Low, R. M. Charl. 298. Kan.—Cohen v. Trowbridge, 6 Kan. 385. Ky.—Jones v. Kenny, Hard. 96.

void.⁷⁰ Such service must be made in the manner prescribed by law and not in a manner agreed upon by the parties, however satisfactory

La.—*Slocomb v. Bowie*, 13 La. 10; *Zacharie v. Blandin*, 4 La. 154; *Wall v. Wilson*, 2 La. 169; *Caldwell v. Glenn*, 6 Rob. 9. **Me.**—*West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730. **Miss.**—*Hunt v. Johnson*, Freem. Ch. 282. **Mo.**—*State ex rel. Deems v. Holtcamp*, 245 Mo. 655, 151 S. W. 153. **N. J.** *Wilson v. American Palace Car Co.*, 65 N. J. Eq. 730, 55 Atl. 997; *Karr v. Karr*, 19 N. J. Eq. 427. **Okla.**—*Waldock v. Atkins*, 158 Pac. 587; *Central Loan & Tr. Co. v. Campbell Com. Co.*, 5 Okla. 396, 49 Pac. 48. **Ore.**—*Woodward v. Baker*, 10 Ore. 491. **S. C.** *Stephens v. Ringling*, 102 S. C. 333, 86 S. E. 683. **Can.**—*In re Ardagh*, 4 Manitoba L. R. 509.

See also *infra*, IV, B, 3, c, (I).

[a] Control of the person or of the property of a defendant is essential to give the court jurisdiction. *Coyne v. Plume*, 90 Conn. 293, 97 Atl. 337.

[b] The mere filing of a bill in equity, and giving notice thereof, and of a motion for the appointment of a receiver, to the defendant, does not give jurisdiction of the parties or of the subject-matter, but service of process is essential. *Wheeler v. Walton & Whann Co.*, 65 Fed. 720.

70. See the following: **U. S.**—*Goldney v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; *Freeman v. Alderson*, 119 U. S. 185, 188, 7 Sup. Ct. 165, 30 L. ed. 372; *St. Clair v. Cox*, 106 U. S. 353, 1 Sup. Ct. 354, 27 L. ed. 222; *Westerwelt v. Lewis*, 2 McLean 511, 29 Fed. Cas. No. 17,446; *Lincoln v. Tower*, 2 McLean 473, 15 Fed. Cas. No. 8,355; *Picquet v. Swan*, 5 Mason 35, 19 Fed. Cas. No. 11,134. **Conn.**—*Kibbe v. Kibbe*, *Kirby* 119. **Fla.**—*Flint River Steam Boat Co. v. Roberts, Allen & Co.*, 2 Fla. 102, 48 Am. Dec. 178. **Ga.**—*Dozier v. Lamb*, 59 Ga. 461. **Ill.**—*Anderson v. Hawhe*, 115 Ill. 33, 3 N. E. 566. **Ind.**—*Dobbins v. McNamara*, 113 Ind. 54, 14 N. E. 887, 3 Am. St. Rep. 626; *Nicholson v. Stephens*, 47 Ind. 185; *Horne v. Doe ex dem. State Bank*, 1 Ind. 130, 48 Am. Dec. 355. **Ia.**—*Gerrish v. Seaton*, 73 Iowa 15, 34 N. W. 485. **Kan.**—*McNeill v. Edie*, 24 Kan. 108; *Foreman v. Carter*, 9 Kan. 674; *Kansas Pac. R. Co.*

v. Streeter, 8 Kan. 133; *Case v. Hanrahs*, 2 Kan. 490. **La.**—*First Municipality v. Christ Church*, 3 La. Ann. 453. **Me.**—*Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630. **Md.**—*Clark v. Bryan*, 16 Md. 171, 177. **Mass.**—*Eliot v. McCormick*, 144 Mass. 10, 10 N. E. 705; *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88. **Miss.**—*Harrington v. Wofford*, 46 Miss. 31. **Mo.**—*Fischer v. Siekmann*, 125 Mo. 165; *Jasper v. Mickey*, 4 S. W. 424. **N. H.**—*Wilbur v. Abbot*, 60 N. H. 40; *Winship v. Conner*, 42 N. H. 341; *Eaton v. Badger*, 33 N. H. 228. **Nev.**—*Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738. **N. Y.**—*Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *Pawling v. Willson*, 13 Johns. 192; *Robinson v. Ward's Exrs.*, 8 Johns. 86, 5 Am. Dec. 327; *Kilburn v. Woodworth*, 5 Johns. 37, 41, 4 Am. Dec. 321. **N. C.**—*Bernhard v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402. **Ohio.**—*Kingsborough v. Tousley*, 56 Ohio St. 450, 47 N. E. 541; *Moore's Lessee v. Starks*, 1 Ohio St. 369. **Pa.**—*Helps v. Holker*, 1 Dall. 261, 1 L. ed. 128. **S. C.**—*Stanley v. Stanley*, 35 S. C. 94, 584, 14 S. E. 675; *Wyman v. Hoover*, 10 S. C. 135. **Tex.**—*McCarthy v. Burtis*, 3 Tex. Civ. App. 439, 22 S. W. 422. **Va.**—*Staunton Perpetual Bldg., etc. Co. v. Haden*, 92 Va. 201, 23 S. E. 285; *Blanton v. Carroll*, 86 Va. 539, 10 S. E. 329; *Dillard v. Central Va. Iron Co.*, 82 Va. 734, 1 S. E. 124; *Lavell v. McCurdy's Exrs.*, 77 Va. 763. **W. Va.**—*Fowler v. Lewis*, 36 W. Va. 112, 126, 14 S. E. 447; *Capehart v. Cunningham*, 12 W. Va. 750. **Wis.**—*Pollard v. Wegener*, 13 Wis. 569; *Falkner v. Guild*, 10 Wis. 563; *Rape v. Heaton*, 9 Wis. 328, 76 Am. Dec. 269. **Eng.**—*Douglas v. Forrest*, 4 Bing. 686, 13 E. C. L. 693, 130 Eng. Reprint 933; *Bequet v. MacCarthy*, 2 B. & Ad. 951, 22 E. C. L. 398, 109 Eng. Reprint 1396; *Buchanan v. Rucker*, 9 East 192, 103 Eng. Reprint 546.

See also 14 STANDARD PROC. 777, et seq.; 15 STANDARD PROC. 442.

[a] A person being in the presence of the court, does not authorize a judgment to be entered against him, unless he is brought into court by legal means. *Jones v. Kenny*, Hard. (Ky.) 96.

that manner may be to one or to both of them,⁷¹ though irregularity in the process itself,⁷² or the service thereof,⁷³ does not affect the jurisdiction, where proper objection is not seasonably made, though where the process is so defective as to not give the defendant notice, the judgment is void.⁷⁴ It is the fact of service that gives the court jurisdiction, not the proof of service,⁷⁵ though with reference to special statutory tribunals the rule is in many cases different;⁷⁶ and this is

71. *Odessa Loan Assn. v. Dyer*, 2 Boyce (Del.) 457, 81 Atl. 469. See *Wright v. Douglass*, 3 Barb. (N. Y.) 554, reversed on other grounds in 2 N. Y. 373; *Stamey v. Barkley*, 211 Pa. 313, 60 Atl. 991; and generally the title "Service of Process and Papers."

72. *U. S.*—*Hollingsworth v. Barbour*, 4 Pet. 466, 7 L. ed. 922. *Cal.* *In re James' Estate*, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838. *Colo.*—*Kimball v. Castagim*, 8 Colo. 525, 9 Pac. 488. *Ind.*—*Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *Boyd v. Fitch*, 71 Ind. 306. *Miss.* *Kelly v. Harrison*, 69 Miss. 856, 12 So. 261. *Mo.*—*Jasper v. Wadlow*, 82 Mo. 172. *Ore.*—*North Pac. Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. *Tex.*—*Moore v. Perry*, 13 Tex. Civ. App. 204, 35 S. W. 838. *Utah.*—*Miller v. Zeigler*, 3 Utah 17, 5 Pac. 518.

See generally the title "Process."

73. *U. S.*—*Sipe v. Capwell*, 59 Fed. 970, 8 C. C. A. 419, 16 U. S. App. 704; *Capwell v. Sipe*, 51 Fed. 667. *Ark.* *St. Louis, etc. R. Co. v. State*, 55 Ark. 200, 17 S. W. 806. *Cal.*—*Drake v. Duvenick*, 45 Cal. 455; *Peck v. Strauss*, 33 Cal. 678. *Ga.*—*Frazer v. Sibley*, 50 Ga. 96. *Ind.*—*Stout v. Woods*, 79 Ind. 168; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409. *Ia.*—*Irions v. Keystone Mfg. Co.*, 61 Iowa 406, 16 N. W. 349; *Bunce v. Bunce*, 59 Iowa 533, 13 N. W. 705; *Myers v. Davis*, 47 Iowa 325; *Shea v. Quintin*, 30 Iowa 58. *Mich.*—*Low v. Mills*, 61 Mich. 35, 27 N. W. 877. *Minn.*—*Millette v. Mehmke*, 26 Minn. 306, 3 N. W. 700. *Miss.*—*Harrington v. Wofford*, 46 Miss. 31. *Mo.*—*Skelton v. Sacket*, 91 Mo. 377, 3 S. W. 874. *Neb.*—*Campbell Printing Press, etc. Co. v. Marder, Luse & Co.*, 50 Neb. 283, 69 N. W. 774, 61 Am. St. Rep. 573; *Gandy v. Jolly*, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460. *N. H.*—*Bruce v. Cloutman*,

45 N. H. 37, 84 Am. Dec. 111. *N. Y.* *Barnes v. Harris*, 4 N. Y. 374; *Myers v. Overton*, 2 Abb. Pr. 344. *Pa.*—*Cockley v. Rehr*, 12 Pa. Co. Ct. 343, 2 Pa. Dist. 331. *Tenn.*—*State v. Hood*, 16 Lea 235; *Harlan v. Harlan*, 14 Lea 107. *Tex.*—*Cave v. Houston*, 65 Tex. 619. *Utah.*—*Amy v. Amy*, 12 Utah 278, 318, 42 Pac. 1121. *Vt.*—*Ex parte Kellogg*, 6 Vt. 509. *Va.*—*Staunton Perpetual Bldg., etc. Co. v. Haden*, 92 Va. 201, 23 S. E. 285. *W. Va.*—*Hansford v. Tate*, 61 W. Va. 207, 56 S. E. 3/2.

See generally the title "Service of Process and Papers."

74. See generally the title "Process."

75. *Cal.*—*Herman v. Santee*, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145; *In re Newman's Est.*, 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146. *Ore.* *Woodward v. Baker*, 10 Ore. 491. *Wis.* *State ex rel. Stengl v. Cary*, 132 Wis. 501, 505, 112 N. W. 428.

[a] Default rendered where proof of service defective is not void where service in fact made. *Herman v. Santee*, 103 Cal. 519, 37 Pac. 509, 42 Am. St. Rep. 145.

[b] Default Causes.—If proof of service of summons is not made as required by law in default cases, the court acquires no jurisdiction of the persons of the defendants, and has no authority to render judgment against them. Any judgment rendered is therefore invalid and void. *Reinhart v. Lugo*, 86 Cal. 395, 24 Pac. 1089, 21 Am. St. Rep. 52; *Lyons v. Cunningham*, 66 Cal. 42, 4 Pac. 938. See generally 14 STANDARD PROC. 865, et seq.

76. *State ex rel. Stengl v. Cary*, 132 Wis. 501, 505, 112 N. W. 428. Where the statute expressly makes proof of service a condition precedent to the jurisdiction which it specially confers, there can be no question that proof of service must appear affirmatively before the board or other special tribunal can act.

also true where the policy of the law or the implications from the statutes require record proof of the preliminary jurisdictional steps in a proceeding.⁷⁷ Yet it does not follow that the evidence that all the steps required by the statute were taken must appear in the record, unless indeed the statute expressly, or by implication, requires it.⁷⁸

Knowledge of a suit on the part of the defendant, no matter how clearly brought home to him, will not supply the want of citation,⁷⁹ without reference to whether jurisdiction was obtained by process or not.⁸⁰ Statutory provisions to the effect that the court acquires jurisdiction from the time of the filing of the complaint do not have the effect of conferring jurisdiction of the person by the mere filing of the complaint.⁸¹

Appearance.—Jurisdiction of the defendant is also acquired by a general appearance personally or by his attorney without service of process,⁸² or even by a special appearance in some states.⁸³

77. *State ex rel. Stengl v. Cary*, 132 Wis. 501, 506, 112 N. W. 428.

78. *Applegate v. Lexington*, etc. Min. Co., 117 U. S. 255, 269, 6 Sup. Ct. 742, 29 L. ed. 892.

79. *Cal.*—*Waller v. Weston*, 125 Cal. 201, 57 Pac. 892. *La.*—*Wall v. Wilson*, 2 La. 169; *Caldwell v. Glenn*, 6 Rob. 9. *Md.*—*Wilmer v. Picka*, 118 Md. 543, 550, 85 Atl. 778; *Wilmer v. Epstein*, 116 Md. 140, 81 Atl. 379. *Mich.*—*Wilcke v. Duross*, 144 Mich. 243, 107 N. W. 907.

80. *Newell v. Newell*, 88 Neb. 705, 130 N. W. 743.

81. *Empire Ranch, etc. Co. v. Col-dren*, 51 Colo. 115, 117 Pac. 1005.

82. See the following: **U. S.**—*St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. ed. 222; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 316, 19 L. ed. 931; *Hupfeld v. Automaton Piano Co.*, 66 Fed. 788. **Ga.**—*Lemaster v. Orr*, 101 Ga. 762, 29 S. E. 32. **Ill.**—*Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673; *Fonville v. Monroe*, 74 Ill. 126; *Randolph v. Ralls*, 18 Ill. 29. **Ind.**—*Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N. E. 37, 100 N. E. 376. **Ia.**—*Blachly v. Blachly*, 169 Iowa 489, 151 N. W. 447, 448; *Danforth v. Thompson*, 34 Iowa 243. **Kan.**—*Meador v. Manlove*, 97 Kan. 706, 156 Pac. 731; *Anderson v. Burchett*, 48 Kan. 781, 30 Pac. 174. **Ky.**—*Chesapeake, O. & S. W. R. Co. v. Heath's Admr.*, 87 Ky. 651, 9 S. W. 832. **Md.**—*Wilmer v. Picka*, 118 Md. 543, 85 Atl.

778; *Wilmer v. Epstein*, 116 Md. 140, 81 Atl. 379. **Mich.**—*Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868; *Thompson v. Mich. Mut. Ben. Assn.*, 52 Mich. 522, 18 N. W. 247. **Mo.**—*Union Depot Co. v. Frederick*, 117 Mo. 138, 21 S. W. 1118, 1130, 26 S. W. 350. **Mont.**—*State ex rel. Mackey v. Dist. Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. **Neb.**—*Newell v. Newell*, 88 Neb. 705, 130 N. W. 743; *Orr v. Seaton*, 1 Neb. 105. **Nev.**—*State ex rel. Curtis v. McCullough*, 3 Nev. 202. **N. J.**—*Mulhearn v. Press Pub. Co.*, 53 N. J. L. 150, 20 Atl. 760. **N. Y.**—*Hunt v. Hunt*, 72 N. Y. 217, 237, 28 Am. Rep. 129. **N. C.**—*First Nat. Bank v. Wilson*, 80 N. C. 240. **P. R.**—*Matos v. Moris*, 7 Porto Rico 202. **Tex.**—*Williams v. Warren*, 82 Tex. 319, 15 S. W. 560; *Glass v. Smith*, 66 Tex. 548, 2 S. W. 195; *Wilson v. Zeigler*, 44 Tex. 657. **Wash.**—*State ex rel. Bogle v. Superior Court*, 63 Wash. 96, 114 Pac. 905. **W. Va.**—*Fulton v. Ramsey*, 67 W. Va. 321, 68 S. E. 381, 140 Am. St. Rep. 969; *Lumber Co. v. Lance*, 50 W. Va. 636, 41 S. E. 128; *State v. Thacker Coal & C. Co.*, 49 W. Va. 140, 38 S. E. 539. **Wis.**—*Bestor v. Inter. County Fair*, 135 Wis. 339, 115 N. W. 809; *Gilbert-Arnold L. Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38; *Anderson v. Coburn*, 27 Wis. 558.

Also 2 STANDARD PROC. 522, et seq.

83. See 2 STANDARD PROC. 521, et seq.

[a] In Mississippi a special appearance is deemed under the code to be a general appearance for all purposes.

(B.) IN ACTIONS IN REM. — Personal service is unnecessary to jurisdiction over the property of a defendant within the territorial jurisdiction of the court; jurisdiction of the res is obtained by a seizure under process of court, whereby it is held to abide such orders as the court may make concerning it.⁸⁴ Other modes than personal service have been substituted by express provision of law, such as service by publication,⁸⁵ or notice to the agent or attorney of the party.⁸⁶ But

Fisher v. Pacific Mut. L. Ins. Co., 112 Miss. 30, 72 So. 846.

[b] **Rule of Court Affecting Special Appearance.**—A standing rule of a federal court, requiring a party appearing specially for any purpose to declare at the same time that if the purpose for which the special appearance was made should not be sanctioned or sustained by the court he would appear generally, is inconsistent with the laws of the United States and therefore invalid. *Western Life Indemnity Co. v. Rupp*, 235 U. S. 261, 272, 35 Sup. Ct. 37, 59 L. ed. 220; *Davidson Bros. Marble Co. v. Gibson*, 213 U. S. 10, 18, 29 Sup. Ct. 324, 53 L. ed. 675.

84. **U. S.**—*Arndt v. Griggs*, 134 U. S. 316, 324, 10 Sup. Ct. 557, 33 L. ed. 918; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Grignon's Lessee v. Astor*, 2 How. 319, 337, 11 L. ed. 283. **Ariz.**—*Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722. **Cal.**—*Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17, 129 Am. St. Rep. 141, 19 L. R. A. (N. S.) 983; *First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626. **Kan.**—*Zimmerman v. Barnes*, 56 Kan. 419, 43 Pac. 764. **Minn.**—*Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967. **Mo.**—*Latimer v. Union Pac. Ry.*, 43 Mo. 105, 97 Am. Dec. 378. **N. J.**—*Cona v. Hudson Co.*, 86 N. J. L. 154, 90 Atl. 1031. **N. Y.** *Monroe v. Douglas*, 4 Sand. C. 126. **N. C.**—*Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235. **N. D.**—*Hartzell v. Vigen*, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451. **Okla.**—*Hobbs v. Gerinan*, etc. Doctors, 14 Okla. 236, 78 Pac. 356; *Whitaker v. Hughes*, 14 Okla. 510, 78 Pac. 383; *School Dist. v. Gautier*, 13 Okla. 194, 73 Pac. 954. **Ore.**—*Mayer v. Mayer*, 27 Ore. 133, 39 Pac. 1002. **R. I.**—*Angell v. Angell*, 14 R. I. 541. **Tenn.**—*Knapp v. United Order G. C. W.*, 121 Tenn. 212, 118 S. W. 390. **Va.**—*Clem v. Given's Exr.*, 106 Va. 145, 55 S. E. 567. **Wis.**—*Jarvis v. Barrett*, 14 Wis. 591.

See *infra*, this section, and generally the titles "Proceedings in Rem;" "Service of Process and Papers."

[a] No court can acquire jurisdiction unless the res is either actually or constructively within the jurisdiction. *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; *Plimpton v. Bigelow*, 93 N. Y. 592, 13 Abb. N. C. 173, 4 Civ. Proc. 189, 66 How. Pr. 131.

[b] **Statute allowing service in reference to lands by publication** where no personal service or attachment or other proceeding against the land violates the federal constitution. *Webster v. Reid*, 11 How. (U. S.) 437, 13 L. ed. 761. See generally the title "Service of Process and Papers."

85. See the statutes, and the following: **U. S.**—*Arndt v. Griggs*, 134 U. S. 316, 327, 10 Sup. Ct. 557, 33 L. ed. 918; *Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. ed. 931. **Ariz.**—*Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722, 729. **Cal.**—*Crell v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. 797 (proceeding for confirmation of irrigation district and sale of bonds); *Lent v. Tilson*, 72 Cal. 404, 14 Pac. 71 (widening streets); *Bennett v. His Creditors*, 22 Cal. 38, insolvency proceedings. **Kan.**—*Zimmerman v. Barnes*, 56 Kan. 419, 43 Pac. 764. **Minn.**—*Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967. **N. C.**—*Bernhardt v. Brown*, 118 N. C. 700, 705, 24 S. E. 527, 36 L. R. A. 402. **N. D.**—*Hartzell v. Vigen*, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451. **Ohio.**—*Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448. **Vt.**—*Woodruff v. Taylor*, 20 Vt. 65, probate of will. **Va.**—*Clem v. Given's Exr.*, 106 Va. 145, 55 S. E. 567. **Wis.**—*Jarvis v. Barrett*, 14 Wis. 591.

As to service by publication, see generally the title, "Service of Process and Papers."

86. **N. Y.**—*Routenberg v. Schweitzer*, 165 N. Y. 175, 58 N. E. 880; *Doug-*

it is well settled that service by publication cannot authorize a judgment in personam upon such notice, against a citizen of another state, resident in such other state, unless such citizen submits himself to the jurisdiction of the court in which the action against him is instituted, by voluntarily appearing in person or by agent.⁸⁷

In order for such constructive service to be effective the property must be taken by one of the provisional remedies or sought to be appropriated by some process of the court adapted to that purpose,⁸⁸ such as attachment,⁸⁹ or garnishment;⁹⁰ the judgment rendered in such case will bind only the property attached, garnisheed or taken into the possession of the court by its process.⁹¹ On the other hand,

lass v. Phenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118. **Ohio**.—*Callen v. Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448. **Tex.**—*Stuart v. Anderson*, 70 Tex. 588, 8 S. W. 295.

[a] **Service upon, or service accepted by the attorney of a defendant in an action, is service upon an agent and is good only when made so by statute.** *Odessa Loan Assn. v. Dyer*, 2 Boyce (Del.) 457, 81 Atl. 469.

Methods of substituted service, see generally the title, "Service of Process and Papers."

87. See *infra*, IV, B, 3, c, (I).

88. **U. S.**—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Oswald v. Kampmann*, 28 Fed. 36. **N. C.**—*Everitt v. Austin Bros.*, 169 N. C. 622, 86 S. E. 523; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198. **Okla.**—*Waldoock v. Atkins*, 158 Pac. 587. **Tenn.**—*Knapp v. United Order G. C. W.*, 121 Tenn. 212, 118 S. W. 390. **Tex.**—*Campbell v. Wilson*, 6 Tex. 379, 380.

[a] **The mere fact (1) that the defendant has property within the state does not give the court jurisdiction to render any judgment** (*McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666; *Waldoock v. Atkins* [Okla.], 158 Pac. 587), (2) unless the court has acquired jurisdiction over such property in one of the ways authorized by statute. *Coyne v. Plume*, 90 Conn. 293, 97 Atl. 337; *Smith v. Gilbert*, 71 Conn. 149, 153, 41 Atl. 284, 71 Am. St. Rep. 163; *Everitt v. Austin Bros.*, 169 N. C. 622, 86 S. E. 523.

[b] **The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail**

himself by appearing as a claimant in the case. *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372.

[c] **Even though the statute authorizes service by publication, if it does not authorize an attachment in the particular case, the judgment upon such service is void.** *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402.

89. **U. S.**—*Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. ed. 931; *Oswald v. Kampmann*, 28 Fed. 36. **N. C.**—*Graham v. O'Bryan*, 120 N. C. 463, 27 S. E. 122; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 36 L. R. A. 402. **Tex.**—*Battle, Heck & Co. v. Carter*, 44 Tex. 485; *Campbell v. Wilson*, 6 Tex. 379.

90. **U. S.**—*Cooper v. Reynolds*, 10 Wall. 308, 317, 19 L. ed. 931; *Oswald v. Kampmann*, 28 Fed. 36. **S. D.**—*State ex rel. Bank v. Circuit Court*, 32 S. D. 573, 580, 143 N. W. 892. **Tex.**—*Wilson Hardware Co. v. Anderson, ete. Co.*, 22 Tex. Civ. App. 229, 54 S. W. 928, *affirmed*, 93 Tex. 653; *Strauss v. Hershheim*, 3 Wills. Civ. Cas. §408; *Weems v. Miles*, 1 White & W. Civ. Cas. §1207.

[a] **This confers jurisdiction merely to render judgment against the non-resident to the extent of the indebtedness acknowledged by the garnishee.** *Wilson Hdw. Co. v. Anderson Knife, ete. Co.*, 22 Tex. Civ. App. 229, 54 S. W. 928, *affirmed*, 93 Tex. 653.

91. **U. S.**—*Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Boswell's Lessee v. Otis*, 9 How. 336, 13 L. ed. 164. **Ala.**—*Louisville & N. R. Co. v. Nash*, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331. **Cal.**—*First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Loaiza v. Superior Court*, 85 Cal.

the seizure of property under attachment or garnishment does not of itself, without any service of process, give the court jurisdiction under many statutes.⁹²

While the general rule, in regard to jurisdiction in rem, requires the actual seizure and possession of the res by the officer of the court,⁹³ where the proceeding is one strictly in rem, as distinguished from one quasi in rem, and where the property is immovably situated within the jurisdiction of the court, in order to acquire jurisdiction it is not necessary to actually seize or attach the property; but it may be acquired by the mere bringing of the suit in which the claim is sought to be enforced, which is in such cases deemed equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit;⁹⁴ and in such case either personal service of process beyond the state, where authorized by statute,⁹⁵ or constructive service by publication is sufficient to authorize a judgment,⁹⁶ provided that the property be either seized into the possession of the court or brought within its grasp by suitable allegations in the complaint.⁹⁷ But jurisdiction of specific property may not be conferred upon a court by a suit in which neither the court nor any of the parties seek to affect it or its title. Pending suits which disclose no purpose of any one to change or to affect in any way the title to specific property of parties to them may not subject the purchasers or grantees thereof pendente lite to subsequent judgments or decrees therein which attempt to affect them.⁹⁸

Statutes sometimes authorize personal service of process out of the

11, 34, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376. **Ill.**—*Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416; *Manchester v. McKee*, 9 Ill. 511. **Ind.** *Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662. **N. C.**—*Bernhardt v. Brown*, 118 N. C. 700, 705, 24 S. E. 527, 36 L. R. A. 402. **Ore.** *Starkey v. Lunz*, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783. **Tex.**—*Nichols v. Able*, 14 Tex. 532; *Campbell v. Wilson*, 6 Tex. 379, 380.

[a] The judgments for costs in such an action is in personam and without jurisdiction. *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80.

92. U. S.—*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 572; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. **Cal.**—*Ransome-Crummey Co. v. Martenstein*, 167 Cal. 406, 139 Pac. 1060. **Me.**—*McVicker v. Beedy*, 31 Me. 314, 50 Am. Dec. 666. **Tex.**—*Stuart v. Anderson*, 70 Tex. 588, 8 S. W. 295. **Va.**—*Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106.

93. Cooper v. Reynolds, 10 Wall. (U. S.) 308, 317, 19 L. ed. 931; *Oswald v.*

Kampmann, 28 Fed. 36. See *supra*, this section, and generally the title "Proceedings in Rem."

94. U. S.—*Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; *Lang v. Choctaw*, etc. R. Co., 160 Fed. 355, 87 C. C. A. 307; *Oswald v. Kampmann*, 28 Fed. 36. **Ariz.**—*Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722. **Minn.**—*Bardwell v. Collins*, 44 Minn. 97, 103, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152. **N. C.**—*Graham v. O'Bryan*, 120 N. C. 463, 27 S. E. 122; *Bernhardt v. Brown*, 118 N. C. 700, 706, 24 S. E. 527, 715, 36 L. R. A. 402. **Tenn.**—*Straus v. Weil*, 5 Goldw. 120. **Tex.**—*Rice v. Peteet*, 66 Tex. 568, 1 S. W. 657; *Wilson v. Zeigler*, 44 Tex. 657, foreclosure mortgage.

95. Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722, 727.

96. Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722.

97. Hook v. Hoffman, 16 Ariz. 540, 147 Pac. 722, 727.

98. McLaughlin v. McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56; *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; *Battle, Heck & Co. v. Carter*, 44 Tex. 485.

state in certain cases as a substitute for service by publication,⁹⁹ and in order to be effective such service must be in the mode provided for by the statute;¹ but the court acquires no jurisdiction to render any judgment in personam against a defendant served beyond the state who does not actually appear.²

c. *Over Non-Residents.*—(I.) *Proceedings in Personam.*—Where the suit is one merely in personam, constructive service by publication upon a nonresident is ineffectual for any purpose, irrespective of whether it is authorized by statute or rule of court, personal service being indispensable to a valid judgment,³ unless the defendant volun-

99. See generally the statutes, and the following: **U. S.**—*Adams v. Heckscher*, 80 Fed. 742; *Salisbury v. Sands*, 2 Dill. 270, 21 Fed. Cas. No. 12,251. **Ark.**—*Martin v. Gwynn*, 90 Ark. 44, 117 S. W. 754. **Ia.**—*Blachly v. Blachly*, 169 Iowa 489, 151 N. W. 447, 448. **Kan.**—*Adams v. Baldwin*, 49 Kan. 781, 31 Pac. 681. **Neb.**—*Anheuser-Busch Brewing Assoc. v. Peterson*, 41 Neb. 897, 60 N. W. 373. **N. Y.**—*Jenkins v. Fahey*, 73 N. Y. 355; *Matthews v. Gilleran*, 58 Hun 607, 12 N. Y. Supp. 74, 35 N. Y. St. 269; *Lockwood v. Brantly*, 31 Hun 155; *Abrahams v. Mitchell*, 8 Abb. Pr. 123. **N. C.**—*Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347. **Ohio.**—*Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451. **Okla.**—*First Nat. Bank v. Lattimer*, 149 Pac. 1099. **S. D.**—*South Dakota Commercial Assn. v. Ramsey*, 34 S. D. 48, 147 N. W. 75; *Newton v. McGee*, 31 S. D. 216, 140 N. W. 252. **Va.**—*Raub v. Otterback*, 89 Va. 645, 16 S. E. 933. **Wash.**—*Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40. **Wis.**—*Wilmot v. Smith*, 86 Wis. 299, 56 N. W. 873; *Pier v. Amory*, 40 Wis. 571.

1. See generally the title "Service of Process and Papers."

2. **U. S.**—*Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. ed. 733. **Cal.**—*First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *In re Culp*, 2 Cal. App. 70, 83 Pac. 89. **D. C.**—*Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. 290. **Ia.**—*Clark v. Tull*, 113 Iowa 143, 84 N. W. 1030; *Kelly v. Norwich Fire Ins. Co.*, 82 Iowa 137, 47 N. W. 986. **Kan.**—*Adams v. Baldwin*, 49 Kan. 781, 31 Pac. 681. **Mo.**—*State v. Barnett*, 245 Mo. 99, 149 S. W. 311. **Neb.**—*Anheuser-Busch Brewing Assn. v. Peterson*, 41 Neb. 897, 60 N. W. 373. **N. Y.**—*Mahr v. Norwich Union F. Ins.*

Soc., 127 N. Y. 452, 28 N. E. 391. **N. C.**—*Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347. **Ohio.**—*Williams' Admrs. v. Welton's Admr.*, 28 Ohio St. 451. **S. C.**—*National Exch. Bank v. Stelling*, 31 S. C. 360, 9 S. E. 1028. **Tex.**—*Donovan v. Hinzie* (Tex. Civ. App.), 60 S. W. 994; *Roller v. Holly*, 13 Tex. Civ. App. 636, 35 S. W. 1074.

3. See the following: **U. S.**—*Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794; *Hart v. Sansom*, 116 U. S. 151, 3 Sup. Ct. 586, 28 L. ed. 101; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Knowles v. Gaslight & Coke Co.*, 19 Wall. 58, 22 L. ed. 70; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Oswald v. Kampmann*, 28 Fed. 36. **Ariz.**—*Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722. **Ark.**—*McLaughlin v. McCrory*, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56. **Cal.**—*First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Crall v. Poso Irr. Dist.*, 87 Cal. 140, 26 Pac. 797; *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376. **D. C.**—*Dexter v. Lichliter*, 24 App. Cas. 222; *Backus Portable Steam Heater Co. v. Simonds*, 2 App. Cas. 290. **Ga.**—*Reynolds & Hamby, etc. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300. **Ind.**—*Beard v. Beard*, 21 Ind. 321, 327. **Ia.**—*Griffith v. Milwaukee Harvester Co.*, 92 Iowa 634, 61 N. W. 243, 54 Am. St. Rep. 573; *Smith v. Griffin*, 59 Iowa 409, 13 N. W. 423. **Kan.**—*Zimmerman v. Barnes*, 56 Kan. 419, 43 Pac. 764. **Md.**—*McSherry v. McSherry*, 113 Md. 395, 77 Atl. 653, 140 Am. St. Rep. 428. **Minn.**—*Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; *Bardwell v. Collins*, 44 Minn. 97, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152. **Miss.**

tarily appears in the action.⁴ And since process runs within the state only, service of process upon the defendant without the state will not give the court jurisdiction over the defendant to render a personal judgment against him,⁵ though if so served, and such defendant appears in the action, he submits to the jurisdiction of the court over

Cooke v. Brewer, 68 Miss. 775, 9 So. 823. **Mo.**—*State v. Blair*, 238 Mo. 132, 142 S. W. 326. **N. J.**—*Lanning v. Twining*, 71 N. J. Eq. 573, 64 Atl. 466. **N. Y.**—*Grubel v. Nassauer*, 210 N. Y. 149, 103 N. E. 1113, 52 L. R. A. (N. S.) 161; *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Schwinger v. Hickok*, 53 N. Y. 280; *McLaughlin v. McLaughlin Real Est. Co.*, 162 App. Div. 644, 147 N. Y. Supp. 959; *Holcomb v. Kelly*, 114 N. Y. Supp. 1048. **N. C.**—*Hinton v. Penn Mut. Life Ins. Co.*, 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636; *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527, 715, 36 L. R. A. 402; *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198. **Ohio.**—*Wood v. Stanberry*, 21 Ohio St. 142. **Ore.**—*Williamette R. E. Co. v. Hendrix*, 28 Ore. 485, 42 Pac. 514, 52 Am. St. Rep. 800; *Goodale v. Coffee*, 24 Ore. 346, 33 Pac. 990. **P. R.**—*Huete v. Teillard*, 17 Porto Rico 46. **S. D.**—*State ex rel. Bank v. Circuit Ct.*, 32 S. D. 573, 143 N. W. 892. **Tenn.**—*Farmers', etc. Bank v. Carter*, 88 Tenn. 279, 12 S. W. 545. **Tex.**—*Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711; *Hardy v. Beaty*, 84 Tex. 562, 19 S. W. 778, 31 Am. St. Rep. 80; *Foot v. Sewall*, 81 Tex. 659, 17 S. W. 373; *Taliaferro v. Butler*, 77 Tex. 578, 14 S. W. 191; *Martin v. Cobb*, 77 Tex. 544, 14 S. W. 162. **Va.**—*Raub v. Otterback*, 89 Va. 645, 16 S. E. 933. **Wash.**—*Neufelder v. German American Ins. Co.*, 6 Wash. 336, 33 Pac. 870, 36 Am. St. Rep. 166, 22 L. R. A. 287; *Paxton v. Daniell*, 1 Wash. 19, 23 Pac. 441. **Wis.**—*Moyer v. Koontz*, 103 Wis. 22, 79 N. W. 50, 74 Am. St. Rep. 837.

See generally the title "**Service of Process and Papers.**"

[a] If neither the person of the defendant nor the res is within the state the court has no jurisdiction to render any valid judgment. *Cooke v. Brewer*, 68 Miss. 775, 9 So. 823.

4. See *supra*, II, B, 3, b, (II), (A) and generally 2 STANDARD PROC. 522, et seq.

5. **U. S.**—*Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Romaine v. Union Ins. Co.*, 28 Fed. 625; *Wilson v. Graham*, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17,804. **Ala.**—*Sessoms Grocery Co. v. International S. Feed Co.*, 188 Ala. 232, 66 So. 479; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758; *Glover v. Glover*, 16 Ala. 440. **Cal.**—*First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376; *Arnold v. Kahn*, 67 Cal. 472, 8 Pac. 36; *Eitel v. Foote*, 39 Cal. 439; *People v. Doe*, 36 Cal. 220; *Friedlander v. Loucks*, 34 Cal. 18; *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595; *Bennett v. His Creditors*, 22 Cal. 38. **Fla.**—*Sanchez v. Haynes*, 35 Fla. 619, 18 So. 27. **Ga.**—*Milner v. Gatlin*, 139 Ga. 109, 76 S. E. 860; *Reynolds & Hamby Estate Mortg. Co. v. Martin*, 116 Ga. 495, 42 S. E. 796; *Howell v. Gordon*, 40 Ga. 302; *Adams v. Lamar*, 8 Ga. 83; *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300. **Ill.**—*Wilcox v. Conklin*, 255 Ill. 604, 99 N. L. 669; *Waverly v. Auditor of Public Accounts*, 100 Ill. 354; *Isett v. Stuart*, 80 Ill. 404, 22 Am. St. Rep. 194; *Dixon v. Dixon*, 61 Ill. 324; *Holmes v. Fihlenburg*, 54 Ill. 203; *Maxwell v. Vansant*, 46 Ill. 58; *Aird v. Haynie*, 36 Ill. 174; *Masure v. Masure*, 171 Ill. App. 438. **Ind.**—*Iron Wks. v. Swift Co.*, 53 Ind. App. 630, 100 N. E. 584, 860; *Beard v. Beard*, 21 Ind. 321; *Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440. **Ia.**—*Bates v. Chicago, etc., R. Co.*, 19 Iowa 260. **Ky.**—*Cowan v. Montgomery*, 7 J. J. Marsh. 299; *Rogers v. Hagan*, 6 J. J. Marsh. 578; *Dicken v. King*, 3 J. J. Marsh. 591; *Cave v. Tra-bue*, 2 Bibb 444; *Meres v. Chrisman*, 7 B. Mon. 422. **La.**—*Gibson v. Huie*, 14 La. 129; *In re Dumas*, 32 La. Ann. 679, 687; *Lemann v. Truxillo*, 32 La. Ann. 65; *Dejona v. The Osceola*, 17 La. Ann. 277; *Fell v. Darden & Co.*, 17 La. Ann. 236. **Me.**—*Smith v. Eaton*, 36 Me. 298,

his person.⁶ A court does not acquire jurisdiction to render a judgment against a non-resident by attaching debts due the non-resident by the resident debtor, as the situs of such debts is the residence of the debtor,⁷ unless the legislature has provided otherwise.⁸ The federal courts cannot acquire jurisdiction of an individual defendant residing without the district by merely attaching property within the district.⁹

(II.) In Rem or Quasi In Rem Proceeding. — The principles hereinabove

58 Am. Dec. 746; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630. Mass.—*Pitman v. Tremont Nail Co.*, 2 Allen 531; *Ewer v. Coffin*, 1 Cush. 23, 48 Am. Dec. 587. Mich.—*Turrill v. Walker*, 4 Mich. 177; *Pratt v. Windsor Bank*, Harr. 254. Minn.—*Shatto v. Latham*, 33 Minn. 36, 21 N. W. 838. Miss.—*Cocke v. Brewer*, 68 Miss. 775, 9 So. 823. Mo.—*Hiles v. Rule*, 121 Mo. 248, 25 S. W. 959. N. J. *Burns v. Yost*, 47 N. J. L. 222; *Wellman v. Bergmann*, 44 N. J. L. 613. N. Y.—*Grubel v. Nassauer*, 210 N. Y. 149, 103 N. E. 1113, 52 L. R. A. (N. S.) 161; *Pietrarroia v. New Jersey & H. R. Co.*, 197 N. Y. 434, 91 N. E. 120; *Mahr v. Norwich Union F. Ins. Soc.*, 127 N. Y. 452, 28 N. E. 391; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Hoag v. Lamont*, 60 N. Y. 96, 16 Abb. Pr. (N. S.) 369; *Schwinger v. Hickok*, 53 N. Y. 280; *Ward v. Arredondo*, *Hopk.* 213, 14 Am. Dec. 543; *Litchfield v. Burwell*, 5 How. Pr. 341, 1 Code Rep. (N. S.) 42; *Appleton v. Appleton*, 50 Barb. 486; *McLaughlin v. McLaughlin Real Est. Co.*, 162 App. Div. 644, 147 N. Y. Supp. 959; *Tierney v. Helvetia Swiss F. Ins. Co.*, 138 App. Div. 469, 122 N. Y. Supp. 869; *Schallock v. Wood*, 89 Misc. 436, 152 N. Y. Supp. 225; *Guffey v. Grand Trunk R. Co.*, 67 Misc. 553, 122 N. Y. Supp. 947; *Matter of Romero*, 56 Misc. 319, 107 N. Y. Supp. 621; *Holcomb v. Kelly*, 114 N. Y. Supp. 1048. N. C.—*Warlick v. Reynolds & Co.*, 151 N. C. 606, 66 S. E. 657. Ohio.—*Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340. Ore. *Brown v. Deschuttas Bridge Co.*, 23 Ore. 7, 35 Pac. 177. Pa.—*Martin v. Martin*, 214 Pa. 389, 63 Atl. 1026; *In re Ralston's Appeal*, 93 Pa. 133; *Scott v. Noble*, 72 Pa. 115, 13 Am. Rep. 663; *Davenport v. Davenport*, 35 Pa. Co. Ct. 62; *Briggs v. Briggs*, 6 Kulp 490. S. C. *Toms v. Richmond*, etc. R. Co., 40 S. C. 520, 19 S. E. 142; *Tillinghast v. Boston*, etc. R. Lumber Co., 39 S. C. 484, 18 S. E. 120, 22 L. R. A. 49; *McKinne*

v. Augusta, 5 Rich. Eq. 55; *Nesbit v. McDaniel*, Cheves, 12. S. D.—*Knittle v. Ellenbusch*, 159 N. W. 893. Tex. *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328; *Franz Falk Brew. Co. v. Hirsch*, 78 Tex. 192, 14 S. W. 450; *Kimmarle v. Houston*, etc. R. Co., 76 Tex. 686, 12 S. W. 698; *Masterson v. Little*, 75 Tex. 682, 13 S. W. 154; *York v. State*, 73 Tex. 651, 11 S. W. 869; *Banco Minero v. Ross*, 106 Tex. 522, 138 S. W. 224; *Louisville*, etc. R. Co. v. Missouri, etc. R. Co., 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276; *Bartley v. Conn.*, 4 Tex. Civ. App. 299, 23 S. W. 382. Vt.—*Davis v. Richmond*, 35 Vt. 419. Va.—*Raub v. Otterback*, 89 Va. 645, 16 S. E. 933; *Miller v. Sharp*, 3 Rand. (24 Va.) 41; *Hopkirk v. Bridges*, 4 Hen. & M. (14 Va.) 413. Wis.—*Smith v. Grady*, 68 Wis. 215, 31 N. W. 477; *Manning v. Heady*, 64 Wis. 630, 25 N. W. 1; *Weatherbee v. Weatherbee*, 20 Wis. 499; *Jarvis v. Barrett*, 14 Wis. 591. Can.—*In re Ardagh*, 4 Manitoba 509.

See generally the title "Service of Process and Papers."

6. See *supra*, II, B, 3, b, (II), (A), and 2 STANDARD PROC. 523, et seq.

7. *Levy v. M. L. Himmel & Son*, 145 Ga. 245, 88 S. E. 959. See the title "Garnishment."

8. *Levy v. M. L. Himmel & Son*, 145 Ga. 245, 88 S. E. 959.

[a] The garnishment of the debt due a non resident is in the nature of a proceeding *in rem*, and the court acts by virtue of its power to compel the garnishee to appropriate the debt to the payment of the execution. *Coyne v. Plume*, 90 Conn. 293, 97 Atl. 337; *Veeder Mfg. Co. v. Marshall-Sanders Co.*, 79 Conn. 15, 17, 63 Atl. 641.

9. *Laborde v. Ubarri*, 214 U. S. 173, 29 Sup. Ct. 552, 53 L. ed. 955; *Ex parte Des Moines & M. R. Co.*, 103 U. S. 794, 26 L. ed. 461; *Toland v. Sprague*, 12 Pet. 300, 9 L. ed. 1093; *Smith v. Reed*,

referred to control only as to actions in personam, and have no reference to proceedings in rem.¹⁰ The law is well settled that in cases involving the status of their citizens and proceedings in rem or quasi in rem, the government, in consequence of the authority which it possesses over things within its borders, may adjudge the rights of the parties thereto without personal service or voluntary appearance by what is known as substituted service or service by publication,¹¹ provided the legislature of the state has authorized service in such manner in the particular case,¹² and for the purpose of such determination may provide any reasonable methods of imparting notice,¹³ so as to render a

210 Fed. 968; *United States v. Brooke*, 184 Fed. 341.

10. **U. S.**—*Haddock v. Haddock*, 201 U. S. 562, 567, 26 Sup. Ct. 525, 526, 50 L. ed. 867; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918. **N. Y.**—*Holcomb v. Kelly*, 114 N. Y. Supp. 1048. **Tenn.**—*Knapp v. United Order G. C. W.*, 121 Tenn. 212, 118 S. W. 390.

11. See the following: **U. S.**—*Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867; *Roller v. Holly*, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. ed. 520; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Morris v. Graham*, 51 Fed. 53; *Chicago & A. Bridge Co. v. Anglo-American Packing Co.*, 46 Fed. 584; *Bennett v. Fenton*, 41 Fed. 283, 10 L. R. A. 500. **Ariz.**—*Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722, 727. **Cal.** *Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17, 129 Am. St. Rep. 141, 19 L. R. A. (N. S.) 983; *First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Perkins v. Wakeham*, 86 Cal. 580, 25 Pac. 51, 21 Am. St. Rep. 67. **Ill.**—*Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507. **Ind.** *Essig v. Lower*, 120 Ind. 239, 21 N. E. 1090. **Kan.**—*Zimmerman v. Barnes*, 56 Kan. 419, 43 Pac. 764; *Dillon v. Heller*, 39 Kan. 599, 18 Pac. 693. **La.**—*Wunstel v. Landry*, 39 La. Ann. 312, 1 So. 893. **Minn.**—*Shepherd v. Ware*, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; *Lydiard v. Chute*, 45 Minn. 277, 47 N. W. 967; *Bardwell v. Collins*, 44 Minn. 97, 102, 46 N. W. 315, 20 Am. St. Rep. 547, 9 L. R. A. 152. **Miss.** *Cocke v. Brewer*, 68 Miss. 775, 9 So. 823. **Mo.**—*Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. Rep. 74. **Mont.**—*Silver Camp M. Co. v. Dickert*, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, 3 Ann. Cas. 1000. **Neb.**—*Keene v.*

Sallenbach, 15 Neb. 200, 18 N. W. 75. **N. J.**—*Cona v. Hudson Co.*, 86 N. J. L. 154, 90 Atl. 1031; *Hudson Nav. Co. v. Murray*, 236 Fed. 419. **N. Y.**—*Holcomb v. Kelly*, 114 N. Y. Supp. 1048. **N. C.** *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235. **N. D.**—*Hartzell v. Vigen*, 6 N. D. 117, 69 N. W. 203, 66 Am. St. Rep. 589, 35 L. R. A. 451. **S. D.**—*State ex rel. Bank v. Circuit Ct.*, 32 S. D. 573, 143 N. W. 892. **Tenn.**—*Knapp v. United Order G. C. W.*, 121 Tenn. 212, 118 S. W. 390. **Va.**—*Clem v. Given's Exr.*, 106 Va. 145, 55 S. E. 567. **Wis.** *Jarvis v. Barrett*, 14 Wis. 591, and generally the title "**Service of Process and Papers.**"

[a] **Quasi In Rem Proceedings.** There is a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant, to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties. *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372.

12. *McKim v. Odom*, 3 Bland (Md.) 407. See generally the title, "**Service of Process and Papers.**"

13. *Arndt v. Griggs*, 134 U. S. 316,

valid judgment so far as such property is concerned by seizure of the property or levy of the writ of attachment,¹⁴ provided such proceedings are according to the principles and rules of the common law,¹⁵ and in strict accordance with the statutes of the state.¹⁶ If there be no personal service on the defendant or owner of the property, or ap-

10 Sup. Ct. 557, 33 L. ed. 918. See generally the title "**Service of Process and Papers.**"

14. **U. S.**—Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. 308, 19 L. ed. 931. **Ark.**—McLaughlin v. McCrory, 55 Ark. 442, 18 S. W. 762, 29 Am. St. Rep. 56. **Cal.**—First Nat. Bank v. Eastman, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Loaiza v. Superior Court, 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376; In re Newman's Est., 75 Cal. 213, 16 Pac. 887, 7 Am. St. Rep. 146, divorce. **Ga.**—Stewart v. Rutherford, 74 Ga. 435; Harris v. Palmore, 74 Ga. 273; Molyneux v. Seymour, 30 Ga. 440, 76 Am. Dec. 662; Adams v. Lamar, 8 Ga. 83. **Ill.**—Williams v. Williams, 221 Ill. 541, 77 N. E. 928; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673. **Minn.**—Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773, 24 Am. St. Rep. 212; Lane v. Innes, 43 Minn. 137, 45 N. W. 4. **Miss.**—New Orleans etc. Co. v. Hemphill, 35 Miss. 17. **N. Y.**—Hunt v. Hunt, 72 N. Y. 217, 237, 28 Am. Rep. 129; Monroe v. Douglas, 4 Sandf. Ch. 126. **N. C.**—Hinton v. Penn Mut. Life Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636. **Ohio.**—Thompson v. Steamboat, 2 Ohio St. 26, 59 Am. Dec. 658. **S. D.**—Froelich v. Swafford, 35 S. D. 35, 150 N. W. 476, 893. **Tex.**—Stuart v. Anderson, 70 Tex. 588, 8 S. W. 295; Battle, Heck & Co. v. Carter, 44 Tex. 485.

[a] **Reason of Rule.**—The theory upon which, in proceedings purely in rem a seizure is notice and gives jurisdiction is, that the res, if not in the possession of the owner himself, is intrusted to an agent who has the power, and whose duty it is, to represent the owner and protect his interests (Dorr's Admr. v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106), or as stated by the United States supreme court, "The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not

only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale." Pennoyer v. Neff, 95 U. S. 714, 727, 24 L. ed. 565.

15. Cocke v. Brewer, 68 Miss. 775, 9 So. 823; Douglass v. Phoenix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118.

16. **U. S.**—Applegate v. Lexington & Carter County Min. Co., 117 U. S. 255, 269, 6 Sup. Ct. 742, 29 L. ed. 892; Pennoyer v. Neff, 95 U. S. 714, 723, 24 L. ed. 565; Cooper v. Reynolds, 10 Wall. 308, 319, 19 L. ed. 931; Wright v. Ankeny, 217 Fed. 988; Hartley v. Boynton, 17 Fed. 873, 5 McCrary 453; Galpin v. Page, 3 Sawy. 93, 9 Fed. Cas. No. 5,206. **Cal.**—People v. Mulcahy, 159 Cal. 34, 112 Pac. 853; McCauley v. Fulton, 44 Cal. 355; McMin v. Whelan, 27 Cal. 300; People v. Huber, 20 Cal. 81; Lima v. Lima, 26 Cal. App. 1, 147 Pac. 233. **Colo.**—Empire Trowbridge v. Allen, 48 Colo. 419, 110 Pac. 193; Israel v. Arthur, 7 Colo. 5, 1 Pac. 438; Brown v. Tucker, 7 Colo. 30, 1 Pac. 221; Gibson v. Wagner, 25 Colo. App. 129, 136 Pac. 93; Ranch & Co. v. Saul, 22 Colo. App. 605, 127 Pac. 123. **D. C.**—Morse v. United States, 29 App. Cas. 433. **Fla.**—Shrader v. Shrader, 36 Fla. 502, 18 So. 672. **Ill.**—Reid, Murdock & Co. v. McGregor, 183 Ill. App. 300; Kircher v. Keating etc. Co., 145 Ill. App. 1. **Ia.**—Schaller & Son v. Marker, 136 Iowa 575, 114 N. W. 43; Bradley v. Jamison, 46 Iowa 68; Tunis v. Withrow, 10 Iowa 305, 77 Am. Dec. 117. **Mich.**—Schoenfeld v. Bourne, 159 Mich. 139, 132 N. W. 537, 30 L. R. A. (N. S.) 122. **Miss.**—Foster v. Simmons, 40 Miss. 585. **Mo.**—South Missouri P. Lumb. Co. v. Carroll, 255 Mo. 357, 164 S. W. 599; Kunzi v. Hickman, 243 Mo. 103, 147 S. W. 1002; Shuck v. Moore, 232 Mo. 649, 135 S. W. 59; Ohlmann v. Clarkson S. Mill Co., 222 Mo. 62, 120 S. W. 1155, 28 L. R. A. (N. S.) 432; Otis v. Epperson, 88 Mo. 131. **Neb.**—Calkins v. Miller, 55 Neb. 601, 75 N. W. 1108. **Nev.**—State ex rel. Sparks v. State Bank & Tr. Co., 37 Nev. 55, 139

pearance by him, the jurisdiction cannot extend beyond binding the property attached or effects garnished.¹⁷

4. **Over the Res.**—Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it.¹⁸

C. JURISDICTION BY CONSENT OR WAIVER.¹⁹—1. **Over the Subject-Matter.**—a. *In General.*—Jurisdiction over subject-matter cannot be conferred upon a court by consent, express or implied,²⁰ or by

Pac. 505, 142 Pac. 627; *Coffin v. Bell*, 22 Nev. 169, 37 Pac. 240, 58 Am. St. Rep. 738; *Victor Mill etc. Co. v. Justice Ct.*, 18 Nev. 21, 1 Pac. 831. **N. Y.** *Kendall v. Washburn*, 14 How. Pr. 380; *Gay v. Ulrichs*, 136 App. Div. 809, 121 N. Y. Supp. 726. **Ore.**—*Osburn v. Maata*, 66 Ore. 558, 135 Pac. 165; *Odell v. Campbell*, 9 Ore. 298. **Tex.**—*Stephenson v. Texas*, etc. R. Co., 42 Tex. 162. **Wash.**—*Hays v. Peavey*, 54 Wash. 78, 102 Pac. 889; *Garrison v. Cheeney*, 1 Wash. Ter. 489. **Wis.**—*Likens v. McCormick*, 39 Wis. 313; *Hafern v. Davis*, 10 Wis. 501; *Falkner v. Guild*, 10 Wis. 563.

See generally the title "Service of Process, and Papers."

17. **U. S.**—*Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565. **Ia.**—*Wells, Pettit & Co. v. Sequin*, 14 Iowa 143. **N. C.** *Bernhardt v. Brown*, 118 N. C. 700, 705, 24 S. E. 527, 715, 36 L. R. A. 402.

See also *supra*, IV, B, 3, b, (II), (B).

18. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 316, 19 L. ed. 931; *Hall v. Hall*, 12 W. Va. 1. See also *supra*, IV, B, 3, b, (II), (B); IV, B, 3, c, (II).

19. In justice's court, see the title "Justices of the Peace."

20. **U. S.**—*Thomas v. Board of Trustees*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160; *Minnesota v. Northern Sec. Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. ed. 870; *Minnesota v. Hitchcock*, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. ed. 954; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. ed. 867; *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. ed. 249; *People's Bank v. Calhoun*, 102 U. S. 256, 26 L. ed. 101; *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365; *In re Hollins*, 229 Fed. 349, 143 C. C. A. 469; *Nazro v. Cragin*, 3 Dill. 474, 17 Fed. Cas. No. 10,062. **Ala.**—*Woolf v. McGaugh*, 175 Ala. 299, 57 So. 754;

Dunham v. Hatcher, 31 Ala. 483; *Fields v. Walker*, 23 Ala. 155; *Harrison v. Harrison*, 20 Ala. 629, 644, 56 Am. Dec. 227; *State ex rel. Savary v. Caroline*, 20 Ala. 19, 23; *Jeffries v. Harbin*, 20 Ala. 387; *Winn v. Freele*, 19 Ala. 171; *Wyatt v. Judge*, 7 Port. 37; *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525. **Ark.**—*Price v. Madison County Bank*, 90 Ark. 195, 118 S. W. 706; *Frank v. Frank*, 88 Ark. 1, 113 S. W. 640, 129 Am. St. Rep. 73, 19 L. R. A. (N. S.) 176; *American Soda Fountain Co. v. Battle*, 85 Ark. 213, 107 S. W. 672, 108 S. W. 508; *Gaither v. Wasson*, 42 Ark. 126; *Jacks v. Moore*, 33 Ark. 31; *Feild v. Dortch*, 34 Ark. 399. **Cal.** *Ball v. Putnam*, 132 Cal. 134, 55 Pac. 773; *Yore v. Superior Court*, 108 Cal. 431, 41 Pac. 477; *Bates v. Gage*, 40 Cal. 183; *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Gray v. Hawes*, 8 Cal. 562. **Colo.**—*Board of Comrs. v. Denver U. Water Co.*, 32 Colo. 382, 76 Pac. 1060; *Whipple v. Stevenson*, 25 Colo. 447, 55 Pac. 188; *Haverly Invinible Min. Co. v. Howcutt*, 6 Colo. 574; *McKinnon v. Hall*, 10 Colo. App. 291, 50 Pac. 1052. **Conn.**—*Hazzard v. Gallucci*, 89 Conn. 196, 93 Atl. 230; *Savings Bank v. Downs*, 74 Conn. 87, 49 Atl. 913; *Chipman v. Waterbury*, 59 Conn. 496, 22 Atl. 289; *Andrews v. Wheaton*, 23 Conn. 112. **Del.**—*Odessa Loan Assn. v. Dyer*, 2 Boyce 457, 81 Atl. 469. **Fla.**—*Post v. Carpenter*, 2 Fla. 441; *Shepard v. Kelly*, 2 Fla. 634. **Ga.**—*State v. Sallade*, 111 Ga. 700, 36 S. E. 922; *Watson v. Pearre*, 110 Ga. 320, 35 S. E. 316; *Smith v. Ferrario*, 105 Ga. 51, 31 S. E. 38; *Amos v. Parker*, 88 Ga. 754, 16 S. E. 200; *Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 660; *Citizens Nat. Bank v. Swift Fertilizer Wks.*, 16 Ga. App. 523, 86 S. E. 403; *Wright v. State*, 16 Ga. App. 216, 84 S. E. 975; *Western Union Tel. Co. v. Cooper*, 2 Ga. App. 376, 58 S. E. 517. **Haw.**—*Richards v. Ontai*, 20 Hawaii 198. **Ill.**—*People v.*

- May, 276 Ill. 332, 114 N. E. 685; *People v. Industrial Sav. Bank*, 275 Ill. 139, 113 N. E. 937; *Boyd v. Kimmel*, 244 Ill. 545, 91 N. E. 710; *Compton v. Johnson*, 240 Ill. 433, 88 N. E. 988; *City of Aurora v. Schoeberlein*, 230 Ill. 496, 82 N. E. 860; *People v. Peoria*, 229 Ill. 225, 82 N. E. 225; *Murphy v. People*, 221 Ill. 127, 77 N. E. 439; *Demilly v. Grosvenaud*, 201 Ill. 272, 66 N. E. 234; *Douglas v. Dee*, 194 Ill. App. 612; *Mathias v. Mathias*, 104 Ill. App. 344, *affirmed* 202 Ill. 125, 66 N. E. 1042; *Cobb v. People*, 84 Ill. 511; *Bishop v. Nelson*, 83 Ill. 601. **Ind. Ter.**—*In re Frazee*, 3 Ind. Ter. 590, 64 S. W. 545. **Ind.**—*Indianapolis v. Hawkins*, 180 Ind. 282, 103 N. E. 10; *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692, 58 Am. Rep. 375; *Tucker v. Sellers*, 136 Ind. 514, 30 N. E. 531; *Lowery v. State L. Ins. Co.*, 153 Ind. 100, 54 N. E. 442; *Wingo v. State*, 99 Ind. 243; *Herbster v. State*, 80 Ind. 484; *Doctor v. Hartman*, 74 Ind. 221; *Brady v. Richardson*, 18 Ind. 1; *Daniels v. Bruce* (Ind. App.), 93 N. E. 675; *Huber v. Beck*, 6 Ind. App. 47, 32 N. E. 1025. **Ia.**—*Danforth v. Thompson*, 34 Iowa 243; *Roland v. Brock*, 29 Iowa 284; *Walters v. Mollie Dozier*, 24 Iowa 192; *Dicks v. Hatch*, 10 Iowa 380; *Chapman v. Morgan*, 2 G. Gr. 374; *Cerro Gordo v. Wright*, 59 Iowa 485, 13 N. W. 645; *McMeans v. Cameron*, 51 Iowa 691, 49 N. W. 856. **Kan.**—*Van Bentham v. Osage*, 49 Kan. 30, 30 Pac. 111. **Ky.**—*Davis v. Davis*, 10 Bush 274; *Stark's Admr. v. Thompson's Admr.*, 3 J. J. Marsh. 299; *Brown v. McKee's Representatives*, 1 J. J. Marsh. 471; *Lindsey v. M'Clelland*, 1 Bibb 262. **La.**—*Marsoulet v. Bienvenu*, 11 La. 122; *Abat v. Songy's Estate*, 7 Mart. (O. S.) 274; *Riggs v. Bell*, 39 La. Ann. 1030, 3 So. 183; *State v. Fosdick*, 21 La. Ann. 256. **Me.**—*West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730; *Powers v. Mitchell*, 75 Me. 364; *State v. Bonney*, 34 Me. 223. **Md.**—*Park Land Corp. v. Baltimore*, 128 Md. 611, 98 Atl. 153; *Hadaway v. Hynson*, 89 Md. 305, 43 Atl. 806; *Danner v. State*, 89 Md. 220, 42 Atl. 965. **Mass.**—*Fourth Nat. Bank v. Mead*, 214 Mass. 549, 102 N. E. 69; *Santom v. Ballard*, 133 Mass. 464; *Osgood v. Thurston*, 23 Pick. 110; *Carlisle v. Weston*, 21 Pick. 535. **Mich.**—*People v. Meloche*, 186 Mich. 536, 152 N. W. 918; *Nichols v. Circuit Judge*, 185 Mich. 654, 152 N. W. 482; *Maslen v. Anderson*, 163 Mich. 477, 482, 128 N. W. 723; *Hull v. Hull*, 149 Mich. 500, 506, 112 N. W. 1126; *Kirkwood v. Hoxie*, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549; *Hagar v. Coup*, 50 Mich. 54, 14 N. W. 698. **Minn.**—*In re Hunstiger*, 130 Minn. 538, 153 N. W. 1095; *Johnson v. Clontarf*, 98 Minn. 281, 108 N. W. 521; *State v. Dike*, 20 Minn. 363; *Marsh v. Armstrong*, 20 Minn. 81, 18 Am. Rep. 355; *Rathbun v. Moody*, 4 Minn. 364. **Miss.**—*Switzer v. Benny*, 94 Miss. 209, 48 So. 401; *American Burial Case Co. v. Shaugnessy*, 59 Miss. 398; *Cason v. Cason*, 31 Miss. 578; *Holloman v. Holloman*, 5 Smed. & M. 559; *Hurd v. Tombes*, 7 How. 229. **Mo.**—*Big Tarkio Drain. Dist. v. Voltmer*, 256 Mo. 152, 165 S. W. 338; *St. Louis v. Glasgow*, 254 Mo. 262, 162 S. W. 596; *State ex rel. St. Louis, etc. Co. v. Nixon*, 232 Mo. 496, 134 S. W. 538; *State v. Nixon*, 133 S. W. 340; *Abernathy v. Moore*, 83 Mo. 65; *McIlwrath v. Hollander*, 73 Mo. 105, 39 Am. Rep. 484; *Brown v. Woody*, 64 Mo. 547; *Tippack v. Briant*, 63 Mo. 580. **Mont.**—*Rader v. Nottingham*, 2 Mont. 157; *Sanders v. Farwell*, 1 Mont. 599; *Wilson v. Davis*, 1 Mont. 98. **Neb.**—*Crawford Co. v. Hathaway*, 61 Neb. 317, 85 N. W. 303; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Johnson v. Bouton*, 56 Neb. 626, 77 N. W. 57. **Nev.**—*Grant v. Grant*, 38 Nev. 185, 147 Pac. 451; *Phillips v. Welch*, 11 Nev. 187; *Feusier v. Lammon*, 6 Nev. 209; *Hastings & Co. v. Burning Moscow Co.*, 2 Nev. 93. **N. H.**—*Mansfield v. Holton*, 74 N. H. 417, 542, 68 Atl. 541; *Batchelder v. Currier*, 45 N. H. 460; *Haywood v. Charlestown*, 34 N. H. 23; *State v. Richmond*, 26 N. H. 232. **N. J.**—*Dixon v. Russell*, 78 N. J. L. 296, 73 Atl. 51; *Collins v. Keller*, 58 N. J. L. 429, 34 Atl. 753; *Warren County School Dist. No. 28 v. Stocker*, 42 N. J. L. 115; *Cottrell v. Thompson*, 15 N. J. L. 344; *Newkirk v. Morris*, 12 N. J. Eq. 62. **N. M.**—*Staab v. Atlantic & Pac. Ry. Co.*, 3 N. M. 606, 9 Pac. 381. **N. Y.**—*In re Walker's Will*, 136 N. Y. 20, 32 N. E. 633; *Daidsburgh v. Knickerbocker L. Ins. Co.*, 90 N. Y. 526; *Wheelock v. Lee*, 74 N. Y. 495, 5 Abb. N. C. 72, 54 How. Pr. 402; *Dudley v. Mayhew*, 3 N. Y. 9; *Shakespeare v. Markham*, 10 Hun 311; *Midler v. Lese*, 45 Misc. 637, 91 N. Y. Supp. 148; *Perlman v. Gunn*, 41 Misc. 166, 83 N. Y. Supp. 986; *In re Mt. Vernon T. Co.*, 161 N. Y. Supp. 1060; *Golden v. Fried-*

- man, 159 N. Y. Supp. 842. **N. C.**—Hawkins v. Hughes, 87 N. C. 115; Leach v. Western North Carolina R. Co., 65 N. C. 486; Green v. Collins, 28 N. C. 139; Skinner v. Moore, 19 N. C. 138, 30 Am. Dec. 155. **Ohio.**—Smith v. Hoover, 39 Ohio St. 249; Rosebrough v. Ansley, 35 Ohio St. 107; Steamboat General Buell v. Long, 18 Ohio St. 521, 526; Rohn v. Dunbar, 13 Ohio St. 572; Dayton & W. R. Co. v. Marshall, 11 Ohio St. 497; Moore v. Robison, 6 Ohio St. 302; McCleary v. McLain, 2 Ohio St. 368. **Okl.** Model Clothing Co. v. First Nat. Bank, 160 Pac. 450; Maer Mfg. Co. v. Cox, 21 Okla. 846, 97 Pac. 649; Hobbs v. German-American Doctors, 14 Okla. 236, 78 Pac. 356; Beach v. Beach, 4 Okla. 359, 46 Pac. 514; Twine v. Carey, 2 Okla. 249, 37 Pac. 1096; Robinson v. Peru Plow & W. Co., 1 Okla. 140, 31 Pac. 988; Lightle v. State, 2 Okla. Crim. 334, 101 Pac. 608. **Ore.**—Catlin v. Jones, 56 Ore. 492, 108 Pac. 633; Goodnough Mercantile Co. v. Galloway, 48 Ore. 239, 84 Pac. 1049. **Pa.**—*In re* Hazard's Estate, 253 Pa. 447, 98 Atl. 678; Williamsport v. Williamsport Water Co., 232 Pa. 255, 81 Atl. 324; *In re* Opening Spring St., 112 Pa. 258, 3 Atl. 581; Montgomery v. Heilmann, 96 Pa. 44; Oil City v. McAboy, 74 Pa. 249; *In re* Hoch's Appeal, 72 Pa. 53; Mallessa v. Pennsylvania Co., 22 Pa. Dist. 1087; *In re* Small's Appeal, 1 Monag. 664, 15 Atl. 767. **P. R.**—Bayron v. Garcia, 17 Porto Rico 512; Property Owners' League v. San Juan, 14 Porto Rico, 85. **R. I.**—Fitts v. Shaw, 22 R. I. 17, 46 Atl. 42; Weeden v. Richmond, 9 R. I. 128, 98 Am. Dec. 373. **S. C.**—Chalmers v. Turnipseed, 21 S. C. 126; Gallman v. Gallman, 5 Strobb. 207; Bent's Exr. v. Graves, 3 McCord 280, 15 Am. Dec. 632. **S. D.**—Peoples Sec. Bank v. Sanderson, 24 S. D. 443, 123 N. W. 873; Michel Brew. Co. v. State, 19 S. D. 302, 103 N. W. 40, 70 L. R. A. 911. **Tenn.** Harmon v. Tyler, 112 Tenn. 8, 83 S. W. 1041; Board of Directors v. Bodkin, 108 Tenn. 700, 69 S. W. 270; Baker v. Mitchell, 105 Tenn. 610, 59 S. W. 137; Travers v. Abbey, 104 Tenn. 665, 58 S. W. 247, 31 L. R. A. 260; Anderson v. Cannon, Cooke, 27; Glasgow v. State, 9 Baxt. 485; Agee v. Dement, 1 Humph. 332. **Tex.**—Hunt v. Johnson, 106 Tex. 509, 171 S. W. 1125; Hoffman v. Cleburne Bldg., etc. Assn., 85 Tex. 409, 22 S. W. 151; Woodruff v. Harrell, 67 Tex. 298, 3 S. W. 48; Snyder v. Wiley, 59 Tex. 448; Smith v. Parks, 55 Tex. 82, 86; Marchison v. White, 54 Tex. 78; Reinertsen v. Bennett & Sons (Tex. Civ. App.), 185 S. W. 1027; Josey v. Masters (Tex. Civ. App.), 179 S. W. 1134; Mercer v. Woods, 33 Tex. Civ. App. 642, 78 S. W. 15, *affirmed*, 98 Tex. 624. **Vt.**—Thayer v. Montgomery, 26 Vt. 491; Glidden v. Elkins, 2 Tyler 218. **Va.**—Litz v. Rowe, 117 Va. 752, 86 S. E. 155, L. R. A. 1916B, 799; Thomas, Andrews & Co. v. Norton, 110 Va. 147, 65 S. E. 466; Adams v. Jennings, 103 Va. 579, 49 S. E. 982; Litterall v. Jackson, 80 Va. 604; Randolph v. Kinney, 3 Rand. (24 Va.) 394. **Wash.**—West v. Martin, 47 Wash. 417, 421, 92 Pac. 334; Hammel v. Fidelity Mut. Aid Assn., 42 Wash. 448, 85 Pac. 35; First Nat. Bank v. Carter, 10 Wash. 11, 38 Pac. 877; Steiner v. Norton, 6 Wash. 23, 32 Pac. 1063; Nickels v. Griffin, 1 Wash. Ter. 374. **W. Va.**—Sprinkle v. Duty, 54 W. Va. 559, 46 S. E. 557; Freer v. Davis, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; Yates v. Taylor Co. Court, 47 W. Va. 376, 35 S. E. 24; Ohio River R. Co. v. Gibbens, 35 W. Va. 57, 12 S. E. 1093. **Wis.** Harrigan v. Gilchrist, 121 Wis. 127, 99 N. W. 909; Hager v. Falk, 82 Wis. 644, 52 N. W. 432; Plano Mfg. Co. v. Rasey, 69 Wis. 246, 34 N. W. 85; Palmer v. Peterson, 46 Wis. 401, 1 N. W. 73; Steen v. Norton, 45 Wis. 412; Damp v. Dane, 29 Wis. 419; Wanzer v. Howland, 10 Wis. 8; Dykeman v. Budd, 3 Wis. 640; Walker v. Rogan, 1 Wis. 597. **Eng.** Lawrence v. Wilcock, 11 Ad. & El. 941, 39 E. C. L. 495, 113 Eng. Reprint 672; Reg. v. Judge, 20 Q. B. Div. 242, 248, 57 L. J. Q. B. 113; *In re* Aylmer, 20 Q. B. Div. 258, 262, 57 L. J. Q. B. 163. See 15 STANDARD PROC. 781.
- [a] Especially will consent or waiver not confer jurisdiction where the jurisdiction is expressly or impliedly inhibited by the constitution, statute or policy of the state. Wright v. State, 16 Ga. App. 216, 84 S. E. 975.
- [b] There is a marked distinction between the question of mere personal privilege to be sued in a certain locality, which privilege may be waived, and that of jurisdiction proper which cannot be conferred, even by express consent. See the title "Venue" and the following cases: Ill.—Douglas v. Dee, 194 Ill. App. 612. Minn.—Duluth v. Dibblee, 62 Minn. 18, 25, 63 N. W.

waiver;²¹ this jurisdiction cannot be conferred otherwise than by the

1117; *Wood v. Myrick*, 16 Minn. 494. **Tex.**—*Masterson v. Asheom*, 54 Tex. 324. **W. Va.**—*Yates v. Taylor County Ct.*, 47 W. Va. 376, 35 S. E. 24.

[c] **Making an agreed case**, does not extend the jurisdiction over a cause otherwise without the jurisdiction. *Anderson v. Cannon*, *Cooke (Tenn.)* 27. See also *Ramsdell v. Duxberry*, 14 S. D. 222, 85 N. W. 221.

[d] **An agreement to consider a house as real property** cannot be considered in determining jurisdiction of court. *Haney v. Millikin*, 2 Wills. Civ. Cas. (Tex.) §221.

[e] **Nor can misleading confer jurisdiction.** *Jeffries v. Harbin*, 20 Ala. 387.

[f] **An agreement to continue a suit after payment of the claim on which it is founded will not confer jurisdiction to continue the case.** *Thomas, etc. Co. v. Norton*, 110 Va. 147, 65 S. E. 466.

[g] **An agreement in a lease fixing venue of suit thereon** cannot give court jurisdiction over non resident. *York v. State*, 73 Tex. 651, 11 S. W. 869.

[h] **Extra Judicial Judgment.**—Consent of parties can give court no authority to render an extra judicial judgment in the premises. *Cottrell v. Thompson*, 15 N. J. L. 344.

21. Ala.—*Little v. Fitts*, 33 Ala. 343; *McClure v. Lay*, 30 Ala. 208; *Fields v. Walker*, 23 Ala. 155; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525. **Cal.**—*King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; *Mastick v. Superior Ct.*, 94 Cal. 347, 29 Pac. 869; *In re Grove Street*, 61 Cal. 438; *People v. O'Neil*, 47 Cal. 109. **Colo.**—*Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060; *Haverly Invincible Min. Co. v. Howcutt*, 6 Colo. 574; *Derry v. Ross*, 5 Colo. 295; *Schilling v. Rominger*, 4 Colo. 100. **Conn.**—*Hazzard v. Gallucci*, 89 Conn. 196, 93 Atl. 230; *Wildman v. Rider*, 23 Conn. 172. **Dak.**—*Murry v. Burris*, 6 Dak. 170, 42 N. W. 25. **Fla.** *Livingston v. Webster*, 26 Fla. 325, 8 So. 442. **Ga.**—*Block v. Henderson*, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325; *Castleberry v. State*, 68 Ga. 49; *Crane v. Barry*, 47 Ga. 476; *Central Bank v. Gibson*, 11 Ga. 453; *Citizens Nat. Bank v. Swift Fertilizer Works*, 16 Ga. App. 533, 86

S. E. 403. **Idaho.**—*Tootle v. French*, 2 Idaho 745, 25 Pac. 1091; *People v. Du Rell*, 1 Idaho 44. **Ill.**—*Demilly v. Grosrenaud*, 201 Ill. 272, 66 N. E. 234; *Douglass v. Dee*, 194 Ill. App. 612; *Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982; *Richards v. Lake Shore, etc. R. Co.*, 124 Ill. 516, 519, 16 N. E. 909; *Hoagland v. Creed*, 81 Ill. 506; *Randolph County v. Ralls*, 18 Ill. 29. **Ind.** *Pittsburgh, etc. R. Co. v. Gregg*, 181 Ind. 42, 102 N. E. 961; *Daniels v. Bruce*, 176 Ind. 151, 95 N. E. 569; *McCoy v. Able*, 131 Ind. 419, 30 N. E. 528, 31 N. E. 453; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Herbster v. State*, 80 Ind. 484; *Doctor v. Hartman*, 74 Ind. 221; *Riley v. Butler*, 36 Ind. 51; *Justice v. State*, 17 Ind. 56; *Prather v. Brandon*, 44 Ind. App. 45, 88 N. E. 700. **Ia.**—*Marquardt v. Thompson*, 78 Iowa 158, 42 N. W. 634; *Stough v. Chicago & N. W. Ry. Co.*, 71 Iowa 641, 33 N. W. 149; *Orcutt v. Hanson*, 71 Iowa 514, 32 N. W. 482; *Walters v. The Steamboat Mollie Dozier*, 24 Iowa 192, 95 Am. Dec. 722; *Smiths v. Dubuque Co.*, 1 Iowa 492. **Kan.**—*Foreman v. Carter*, 9 Kan. 674; *Rice v. State*, 3 Kan. 141. **Ky.**—*Fidler v. Hall*, 2 Met. 461; *Lindsey v. M'Clelland*, 1 Bibb 262. **La.**—*Fleming v. Hiligsberg*, 11 Rob. 77; *Greiner v. Thielen*, 6 Rob. 365; *Dupey v. Greffin*, 1 Mart. N. S. 198; *Dartex v. Lege*, 28 La. Ann. 640; *Debuys v. Yerby*, 1 Mart. N. S. 380. **Me.** *West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730; *Chase v. Palmer*, 25 Me. 341. **Mass.**—*Cheshire v. Adams & C. Reservoir Co.*, 119 Mass. 356; *Simonds v. Parker*, 1 Mete. 508; *Elder v. Dwight Mfg. Co.*, 4 Gray 201; *Richardson v. Welcome*, 6 Cush. 331. **Mich.** *Nichols v. Houghton Circ. Judge*, 185 Mich. 654, 152 N. W. 482; *Thompson v. Michigan Mut. Ben. Assoc.*, 52 Mich. 522, 18 N. W. 247; *Woodruff v. Ives*, 34 Mich. 320; *Atty-Gen. v. Moliter*, 26 Mich. 444; *Moore v. Ellis*, 18 Mich. 77; *Farrand v. Bentley*, 6 Mich. 281. **Minn.** *Chauncey v. Wass*, 35 Minn. 1, 15, 25 N. W. 457, 30 N. W. 826; *McGinty v. Warner*, 17 Minn. 41; *Rahilly v. Lane*, 15 Minn. 447; *Chandler v. Kent*, 8 Minn. 536. **Miss.**—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742; *Holloman v. Holloman*, 5 Smed. & M. 559; *Bell v. Tombigbee R. Co.*, 4 Smed. & M. 549; *Buckingham v. Bailey*, 4

law;²² in equity cases as well as at law,²³ and in criminal as well as

Smed. & M. 538; Yalabusha County *v.* Carbry, 3 Smed. & M. 529. **Mo.**—Big Tarkio Drain. Dist. *v.* Voltmer, 256 Mo. 152, 165 S. W. 338; Springfield S. W. R. Co. *v.* Schweitzer, 246 Mo. 122, 151 S. W. 128; Finley *v.* United Rys. Co., 238 Mo. 6, 141 S. W. 866; Carter *v.* Carter, 237 Mo. 624, 141 S. W. 873; Klingelhoef *v.* Smith, 171 Mo. 455, 71 S. W. 1008; Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 28 S. W. 965; Bray *v.* Marshall, 66 Mo. 122; East Prairie *v.* Greer (Mo. App.), 186 S. W. 952; Craton *v.* Huntzinger (Mo. App.), 177 S. W. 816. **Mont.**—State *v.* District Ct., 34 Mont. 226, 85 Pac. 1022. **Neb.** Armstrong *v.* Mayer, 60 Neb. 423, 83 N. W. 401; Union Pacific R. Co. *v.* Ogilvy, 18 Neb. 638, 26 N. W. 464; Brondberg *v.* Babbott, 14 Neb. 517, 16 N. W. 845. **N. J.**—Collins *v.* Keller, 58 N. J. L. 429, 34 Atl. 753; School Dist. No. 28 *v.* Stocker, 42 N. J. L. 115. **N. Y.** Delafield *v.* Illinois, 2 Hill 159; McCarty *v.* Parker, 26 Abb. N. C. 235, 14 N. Y. Supp. 128; De Bussierre *v.* Holladay, 55 How. Pr. 210, 4 Abb. N. C. 111; Bennett *v.* American Art Union, 5 Sandf. 614; People *ex rel.* Ceceere *v.* Slocum, 161 App. Div. 733, 146 N. Y. S. 556; Herald Square Cloak, etc. Co. *v.* Rocca, 48 Misc. 650, 96 N. Y. Supp. 189. **Ohio.**—State *v.* Turner, Wright 20; Steamboat General Buell *v.* Long, 18 Ohio St. 521; Thompson *v.* Steamboat Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658; Wilson *v.* Swigart, 1 Ohio Dec. 418. **Okla.**—Apache State Bank *v.* Voight, 161 Pac. 214; Keenan *v.* Chastain, 157 Pac. 326. **Ore.**—Montesano Lumber Co. *v.* Portland Iron Wks., 78 Ore. 53, 152 Pac. 244; Holton *v.* Holton, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779. **Pa.**—Lewisburg Bridge Co. *v.* Union & N. Counties, 232 Pa. 255, 81 Atl. 324; Com. *v.* Barnett, 199 Pa. 161, 177, 48 Atl. 976, 55 L. R. A. 882; In re Musselman's Appeal, 101 Pa. 165; Collins *v.* Collins, 37 Pa. 387; Taylor & Co. *v.* Knipe, 2 Pearson 151; In re Stearly's Appeal, 3 Grant Cas. 270; English *v.* English, 19 Pa. Super. 586. **S. C.**—Ware *v.* Henderson, 25 S. C. 385; Segler *v.* Coward, 24 S. C. 119; State *v.* Penny, 19 S. C. 218. **S. D.**—Wayne *v.* Caldwell, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750. **Tenn.**—Ridley *v.* Halliday, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St.

Rep. 902, 53 L. R. A. 477; Baker *v.* Mitchell, 105 Tenn. 610, 59 S. W. 137; Walsh *v.* Crook, 91 Tenn. 388, 19 S. W. 19; Dixon *v.* Caruthers, 9 Yerg. 30; Agee *v.* Dement, 1 Humph. 332. **Tex.** Hunt *v.* Johnson, 106 Tex. 509, 171 S. W. 1125; Hardeman *v.* Morgan, 48 Tex. 103; Billingsly *v.* State, 3 Tex. App. 686; Heidenheimer *v.* Marx, 1 White & W. Civ. Cas. §171; Newman *v.* McCallum, 1 White & W. Civ. Cas. §273. **Utah.** Conant *v.* Deep Creek, etc. Irr. Co., 23 Utah 627, 66 Pac. 188, 90 Am. St. Rep. 721. **Vt.**—Wilson Bros. Garage *v.* Tudor, 89 Vt. 522; 95 Atl. 794; Thorp *v.* Porter, 70 Vt. 570, 41 Atl. 657; Lamson *v.* Worcester, 58 Vt. 381, 4 Atl. 145; Glidden *v.* Elkins, 2 Tyler 218; Chittenden *v.* Hurlbut, 1 D. Chip. 384; Eaton *v.* Houghton, 1 Aik. 380. **Va.**—Beckley *v.* Palmer, 11 Gratt. (52 Va.) 625; Poindexter *v.* Burwell, 82 Va. 507. **Wash.**—Tolmie *v.* Dean, 1 Wash. Ter. 46. **W. Va.**—Yates *v.* Taylor County Court, 47 W. Va. 376, 383, 35 S. E. 24. **Wis.**—Goyke *v.* State, 136 Wis. 557, 117 N. W. 1027, 1126; Harrigan *v.* Gilchrist, 121 Wis. 127, 99 N. W. 909; Plano Mfg. Co. *v.* Rasey, 69 Wis. 246, 34 N. W. 85; Bullard *v.* Kuhl, 54 Wis. 544, 11 N. W. 801; Henckel *v.* Wheeler, etc. Mfg. Co., 51 Wis. 363, 7 N. W. 780; Mathie *v.* McIntosh, 40 Wis. 120; Butler *v.* Wagner, 35 Wis. 54; Damp *v.* Dane, 29 Wis. 419.

And see *infra*, XII.

[a] **On Habeas Corpus as to Person in Another District.**—Under a constitutional provision giving the courts jurisdiction to issue writs of habeas corpus as to persons held in actual custody in their respective districts, a court of a district other than that where defendant is incarcerated has no jurisdiction even though defendant is produced upon the hearing. State *v.* District Court, 35 Mont. 51, 88 Pac. 564. **22. Ill.**—People *v.* May, 276 Ill. 332, 114 N. E. 685. **Ind.**—City of Indianapolis *v.* Hawkins, 180 Ind. 382, 103 N. E. 10. **N. M.**—Staab *v.* Atlantic & Pac. Ry. Co., 3 N. M. 606, 9 Pac. 381. **N. Y.**—Burekle *v.* Eckhart, 3 N. Y. 132. **N. C.**—Springer *v.* Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. **W. Va.**—Ohio River R. Co. *v.* Gibbens, 35 W. Va. 57, 12 S. E. 1093. **23.** Hill *v.* Moors, 224 Mass. 163, 112 N. E. 641.

in civil cases.²⁴ Thus the parties cannot stipulate to have the court decide matters not raised by the pleadings,²⁵ or determine a case involving an amount in excess of,²⁶ or less than,²⁷ the jurisdictional limit of the court, or try an offense committed in another county,²⁸ or to decide matters in a certain action which would extend the jurisdiction of the court,²⁹ or to try a local suit in county other than where the land lies,³⁰ or to determine disputed land titles where it has no jurisdiction over the subject-matter.³¹ Nor can consent confer upon a court of equity, jurisdiction of a cause exclusively cognizable in a common-law court,³² unless authorized by statute,³³ but in those cases involving matters of contract and the like, which do not come within the ordinary jurisdiction of a court of equity merely because they lack some equitable element, equity may try the case if the parties fail to object,³⁴ or stipulate thereto.³⁵

The institution of a suit by the plaintiff in a court which has no jurisdiction over the subject-matter is not such consent as to preclude him from raising the objection,³⁶ but it is otherwise if he institutes such suit in a court having general jurisdiction of the subject-matter,³⁷ as jurisdiction of a particular case³⁸ falling within the scope of the

24. *People v. Meloche*, 186 Mich. 536, 152 N. W. 918.

25. *Union Coal Co. v. La Salle*, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326. *Contra*, *Hutts v. Martin*, 134 Ind. 587, 592, 33 N. E. 676.

26. *Model Clothing Co. v. First Nat. Bank* (Okla.), 160 Pac. 450; *Bay Lumber Co. v. Artman* (Tex. Civ. App.), 188 S. W. 279.

27. **U. S.**—*Merrill v. Petty*, 16 Wall. 338, 21 L. ed. 499. **Cal.**—*Feillett v. Engler*, 8 Cal. 76. **Ind.**—*Horton v. Sawyer*, 59 Ind. 587. **La.**—*Gee's Heirs v. Thompson*, 39 La. Ann. 310, 1 So. 537; *Tague v. Royal Ins. Co.*, 38 La. Ann. 456. **Mich.**—*Gamber v. Holben*, 5 Mich. 331. **Mo.**—*Tippack v. Briant*, 63 Mo. 580. **N. Y.**—*Warden v. Goldman*, 84 Misc. 87, 145 N. Y. Supp. 989. **Okla.**—*Apache State Bank v. Voigt*, 161 Pac. 214; *Model Clothing Co. v. First Nat. Bank*, 160 Pac. 450; *Musser v. Baker*, 158 Pac. 442. **Tex.**—*Southern Pac. Co. v. Burns*, 23 S. W. 288; *McMahan v. Dennis*, 1 White & W. Civ. Cas., §1209. **Va.**—*Wynn v. Scott*, 7 Leigh (34 Va.) 63.

28. *People v. Meloche*, 186 Mich. 536, 152 N. W. 918.

29. *Hadaway v. Hynson*, 89 Md. 305, 43 Atl. 806.

30. *Thompson v. Michigan Mut. B. Assn.*, 52 Mich. 522, 18 N. W. 247; *McHenry's Lessee v. Wallen*, 2 Yerg. (Tenn.) 441.

31. *Galyon v. Gilmore*, 93 Tenn. 671, 28 S. W. 301.

32. *Palmer v. Fleming*, 1 App. Cas. (D. C.) 528; *Darst v. Kirk*, 230 Ill. 521, 82 N. E. 862; *Richards v. Lake Shore & M. S. Ry. Co.*, 124 Ill. 516, 16 N. E. 909; *Darst v. Kirk*, 132 Ill. App. 203.

33. *Walsh v. Crook*, 91 Tenn. 388, 19 S. W. 19; *Marsh v. Haywood*, 6 Humph. (Tenn.) 210; *Galbrath v. Martin*, 5 Humph. (Tenn.) 50; *Dean v. Snelling*, 2 Heisk. (Tenn.) 484.

34. *Darst v. Kirk*, 230 Ill. 521, 82 N. E. 862; *Richards v. Lake Shore & M. S. Ry. Co.*, 124 Ill. 516, 16 N. E. 909; *Guzzi v. Delaware & Hudson Co.*, 61 Pa. Super. 48, 58.

35. *Darst v. Kirk*, 132 Ill. App. 203; *Mertens v. Roche*, 39 App. Div. 398, 57 N. Y. Supp. 349.

36. *Stump v. Sheppard*, *Cooke* (Tenn.) 191.

[a] **Estoppel.**—Upon appeal from a justice's court which had no jurisdiction of the subject-matter, to a court having such jurisdiction, consent of the parties will estop them from afterward questioning the jurisdiction. *Montgomery v. Heilman*, 96 Pa. 44. See more fully the title "Justices of the Peace."

37. *In re Spring St.*, 112 Pa. 258, 3 Atl. 581.

38. **Ind.**—*Pittsburgh, C. C. & St. L. R. Co. v. Gregg*, 181 Ind. 42, 102

general subject-matter of a court's jurisdiction, may be given by consent or by waiver.

No stipulation of parties or counsel can enlarge the power of the court to pass upon moot questions or abstract propositions not actually involved in a pending controversy between parties before the court.³⁹ And if a court having had jurisdiction over a cause has lost it, the parties cannot restore its jurisdiction by consent,⁴⁰ or by failure to object.⁴¹ Nor can jurisdiction to try a cause be conferred by consent where the court failed to convene in regular session at the time fixed by law,⁴² or where the court is illegal,⁴³ where the term is adjourned by operation of law,⁴⁴ or where the judge goes beyond the territorial jurisdiction of his court.⁴⁵ If the court has jurisdiction, however, of the subject-matters involved, but the prohibition is merely to the consideration thereof at one and the same trial, consent of the parties will give the court jurisdiction to determine the matters in one suit.⁴⁶

The lack of jurisdiction of the federal court to maintain an action relating to property involved in a prior action in a state court cannot be waived, even by consent, as a court will not knowingly invade the jurisdiction of another court.⁴⁷ While consent cannot confer upon a tribunal a jurisdiction not vested in it by law, yet parties may, by consent, permit a tribunal to acquire, though irregularly, a jurisdiction which the law has conferred upon it;⁴⁸ but if a court has not capacity

N. E. 961; *Daniels v. Bruce*, 176 Ind. 151, 95 N. E. 569; *Tucker v. O'Neal*, 130 Ind. 597, 30 N. E. 533; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531. N. C.—*Greer v. Cagle*, 84 N. C. 385. Wis.—*Wanzer v. Howland*, 10 Wis. 8.

[a] Acquiescence in the assumption of jurisdiction over a particular estate by a court having general jurisdiction over estates precludes inquiry into the question as to whether such court should have assumed jurisdiction over the particular estate. *Lewis v. Ames*, 44 Tex. 319.

[b] Where an order of court with the consent of all parties set aside to a widow a homestead in certain property, and the court transcended its jurisdiction, the order was valid and the parties would not demand the return of the property from the estate of the widow. *Chalmers v. Turnipseed*, 21 S. C. 126.

[c] **Determining Boundaries of Land in Another District.**—If the court has general jurisdiction of the subject-matter, the court may determine the boundaries of land situated in another district where there is no objection. *Thompson v. Alford*, 20 Tex. 491.

39. U. S.—*California v. San Pablo*, etc. R. Co., 149 U. S. 308, 13 Sup. Ct. 876, 37 L. ed. 747; *Singer Mfg. Co. v. Wright*, 141 U. S. 696, 12 Sup. Ct. 103, 35 L. ed. 906. Va.—*Thomas*, etc. Co. v. *Norton*, 110 Va. 147, 65 S. E. 466. W. Va.—*State v. Lambert*, 52 W. Va. 248, 43 S. E. 176.

40. Ill.—*Morris v. Watson*, 61 Ill. App. 536. Mont.—*Evans v. Oregon Short Line R. Co.*, 51 Mont. 107, 149 Pac. 715. Ohio.—*Long v. Newhouse*, 57 Ohio St. 348, 49 N. E. 79.

41. *Evans v. Oregon Short Line R. Co.*, 51 Mont. 107, 149 Pac. 715.

42. *American Fire Ins. Co. v. Pappe*, 4 Okla. 110, 43 Pac. 1085.

43. *Norwood v. Kenfield*, 34 Cal. 329.

44. *Bates v. Gage*, 40 Cal. 183.

45. *Foster v. McAdams*, 9 Tex. 542.

46. *Puckett v. Page* (Tex. Civ. App.), 100 S. W. 346, wherein consent to consider counterclaim in action for unliquidated damages was held valid.

47. *Pacific Coast Pipe Co. v. Conrad City Water Co.*, 237 Fed. 673.

48. Colo.—*People v. Scott*, 52 Colo. 59, 68, 120 Pac. 26. N. J.—*Newark Pass. Ry. Co. v. Kelly*, 57 N. J. L. 655, 676, 32 Atl. 223. Tenn.—*Elkins*

to try a question, except under particular conditions, or when it is brought before them in a particular way, the parties cannot waive those conditions, or approach the court in any other way, by their mutual consent merely.⁴⁹ Where jurisdiction has attached and the cause of action or the subject-matter is legally and properly within the power and cognizance of a court, it may proceed upon consent or stipulation with reference to the matters before it.⁵⁰

b. *Consent as Conferring Jurisdiction Upon Appellate Court.* Consent can neither confer original jurisdiction upon an appellate court whose jurisdiction is appellate only,⁵¹ nor confer upon such a court appellate jurisdiction of a cause not within the jurisdiction given it by law.⁵² But if an appellate court has original jurisdiction

v. Sams, 3 Hayw. 44, irregular change of venue. *Va.*—*Mayo v. Murchie*, 3 Munf. (17 Va.) 358.

49. *Walker v. Webb*, 2 Ohio Dec. (Reprint) 568.

Where residence of parties is jurisdictional prerequisite, see *infra*, IV, C, 2.

50. *In re Hollins*, 229 Fed. 349, 143 C. C. A. 469.

51. *Ark.*—*Knox v. Beirne*, 4 Ark. 460. *Minn.*—*Ames v. Boland*, 1 Minn. 365. *Tenn.*—*Elkins v. Sams*, 3 Hayw. 44.

52. *U. S.*—*Mills v. Brown*, 16 Pet. 525, 10 L. ed. 1055; *Shankland v. Washington*, 5 Pet. 390, 8 L. ed. 166; *Sampson v. Welsh*, 24 How. 207, 16 L. ed. 632. *Ala.*—*Mabry v. Dickens*, 31 Ala. 243; *Benford v. Daniels*, 20 Ala. 445. *Colo.*—*Morse v. People*, 43 Colo. 118, 95 Pac. 285; *Thorne v. Ornauer*, 6 Colo. 39; *Bernard v. Boggs*, 4 Colo. 73; *County Comrs. v. Sloan*, 4 Colo. 128.

Ill.—*Richards v. Lake Shore, etc. R. Co.*, 124 Ill. 516, 16 N. E. 909; *Fleischman v. Walker*, 91 Ill. 318; *Ginn v. Rogers*, 9 Ill. 131; *Ward v. Mississippi R. P. Co.*, 188 Ill. App. 305; *Sternberg v. Strauss*, 41 Ill. App. 147. *Ind.*—*Branson v. Studebaker*, 133 Ind. 147, 32 N. E. 98; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Tucker v. O'Neal*, 130 Ind. 597, 30 N. E. 533; *Flory v. Wilson*, 83 Ind. 391; *Doctor v. Hartman*, 74 Ind. 221; *Davis v. Davis*, 36 Ind. 160. *Ia.*—*McMeans v. Cameron*, 51 Iowa 691, 49 N. W. 856. *La.*—*State v. Voorhies*, 41 La. Ann. 540, 6 So. 821; *Gee's Heirs v. Thompson*, 39 La. Ann. 310, 1 So. 537; *Robouam's Heirs v. Robouam's Exr.*, 12 La. 73. *Mich.*—*Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Allen v. Carpenter*,

15 Mich. 25; *Farrand v. Bentley*, 6 Mich. 281; *Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688; *Wilson v. Davis*, 1 Mich. 156. *Minn.*—*Washburne v. Lufkin*, 4 Minn. 466. *Mo.*—*Springfield S. W. R. Co. v. Schweitzer*, 246 Mo. 122, 151 S. W. 128; *State ex rel. Sale v. Norton*, 201 Mo. 1, 98 S. W. 554; *State v. Bulling*, 100 Mo. 87, 12 S. W. 356; *Abernathy v. Moore*, 83 Mo. 65; *Brown v. Woody*, 64 Mo. 547; *Tippack v. Briant*, 63 Mo. 580; *Pearce v. Calhoun*, 59 Mo. 271; *Cones v. Ward*, 47 Mo. 289. *Ohio.*—*Wasson v. Heffner*, 13 Ohio St. 573. *Va.*—*Clarke v. Conn*, 1 Munf. (15 Va.) 160. *Wash.*—*McKay v. Stephens*, 81 Wash. 306, 142 Pac. 662, stipulation. *Wis.*—*Vogel v. Antigo*, 81 Wis. 642, 51 N. W. 1008; *Plano Mfg. Co. v. Rasey*, 69 Wis. 246, 34 N. W. 85; *Watson v. Appleton*, 62 Wis. 267, 22 N. W. 475; *Fleming v. Appleton*, 55 Wis. 90, 12 N. W. 462; *Palmer v. Peterson*, 46 Wis. 401, 1 N. W. 73; *Ohse v. Bruss*, 45 Wis. 442.

[a] *Appearance in appellate court in cause in which law does not authorize an appeal does not confer jurisdiction.* *Vogel v. Antigo*, 81 Wis. 642, 51 N. W. 1008.

[b] *Even where a party appeals from justice court to county court, he may question jurisdiction.* *Ingersoll v. Buchanan*, 1 W. Va. 181.

[c] *The question of jurisdiction is not waived by failure to present it while the appeal is pending.* *Heady v. Brown*, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85.

[d] *Proceedings in error brought after expiration of statutory limit are without the jurisdiction of the supreme court which cannot determine them even if the parties agree or consent thereto, or voluntarily appear in such*

of the subject-matter of a case appealed from a court without such jurisdiction, the appearance and participation of the parties in the trial *de novo*, without objection, is a waiver of the lack of jurisdiction below.⁵³ In its discretion, however, the court may refuse to entertain a case not brought before it in the manner provided by statute, regardless of stipulations.⁵⁴ Jurisdiction of an appeal cannot be conferred by consent where the appellate court is not given jurisdiction by law, of appeals from the court from which the appeal is taken,⁵⁵ even though the proceeding might have been begun in the appellate court as an original proceeding.⁵⁶

court. *King v. Penn*, 43 Ohio St. 57, 1 N. E. 84.

[e] **Of Interlocutory Order.**—Parties cannot confer jurisdiction upon an appellate court to review an interlocutory ruling not appealable by law. *Baldwin v. Lowe*, 129 Ga. 711, 59 S. E. 772.

[f] **Abiding Result of Appeal in pending in the lower court** cannot be ment rendered on appeal of one case determine judgment to be rendered in different suits against different defendants and placing unappealed cases on docket of appellate court does not give appellate court jurisdiction of latter cases. *Woodruff v. Harrell*, 67 Tex. 298, 3 S. W. 48.

[g] **Jurisdiction over a cause still pending in the lower court** cannot be conferred by consent. *Long v. Long, Morris* (Iowa) 381.

53. **Colo.**—*Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060; *Mackey v. Briggs*, 16 Colo. 143, 26 Pac. 131. **Ill.**—*Randolph County v. Ralls*, 18 Ill. 29; *Allen v. Belcher*, 8 Ill. 594. **Ind.**—*Horton v. Sawyer*, 59 Ind. 587; *Mays v. Dooley*, 59 Ind. 287; *Pritchard v. Bartholomew*, 45 Ind. 219; *Goodwin v. Barnett*, 2 Ind. App. 16, 28 N. E. 115. **Ky.**—*Fitzpatrick v. Young*, 160 Ky. 5, 169 S. W. 530; *Hughes' Admr. v. Hardesty*, 13 Bush 364. **Ohio.**—*Ballou v. Farnsworth*, 1 Cleve. L. Rep. 17, 4 Ohio Dec. (Reprint) 88. **Okla.**—*School Dist. v. Gauthier*, 13 Okla. 194, 73 Pac. 954.

See the title "**Justices of the Peace.**"

[a] **Statutory Proceeding of Appeal From Assessing Body.**—This rule is not applicable to a special statutory proceeding to correct an erroneous assessment of taxes. Even though the district court would, in a proper case, have original jurisdiction to annul a void or illegal tax laid upon non-

assessable property, it has no such jurisdiction, upon appeal from the board of county commissioners in the statutory proceeding to correct erroneous assessments, although no objection was made to the jurisdiction. *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060.

[b] **Effect of Amendment.**—Upon appeal from the judgment of a justice if the cause of action be changed by amendment and so enlarged as to exceed the jurisdiction of a justice, without objection, and the parties proceed to the trial of the issues thus changed, in the higher court without objection, they will be presumed to have waived the objection. *Jackson v. Swope*, 49 Ind. 388; *Goodwin v. Barnett*, 2 Ind. App. 16, 22, 28 N. E. 115.

[c] **But where after challenging the jurisdiction** a party goes to trial on the appeal, he does not waive the objection. *Fitzpatrick v. Young*, 160 Ky. 5, 169 S. W. 530; *Davidson v. Johnson*, 113 Ky. 202, 67 S. W. 996.

54. **Rathbun v. Moody, 4 Minn. 273.**

55. **U. S.**—*Merrill v. Petty*, 16 Wall. 338, 21 L. ed. 499; *Kelsey v. Forsyth*, 21 How. 85, 16 L. ed. 33. **Ala.**—*Little v. Fitts*, 33 Ala. 343; *Maby v. Dickens*, 31 Ala. 243; *Benford v. Daniels*, 20 Ala. 445. **Ark.**—*Hamilton v. Buxton*, 5 Ark. 400. **Ill.**—*Fleishman v. Walker*, 91 Ill. 318; *Peak v. People*, 71 Ill. 278; *People v. Royal*, 2 Ill. 557. **Mass.** *Smith v. Brown*, 136 Mass. 416. **Mo.** *Tippack v. Briant*, 63 Mo. 580. **Nev.** *Phillips v. Welch*, 11 Nev. 187. **Pa.** *McFee v. Harris*, 25 Pa. 102. **Va.** *M'Call v. Peachy*, 1 Call. (5 Va.) 55. **Wis.**—*Mathie v. McIntosh*, 40 Wis. 120.

[a] **Failure to object** does not confer jurisdiction. *McMeans v. Cameron*, 51 Iowa 691, 49 N. W. 856.

56. *McMeans v. Cameron*, 51 Iowa 691, 49 N. W. 856.

c. *Change of Venue by Consent*.⁵⁷ — Applying the foregoing rule a change of venue may not be had by consent of the parties to a court not having jurisdiction of the cause,⁵⁸ though where a change of venue has been had the jurisdiction may be restored by consent.⁵⁹

After a change of venue has been ordered to a wrong county, it is competent for the parties to come into court by consent, have the order rescinded, and give the court jurisdiction of their person.⁶⁰

2. *As to the Person*. — The rule that jurisdiction cannot be conferred by consent applies only where the court has not the right to assume general jurisdiction of the subject-matter of an action,⁶¹ and it is well settled that jurisdiction over the person of the defendant may be conferred by consent, express or implied, if the court has jurisdiction over the subject-matter,⁶² although it has been held that jurisdiction of the person cannot be waived so as to prejudice the

[a] This rule is not changed by a statute providing that upon appeal the cause shall be tried upon the merits and all errors, irregularities and illegalities are to be disregarded if the cause might have been instituted in such court, as such statute means something less than jurisdictional questions. *McMeans v. Cameron*, 51 Iowa 691, 49 N. W. 856.

57. *As to changing venue by consent*, see 5 STANDARD PROC. 33.

58. *Ex parte Williams*, 4 Yerg. (Tenn.) 579; *Dykeman v. Budd*, 3 Wis. 640. But see *Salter v. Salter's Creditors*, 6 Bush (Ky.) 624.

[a] Stipulation to change venue of an appeal from one court to another and entry of order thereon does not give latter court jurisdiction. *Wanzer v. Howland*, 10 Wis. 8.

59. *Taylor v. Atlantic, etc. R. Co.*, 68 Mo. 397.

60. *Gager v. Doe ex dem. Gordon*, 29 Ala. 341.

61. *Groves v. Richmond*, 56 Iowa 69, 8 N. W. 752.

62. *U. S.*—*Toledo, etc. R. Co. v. Perenchio*, 205 Fed. 472, 123 C. C. A. 540; *Gray v. Quicksilver Min. Co.*, 21 Fed. 288. *Ala.*—*Wool v. McGaugh*, 175 Ala. 299, 57 So. 754; *Pelham v. Miller*, 148 Ala. 660, 41 So. 418; *Little v. Fitts*, 33 Ala. 343; *Mabry v. Dickens*, 31 Ala. 243; *Gager v. Gordon*, 29 Ala. 341; *Humphrey v. State, Minor* 64; *Huntsville Grocery Co. v. Johnson*, 13 Ala. App. 488, 69 So. 967; *Chandler v. Hardeman*, 12 Ala. App. 572, 68 So. 525. *Ariz.*—*Fleming v. Black Warrior Copper Co.*, 15 Ariz. 1, 136 Pac. 273, 51 L. R. A. (N. S.) 99; *Parker v.*

Uchida, 14 Ariz. 57, 125 Pac. 715. *Ark.* *Morgan Eng. Co. v. Cache River Drain Dist.*, 115 Ark. 437, 172 S. W. 1020; *Grimmett v. Askew*, 48 Ark. 151, 2 S. W. 707; *Feild v. Dortch*, 34 Ark. 399. *Cal.*—*People v. Granice*, 50 Cal. 447; *Norwood v. Kenfield*, 34 Cal. 329; *Gray v. Hawes*, 8 Cal. 562; *Bell v. Cannon*, 10 Cal. App. 388, 102 Pac. 225. *Colo.* *Arapahoe County v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060; *Christ v. Flannagan*, 23 Colo. 140, 46 Pac. 683; *Schilling v. Rominger*, 4 Colo. 100. And see *People v. Scott*, 52 Colo. 59, 120 Pac. 126. *Conn.*—*Orcutt's Appeal*, 61 Conn. 378, 24 Atl. 276; *Chipman v. Waterbury*, 59 Conn. 496, 22 Atl. 289. *Del.*—*Lewis v. Hazel*, 4 Harr. 470; *Carey v. Russell*, 2 Harr. 280. *Ga.* *Glennville Bank v. Deal*, 90 S. E. 958; *Varn v. Chapman*, 137 Ga. 300, 73 S. E. 507; *Sanford v. Tanner*, 114 Ga. 1005, 41 S. E. 668; *McGahee v. Hilton, etc. L. Co.*, 112 Ga. 513, 37 S. E. 708; *Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 660; *Brown v. Anderson*, 13 Ga. 171; *Central Bank v. Gibson*, 11 Ga. 453; *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300; *Bostwick v. Perkins*, 4 Ga. 47. *Ill.*—*Union Coal Co. v. La Salle*, 136 Ill. 119, 26 N. E. 506, 12 L. R. A. 326; *Randolph County v. Ralls*, 18 Ill. 29; *Allen v. Belcher*, 8 Ill. 594; *Douglas v. Dee*, 194 Ill. App. 612; *Mohlke v. People*, 117 Ill. App. 595. *Ind.*—*Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127; *Gage v. Clark*, 22 Ind. 163; *Brady v. Richardson*, 18 Ind. 1. *Ind. Ter.*—*In re Frazee*, 3 Ind. Ter. 590, 64 S. W. 545. *Ia.* *German Bank v. American F. Ins. Co.*,

83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; *Milner v. Chicago*, etc. R. Co., 77 Iowa 755, 42 N. W. 567; *Hynds v. Fay*, 70 Iowa 433, 30 N. W. 683; *Groves v. Richmond*, 56 Iowa 69, 8 N. W. 752. **Kan.**—*Van Bentham v. Osage*, 49 Kan. 30, 30 Pac. 111. **Ky.**—*Gainesboro Tel. Co. v. Buckner*, 160 Ky. 604, 169 S. W. 1000; *Brown v. McKee's Representatives*, 1 J. J. Marsh. 471. **La.**—*Fleming v. Hiligsberg*, 11 Rob. 77. **Me.**—*West Cove Grain Co. v. Bartley*, 105 Me. 293, 74 Atl. 730; *Powers v. Mitchell*, 75 Me. 364. **Mass.** *Peabody v. School Com.*, 115 Mass. 383; *Brown v. Webber*, 6 Cush. 560. **Mich.**—*Johnson v. Burke*, 167 Mich. 349, 132 N. W. 1017; *Ferguson v. Oliver*, 99 Mich. 161, 58 N. W. 43, 41 Am. St. Rep. 593; *Cofrode v. Circuit Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511; *Stilson v. Greeley*, 2 Mich. N. P. 222. **Minn.**—*Slater v. Olson*, 83 Minn. 35, 85 N. W. 825; *Hurst v. Martinsburg*, 80 Minn. 40, 82 N. W. 1099; *Anderson v. Decoria*, 74 Minn. 339, 77 N. W. 229; *McCubrey v. Lankis*, 74 Minn. 302, 77 N. W. 144; *Chandler v. Kent*, 8 Minn. 536. **Mo.**—*Cones v. Ward*, 47 Mo. 289; *Dodson v. Scroggs*, 47 Mo. 285. **Mont.** *In re Graye*, 36 Mont. 394, 93 Pac. 266; *State v. District Court*, 35 Mont. 51, 88 Pac. 564. **Neb.**—*Union Pac. R. Co. v. Ogilvy*, 18 Neb. 638, 26 N. W. 464; *Bedford v. Ruby*, 17 Neb. 97, 22 N. W. 76. **Nev.**—*Grant v. Grant*, 38 Nev. 185, 147 Pac. 451; *Phillips v. Welch*, 11 Nev. 187. **N. H.**—*Batchelder v. Currier*, 45 N. H. 460. **N. J.**—*Collins v. Keller*, 58 N. J. L. 429, 34 Atl. 753; *Paulison v. Halsey*, 37 N. J. L. 205. **N. Y.**—*Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Burckle v. Eckhart*, 3 N. Y. 132; *Parkhurst v. Rochester L. Mach. Co.*, 65 Hun 489, 20 N. Y. Supp. 395; *Tierney v. Helvetia Swiss Fire Ins. Co.*, 138 App. Div. 469, 122 N. Y. Supp. 869; *Simmonds v. Simmonds*, 78 Misc. 571, 138 N. Y. Supp. 639; *Reynolds v. Foster*, 66 Misc. 133, 123 N. Y. Supp. 273; *Fairelough v. Southern Pac. Co.*, 155 N. Y. Supp. 899. **N. C.**—*Warlick v. Reynolds & Co.*, 151 N. C. 606, 66 S. E. 657; *Springer v. Shavender*, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708. **Ohio.**—*Saylor v. Simpson*, 45 Ohio St. 141, 12 N. E. 181, *affirming* 1 Ohio Cir. Dec. 370; *Hamilton v. Merrill*, 37 Ohio St. 682; *Wood v. O'Ferrall*, 19 Ohio St. 427; *The General Buell v. Long*, 18 Ohio St. 521; *Reece v. West Hamilton H., etc. Co.*, 12 Ohio Cir. Dec. 728; *First Nat. Bank v. Mullen*, 18 Ohio Dec. (N. P.) 637; *Campbell v. Cowden*, Wright 484. **Okla.** *Whitaker v. Hughes*, 14 Okla. 510, 78 Pac. 383; *Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356; *Hockaday v. Jones*, 8 Okla. 156, 56 Pac. 1054. **Ore.**—*Catlin v. Jones*, 56 Ore. 492, 108 Pac. 633. **Pa.**—*In re Hanau's Estate*, 12 Pa. Co. Ct. 386, 2 Pa. Dist. 127. **P. R.**—*Bayron v. Garcia*, 17 Porto Rico 512; *Sola v. Registrar*, 8 Porto Rico 205; *Matos v. Moris*, 7 Porto Rico 202. **R. I.**—*In re College St.*, 11 R. I. 472. **S. C.**—*Brown & Co. v. Overstreet & Co.*, 4 McCord 79. **Tenn.** *First Nat. Bank v. Foster*, 90 Tenn. 735, 18 S. W. 267; *Childress v. Nashville*, 3 Sneed 347, 358; *Glass v. Stovall*, 10 Humph. 453; *Noel & Co. v. Seoby*, 2 Heisk. 20, 28. **Tex.**—*Murchison v. White*, 54 Tex. 78; *Burnley v. Cook*, 13 Tex. 586, 65 Am. Dec. 79; *Frosh v. Holmes*, 8 Tex. 29; *Josey v. Masters* (Tex. Civ. App.), 179 S. W. 1134; *Mercer v. Woods*, 33 Tex. Civ. App. 642, 78 S. W. 15, *affirmed*, 98 Tex. 624. **Utah.**—*Stone v. Union Pac. R. Co.*, 32 Utah 185, 207, 89 Pac. 715, 723. **Va.** *Bell v. Farnville & P. R. Co.*, 91 Va. 99, 20 S. E. 942. **W. Va.**—*Yates v. Taylor County Court*, 47 W. Va. 376, 35 S. E. 24; *Hunter's Exrs. v. Stewart*, 23 W. Va. 549. **Wis.**—*Damp v. Dane*, 29 Wis. 419; *Lane v. Burdick*, 17 Wis. 92; *Hills v. Miles*, 13 Wis. 625; *Pereles v. Albert*, 12 Wis. 666; *Walker v. Rogan*, 1 Wis. 597. **Wyo.**—*Lee v. Board of Comrs.*, 3 Wyo. 52, 31 Pac. 1045. **Can.** *Gibbins v. Chadwick*, 8 Manitoba 209; *Nelson v. Lenz*, 9 Ont. L. R. 50, 5 Ont. W. R. 21; *Perras v. Keefer*, 22 Ont. 672.

See generally the title "*Venus*."

[a] Where the district court granted a writ of certiorari in a matter of which the circuit court had exclusive jurisdiction, an agreement by the attorneys of the parties that the action should be transferred to the circuit court, and should stand as though originally commenced there, conferred upon such court jurisdiction to proceed and determine the questions involved in the action. *Groves v. Richmond*, 56 Iowa 69, 8 N. W. 752.

rights of third parties,⁶³ and that jurisdiction of the person of a receiver being an officer of the court cannot be conferred by consent, or waiver,⁶⁴ and where a court has no jurisdiction over any action against a foreign corporation, its appearance cannot confer jurisdiction.⁶⁵

Accordingly, by the entry of a voluntary general appearance, a defendant although a nonresident,⁶⁶ waives jurisdiction⁶⁷ over his per-

63. *Glennville Bank v. Deal* (Ga.), 90 S. E. 958; *Ainsworth v. Mobile Fruit, etc. Co.*, 102 Ga. 123, 29 S. E. 142; *American Grocery Co. v. Kennedy*, 100 Ga. 462, 28 S. E. 241; *First Nat. Bank v. Ragan*, 92 Ga. 333, 18 S. E. 295; *Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 660; *Georgia R., etc. Co. v. Harris*, 5 Ga. 527.

64. *Brown v. Rauch*, 1 Wash. 497, 20 Pac. 785.

[a] Leave to sue receiver is not jurisdictional and may be waived. *Payson v. Jacobs*, 38 Wash. 203, 80 Pac. 429; *Sligh v. Shelton S. W. R. Co.*, 20 Wash. 16, 54 Pac. 763; *Lamberton v. Pereles*, 87 Wis. 449, 58 N. W. 776, 23 L. R. A. 824.

65. *Davidsburgh v. Knickerbocker L. Ins. Co.*, 90 N. Y. 526; *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 14 Abb. Pr. (N. S.) 346; *Parkhurst v. Rochester L. M. Co.*, 65 Hun 489, 20 N. Y. Supp. 395.

[a] Such provision is not a question of jurisdiction of the person but of the limitation of the power of the court. *Parkhurst v. Rochester L. Mach. Co.*, 65 Hun 489, 20 N. Y. Supp. 395.

66. *Ia.*—*German Bank v. American Fire Ins. Co.*, 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316. *Mich.*—*Cofrode v. Circuit Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. *S. D.*—*Rogers v. Penobscot Min. Co.*, 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184.

67. *Ala.*—*Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227. *Cal.*—*Childs v. Lanterman*, 103 Cal. 387, 37 Pac. 282, 42 Am. St. Rep. 121. *Ga.*—*Thomason v. Thompson*, 129 Ga. 440, 59 S. E. 236, 26 L. R. A. (N. S.) 536. *Ia.*—*German Bank v. American Fire Ins. Co.*, 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316. *Kan.*—*Kansas City, St. J. & C. B. R. Co. v. Rodebaugh*, 36 Kan. 45, 15 Pac. 899, 5 Am. St. Rep. 715. *Me.*—*Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746. *Mass.*—*Hall*

v. Young, 3 Pick. 80, 15 Am. Dec. 180. *Mich.*—*Jones v. Merrill*, 113 Mich. 433, 71 N. W. 838, 67 Am. St. Rep. 475; *Cofrode v. Circuit Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511. *N. Y.*—*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; *Jones v. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Wells v. Scofield*, 157 App. Div. 8, 141 N. Y. Supp. 657. *Ohio.*—*Crawford's Estate*, 68 Ohio St. 58, 67 N. E. 156, 96 Am. St. Rep. 648. *S. D.*—*Rogers v. Penobscot Min. Co.*, 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184. *Tex.*—*Kelso v. Adams*, 2 Posey Unrep. Cas. 374. *Wash.*—*Meisenheimer v. Meisenheimer*, 55 Wash. 32, 104 Pac. 159, 133 Am. St. Rep. 1005.

See 2 STANDARD PROC. 522.

[a] "The want of a process to bring a defendant into court may, it is true, be waived by a voluntary appearance in the suit; but a voluntary appearance, to be effectual for this purpose, must be with knowledge that there is a suit pending and with a full intention to appear therein." *Merkel v. City of Rochester*, 13 Hun (N. Y.) 157; *Matter of Graham*, 39 Misc. 226, 79 N. Y. Supp. 573, 12 N. Y. Ann. Cas. 157.

[b] The execution of a consent and waiver prior to the institution of any proceeding does not confer upon the surrogate jurisdiction over the party executing such consent and waiver. *Matter of Graham*, 39 Misc. 226, 79 N. Y. Supp. 573, 12 N. Y. Ann. Cas. 157.

[c] Any irregularities in the process (1) by which he is brought into court, or in its execution are waived by a general appearance (*Burckle v. Eckhart*, 3 N. Y. 132, 137; *Parkhurst v. Rochester L. Mach. Co.*, 65 Hun 489, 20 N. Y. Supp. 395. See 2 STANDARD PROC. 536), (2) as well as the absence of process. *Block v. Henderson*, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325; *Raney v.*

son, but a special appearance will not have this effect, however.⁶⁸ A statute prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts,⁶⁹ but is rather a personal exemption which may be waived.⁷⁰ But when residence of the plaintiff,⁷¹ or defendant,⁷² within the limits of the court is a jurisdictional fact which must exist before the court can act at all, it is essential to jurisdiction of the cause not of the person. In such case there can be no waiver, and the mere appearance of the parties does not cure the defect.⁷³

D. LOSS OR DIVESTITURE OF JURISDICTION.—1. Construction of Statutes.—When a court acquires jurisdiction, it can only divest itself or be divested of that jurisdiction in a statutory method.⁷⁴ In dealing with statutes intended or claimed to affect the continuance of jurisdiction in courts of original and general authority, the law has always recognized a principle of construction which served to favor the retention of jurisdiction.⁷⁵ In other words the law does not favor the ouster of jurisdiction of courts after it has once attached,⁷⁶ and when once given, jurisdiction is not to be taken away by implication from either a trial,⁷⁷ or an appellate court,⁷⁸ especially if the jurisdiction

McRae, 14 Ga. 589, 60 Am. Dec. 660; Burekle v. Eckhart, 3 N. Y. 132, 137. See 2 STANDARD PROC. 522.

68. Terminal Oil Mill Co. v. Planters' etc. Co. (Ala.), 73 So. 18; Arroyo Ditch & W. Co. v. Superior Court, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91. See 2 STANDARD PROC. 521.

69. *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853; Gray v. Quick-silver Min. Co., 21 Fed. 288. See generally the title "**Venue.**"

70. *Ex parte* Schollenberger, 96 U. S. 369, 24 L. ed. 853.

71. *Andrews v. Andrews*, 188 U. S. 14, 39, 23 Sup. Ct. 237, 47 L. ed. 366.

72. *Davidsburgh v. Knickerbocker L. Ins. Co.*, 90 N. Y. 526; *Risley v. Phoenix Bank*, 83 N. Y. 318, 337, 38 Am. Rep. 421; *Wheelock v. Lee*, 74 N. Y. 495, 5 Abb. N. C. 72, 54 How. Pr. 402; *Hoag v. Lamont*, 60 N. Y. 96, 16 Abb. Pr. 369; *Burekle v. Eckhart*, 3 N. Y. 132, 137.

[a] **Divorce.**—If the statutes of a state make domicile an element of jurisdiction over the subject-matter of divorce, the appearance of the parties does not give the court jurisdiction of such subject-matter where such domicile does not exist. *Andrews v. Andrews*, 188 U. S. 14, 39, 23 Sup. Ct. 237, 47 L. ed. 366, where both parties appeared. See also *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. 531, 45 L. ed. 804; *Streitwolf v. Streitwolf*, 181 U. S. 179,

21 Sup. Ct. 553, 45 L. ed. 807, where defendant did not appear, though many of the states hold the contrary. *Mass. Loud v. Loud*, 129 Mass. 14. *Mich. Waldo v. Waldo*, 52 Mich. 94, 17 N. W. 710. *Minn.—In re Ellis' Est.*, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287. *Nev.—Grant v. Grant*, 38 Nev. 185, 147 Pac. 451. *N. Y.—Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Johnson v. Johnson*, 67 How. Pr. 144. *Tenn.—Turpin v. Turpin* (Tenn. Ch. App.), 58 S. W. 763. *Wash.—Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431.

73. *Burekle v. Eckhart*, 3 N. Y. 132, 137.
74. *State v. Raaf*, 16 Idaho 411, 101 Pac. 747.

[a] **Suspension of Jurisdiction.** Jurisdiction is either exhausted or retained. It can never be properly said to be in a state where it is suspended and can be revived. The exercise of it by the court possessing it may be and often is suspended, but it still continues to exist, and only awaits the determination of the court as to when and how it shall be called into action. *Sanford v. Sanford*, 28 Conn. 6, 15.

75. *Crane v. Reeder*, 28 Mich. 527, 15 Am. Rep. 223.

76. *State v. Jaeger*, 157 Mo. App. 328, 341, 138 S. W. 345.

77. *Boone v. Poindexter*, 12 Smed. & M. (Miss.) 640, 649.

78. *United States v. West*, 34 App. Cas. (D. C.) 12.

thus sought to be taken away would have to be conferred by implication upon an inferior court of special, limited jurisdiction.⁷⁹ The jurisdiction of any court, in civil actions will not usually be defeated by rigid construction, where the matter is fairly doubtful.⁸⁰ Before it can be claimed that an act is to have the effect to absolutely divest a jurisdiction which has regularly and fully vested, the law in favor of it must be clear and unambiguous,⁸¹ and the court will lose its jurisdiction only in the case and in the way and manner prescribed.⁸² Hence, statutes depriving courts of their jurisdiction, particularly where it has already attached, are to be strictly interpreted,⁸³ and if a court has possessed and exercised jurisdiction over a subject-matter, the subsequent extension of jurisdiction over the same subject-matter to another court does not oust the jurisdiction of the first court in the absence of a repealing clause or words of exclusion in the later act.⁸⁴

As a general rule a statute conferring power upon a court in special, enumerated cases, is not to be construed as divesting a general jurisdiction in cases of an analogous nature not enumerated.⁸⁵ The fact that there is a specific remedy in equity does not necessarily oust the jurisdiction of a common-law court, but only appeals to its discretion, which may be exercised where the circumstances call for prompt interference by the courts.⁸⁶

2. By Subsequent Events.—It does not follow that jurisdiction once acquired always remains. A court or judge may have authority at one time to proceed, and his authority may afterward be divested by statute,⁸⁷ or by the settlement of the controversy.⁸⁸ In the absence

79. *United States v. West*, 34 App. Cas. (D. C.) 12.

80. *Stanley v. Barker*, 25 Vt. 507.

81. **U. S.**—*Parsons v. Bedford*, 3 Pet. 433, 440, 7 L. ed. 732. **Ala.**—*Gould v. Hayes*, 19 Ala. 438; *State v. Moore*, 19 Ala. 514. **Ia.**—*Wright v. Marsh*, 2 G. Gr. 94. **Md.**—*Rawlings v. State*, 2 Md. 201. **Mich.**—*Crane v. Reeder*, 28 Mich. 527, 15 Am. Rep. 223. **Mo.**—*State v. County Ct.*, 38 Mo. 402. **N. Y.**—*Ex parte Heath*, 3 Hill 42. **N. C.**—*State v. Perry*, 71 N. C. 522; *Griffin v. Ing*, 14 N. C. 358. **Pa.**—*Kline v. Wood*, 9 Serg. & R. 294; *Overseer of Poor v. Smith*, 2 Serg. & R. 363. **Tenn.**—*Murfree v. Leeper*, 1 Overt. 1. **Eng.**—*Rex v. Rochdale Canal Co.*, 6 Eng. L. & Eq. 241; *Crisp v. Bunbury*, 8 Bing. 394, 131 Eng. Reprint 445; *Shipman v. Henbest*, 4 T. R. 109, 100 Eng. Reprint 921; *Cates v. Knight*, 3 T. R. 442, 100 Eng. Reprint 667.

[a] Jurisdiction will not be overturned or impaired by any legislative enactment unless express prohibitory words are used. *State v. County Court*, 38 Mo. 402.

82. *State v. Sullivan*, 110 N. C. 513, 14 S. E. 796.

83. *State v. Sullivan*, 110 N. C. 513, 14 S. E. 796.

84. *Howard v. Lacroix*, McGloin (La.) 16; *Linn County Bank v. Clifton*, 263 Mo. 200, 172 S. W. 388; *State v. County Ct.*, 38 Mo. 402.

[a] As to Pending Action.—The enactment of a statute giving certain courts jurisdiction of causes pending in other courts does not divest the court before which the cause is pending of jurisdiction until the order of transfer is made. *Stone v. Martin*, 1 White & W. Civ. Cas. (Tex.), §87.

85. *Durrett v. Dairs*, 24 Gratt. (65 Va.) 302.

86. *Tawas, etc. R. Co. v. Iosco Cir. Judge*, 44 Mich. 479, 7 N. W. 65.

87. **Cal.**—*Ball v. Tolman*, 135 Cal. 375, 67 Pac. 339, 87 Am. St. Rep. 110. **Tex.**—*Cohen v. Moore*, 101 Tex. 45, 104 S. W. 1053. **Wis.**—*Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131; *Noyes v. State*, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710; *Brahmstead v. Ward*, 44 Wis. 591.

88. **Conn.**—*Ayer v. Ashmead*, 31

of statute, however, jurisdiction of the court depends upon the state of things at the time of the action brought, and after vesting, it cannot, ordinarily, be ousted by subsequent events, or facts arising in the cause,⁸⁹ even if they were of such a character as would have prevented

Conn. 447, 83 Am. Dec. 154; Canfield v. Eleventh School Dist., 19 Conn. 529. **N. Y.**—Johnston v. Brannan, 5 Johns. 268; Bendit v. Annesley, 42 Barb. 192. **Wis.**—Mason v. Beach, 55 Wis. 607, 13 N. W. 884; Geiser Threshing Mach. Co. v. Smith, 36 Wis. 295, 17 Am. Rep. 494.

[a] **Voluntary settlement of the controversy** by the parties pending an action does not deprive the court of jurisdiction to enter judgment dismissing both the complaint and a counterclaim. Dr. Shoop Family Medicine Co. v. Schowalter, 120 Wis. 663, 98 N. W. 940.

89. **U. S.**—Mollan v. Torrance, 9 Wheat. 537, 6 L. ed. 154; Morgan's Heirs v. Morgan, 2 Wheat. 290, 4 L. ed. 242; United States v. Eisenbeis, 112 Fed. 190, 50 C. C. A. 179. **Ark.**—Estes, Ad., etc. v. Martin, Ad., etc., 34 Ark. 410. **Cal.**—Kent v. Williams, 146 Cal. 3, 79 Pac. 527. **Ill.**—Tindall v. Meeker, 2 Ill. 137. **Ia.**—Burch v. Davenport & St. P. R. Co., 46 Iowa 449, 26 Am. Rep. 150. **Ky.**—Graham's Heirs v. Kitchen, 118 Ky. 18, 80 S. W. 464. **La.**—Hoover v. York, 30 La. Ann. 752, 757. **Mo.**—State v. County Ct., 38 Mo. 402; State v. Jaeger, 157 Mo. App. 328, 348, 138 S. W. 345. **Mont.**—Curry v. McCaffery, 47 Mont. 191, 131 Pac. 673. **Neb.**—Newell v. Newell, 88 Neb. 705, 130 N. W. 743. **N. Y.**—Koppel v. Heinrichs, 1 Barb. 449. **Okla.**—Crosbie v. Brewer, 158 Pac. 388, 393. **Ore.**—De Vall v. De Vall, 57 Ore. 128, 141, 109 Pac. 755, 110 Pac. 705. **Pa.**—Ehrlen's License, 22 Pa. Dist. 1041, 1043. **P. I.**—Herrera v. Barretto, 25 Phil. Isl. 245. **S. C.**—Cobb v. Garlington, 100 S. C. 51, 84 S. E. 302. **Tex.**—Gordon v. Willson, 101 Tex. 43, 104 S. W. 1043; Earl v. Baker (Tex. Civ. App.), 184 S. W. 297; Waters-Pierce Oil Co. v. State, 47 Tex. Civ. App. 162, 103 S. W. 836. **W. Va.**—United States Oil, etc. Co. v. Gartlan, 65 W. Va. 689, 64 S. E. 933.

[a] **By Removal of Property.** Where the situs of the piece of property is in one state, the court there having acquired jurisdiction over it,

does not lose that jurisdiction upon the temporary removal of the piece of property from that state. North Carolina Land & Lumb. Co. v. Boyer, 191 Fed. 552, 112 C. C. A. 162, 39 L. R. A. (N. S.) 627.

[b] **Change of County Boundaries.** Jurisdiction once vested is not ousted by a subsequent statute cutting off the land and placing it in another county, where the court had jurisdiction under a special statute. Graham's Heirs v. Kitchen, 118 Ky. 18, 80 S. W. 464.

[c] **Failure of judge to appear within one hour** after time set for trial of cause does not divest court of jurisdiction under Nebraska statute. Bussing v. Taggart, 73 Neb. 787, 103 N. W. 430.

[d] **The creation of new district court of appeals** where the appeal was perfected several days before the law creating the new district went into effect, does not deprive court of right to determine appeal. Gordon v. Willson, 101 Tex. 43, 104 S. W. 1043; Waters-Pierce Oil Co. v. State, 47 Tex. Civ. App. 162, 103 S. W. 836.

[e] **Absence of Party's Attorney.** That the plaintiff's attorneys upon the overruling of a motion for an abatement of a certain branch of the case left the courtroom, does not defeat the jurisdiction of the court over the plaintiff. Hoover v. Hedrich (Iowa), 155 N. W. 851.

[f] **Dissolution of an attachment** on defendant's special appearance does not divest the court of jurisdiction to further proceed. Griffin Co. v. Howell, 38 Utah 357, 113 Pac. 326.

[g] **Lapse of Lien.**—Where a lien for materials furnished directly to the owner is in force at the time of the commencement of proceedings to enforce it, but ceases during the pendency of the proceedings, because of failure to obtain an order for its continuance, the court having acquired jurisdiction may retain it, and render a personal judgment. Darrow v. Morgan, 65 N. Y. 333.

jurisdiction from attaching in the first instance,⁹⁰ unless it be in the case of a change in the parties after the commencement of a suit, so as to work an abatement.⁹¹ Thus where the court has acquired jurisdiction of a cause and the parties, the statute remaining in force, it does not lose jurisdiction by any change in the condition of the parties,⁹² such as imprisonment in the penitentiary,⁹³ by the adjudication of bankruptcy of the complainant or cross-complainant,⁹⁴ by the acceptance of a foreign consulship by a litigant,⁹⁵ or by the removal of a trustee from the state,⁹⁶ or by a change in residence where jurisdiction is based upon residence,⁹⁷ or by the death, removal from the county, or resignation from office of one of the defendants.⁹⁸ Nor does a court lose jurisdiction of the estate of an insane person by the fact that the insane person is confined in another jurisdiction.⁹⁹ For the same reason where jurisdiction depends upon the amount in controversy, jurisdiction is not lost by a reduction of the amount by confession or otherwise.¹ Nor will the death, removal, or resignation,² or dismissal,³ as to the resident defendant, oust the court of jurisdiction to proceed as to the non-resident defendants over whom jurisdiction was obtained.

Jurisdiction when once vested is not defeated by the transfer of the note or claim sued upon,⁴ or by the destruction of the evidence of the indebtedness,⁵ by the appropriation of property by the plaintiff in a suit for conversion of the property,⁶ or by the return of the property

90. *United States v. Eisenbeis*, 112 Fed. 190, 50 C. C. A. 179.

91. *Koppel v. Heinrichs*, 1 Barb. (N. Y.) 449.

92. Mich.—*Dustin v. Dickinson*, 2 Mich. N. P. 6. Miss.—*Read v. Renaud*, 6 Smed. & M. 79. N. H.—*State v. Wilkins*, 67 N. H. 164, 29 Atl. 693.

93. *Cobb v. Garlington*, 100 S. C. 51, 84 S. E. 302; *Neale v. Utz*, 75 Va. 480.

94. *Anderson v. Wilson*, 100 Ind. 402.

95. *Koppel v. Heinrichs*, 1 Barb. (N. Y.) 449. See generally the title "Ministers, Ambassadors and Consuls."

[a] The privilege conferred upon the consuls of foreign governments, by the constitution and laws of the United States, of being sued in the federal courts only, does not extend so far as to enable a party, after a suit has been commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting the office of consul of a foreign power. *Koppel v. Heinrichs*, 1 Barb. (N. Y.) 449.

96. *McGehee v. Polk*, 24 Ga. 406.

97. U. S.—*Sewing Mach. Co.'s Case*, 18 Wall. 553, 21 L. ed. 914 (death of

party); *Morgan's Heirs v. Morgan*, 2 Wheat. 290, 4 L. ed. 242; *Clarke v. Mathewson*, 12 Pet. 164, 170, 9 L. ed. 1041; *Kanouse v. Martin*, 15 How. 198, 208, 14 L. ed. 660; *Dunn v. Clarke*, 8 Pet. 1, 8 L. ed. 845. Mich.—*Dustin v. Dickinson*, 2 Mich. N. P. 6. N. H. *State v. Wilkins*, 67 N. H. 164, 29 Atl. 693. N. J.—*Upton v. New Jersey Southern Ry. Co.*, 25 N. J. Eq. 372. Pa.—*In re Quakertown*, 3 Grant. Cas. 203. W. Va.—*United States Oil, etc. Co. v. Gartlan*, 65 W. Va. 689, 64 S. E. 933.

98. *Lofton v. Collins*, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150.

99. *Flynn v. Hancock*, 35 Tex. Civ. App. 395, 80 S. W. 245.

1. *State v. Wilkins*, 67 N. H. 164, 29 Atl. 693. See *infra*, XII, J.

2. *Lofton v. Collins*, 117 Ga. 434, 43 S. E. 708, 61 L. R. A. 150.

3. *Read v. Renaud*, 6 Smed. & M. (Miss.) 79.

4. *Blake v. Bank of Louisiana*, 22 La. Ann. 572; *Gibson v. Huie*, 14 La. 129.

5. *Bliss v. Covington & L. Tpk. Co.*, 9 Dana (Ky.) 265.

6. *Montpelier & W. R. Co. v. Coffin*, 52 Vt. 17.

to its owner.⁷ And the court does not lose jurisdiction of an action to cancel a mortgage by its subsequent foreclosure, although no temporary injunction was sought,⁸ or lose jurisdiction of a cross-complaint by the satisfaction of the claim in the original action.⁹ The doctrine of lis pendens does not affect the jurisdiction of the court,¹⁰ and the fact that an innocent purchaser may purchase personal property before trial does not oust the court of jurisdiction of an action to determine the ownership of shares of stock.¹¹ Failure to give a required indemnity bond will not oust the court's jurisdiction.¹²

If the court has no jurisdiction to try title to land, it will lose jurisdiction of a cause as soon as it appears that there is a bona fide contest as to title,¹³ unless the question of title is merely incidentally involved.¹⁴

In the administration of municipal affairs jurisdiction is often given by statute to tribunals to act upon petition of a certain number of legal voters. In such cases jurisdiction once acquired is not lost by the reduction of the number of petitioners below the statutory limit by death or removal preceding the action of the tribunal.¹⁵

3. Subsequent Errors or Irregularities.—Having acquired jurisdiction, a court, whether it be one of original,¹⁶ or appellate jurisdic-

7. *Montpelier & W. R. Co. v. Coffin*, 52 Vt. 17.

8. *Fair v. Cummings* (Ala.), 72 So. 389.

[a] While a foreclosure thus had is not absolutely suspended by the mere filing of the bill, yet its exercise is subject to the equity of the bill as decreed by the court if complainant is awarded relief. *Fair v. Cummings* (Ala.), 72 So. 389; *Carroll v. Henderson*, 191 Ala. 248, 68 So. 1. See also *Johnson v. Smith*, 190 Ala. 521, 67 So. 401.

9. *Aldrich v. Blatchford & Co.*, 175 Mass. 369, 56 N. E. 700.

10. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

11. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

12. *Linn County Bank v. Clifton*, 263 Mo. 200, 172 S. W. 388.

13. *People v. Wolverine Mfg. Co.*, 141 Mich. 455, 104 N. W. 725, 113 Am. St. Rep. 544; *Roberts v. Highway Comrs.*, 25 Mich. 23.

14. *Bourgette v. Hubinger*, 30 Ind. 296.

15. *State v. Wilkins*, 67 N. H. 164, 29 Atl. 693.

[a] And a petitioner's voluntary withdrawal, death, or ceasing to be a legal voter, affects the jurisdiction no more than the death of a complainant

or prosecuting officer by whom an information was filed, or the decease or removal from the jurisdiction of a member of the grand jury by whom an indictment was formed affects the jurisdiction of the court in a criminal proceeding. In such cases the state is the real plaintiff, although in some instances a complainant or petitioner may be liable for costs. *State v. Wilkins*, 67 N. H. 164, 29 Atl. 693.

16. Cal.—*Kent v. Williams*, 146 Cal. 3, 10, 79 Pac. 527. N. Y.—*Hard v. Shipman*, 6 Barb. 621. Ohio.—*Sheldin's Lessee v. Newton*, 3 Ohio St. 494. Tenn.—*Ridgely v. Bennett*, 13 Lea 206; *Fogg v. Gibbs*, 8 Baxt. 464; *Cowan v. Anderson*, 7 Coldw. 284; *Walker v. Wynne*, 3 Yerg. 62; *Overton v. Lackey*, Cooke 193. Wis.—See *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 69 Am. St. Rep. 906, 41 L. R. A. 563.

[a] Such defects may be grounds of reversal on appeal or writ of error in the same suit, but do not render the decree void or the rights derived under it unavailing. *Martin v. Porter*, 4 Heisk. (Tenn.) 407; *Greenlaw v. Kernahan*, 4 Sneed (Tenn.) 371.

[b] **Hearing on Unauthorized Day.** (1) The fact that proofs are not made or judgment entered on the return day named in the summons does not ipso facto oust the court of jurisdiction. *Zimmerman v. Bradford-Kennedy Co.*,

tion,¹⁷ does not lose it by reason of any subsequent errors committed in the course of the trial or proceedings. The court does not lose jurisdiction because of the character of the decision which it may make upon any proposition before it,¹⁸ or, ordinarily, by failure of proof, or by sustaining a demurrer as to part of the demand and thereby reducing the claim below the jurisdictional amount,¹⁹ or because of the fact that for several years the case was omitted from the docket by the clerk.²⁰ A code provision that upon proof of default the court "shall" thereupon enter judgment, is not mandatory in the sense that failure to enter judgment immediately will result in loss of jurisdiction.²¹ Nor does a court lose jurisdiction because one of its members necessary to make a duly organized court, is called from the bench as a witness in the action,²² or by reason of the fact that the court fails to decide a cause within a specified time after its submission,²³ unless the statute so provides,²⁴ or by the entry of a dismissal which the court afterwards set aside,²⁵ nor because the judge by mistake tells the defendant that there is no case set for that date.²⁶

4. Because of Matters Relating to Pleadings. — Jurisdiction once

14 Idaho 681, 95 Pac. 825. (2) Failure to sit at time to which case is adjourned does not deprive court of jurisdiction under statute. *Langhorne v. Waller's Exr.*, 76 Va. 213.

[c] **The continuance** (1) of a case till next term of court does not deprive the court of jurisdiction over the parties for the term at which it is made, so as to deprive it of power to set aside the continuance and try the case. *Kan.*—*Gray v. Ulrich*, 8 Kan. 112. *Mo.*—*Marsh v. Morse*, 18 Mo. 477. *Tex.*—*Cohen v. Moore*, 101 Tex. 45, 104 S. W. 1053. (2) Erroneous adjournment of a cause by a justice of the peace contrary to the agreement of the parties does not deprive the court of jurisdiction. *Hard v. Shipman*, 6 Barb. (N. Y.) 621.

[d] **Omission To Show Regular Adjudgments.**—Where supplementary proceedings were instituted in April, 1875, and plaintiff was appointed receiver therein in February, 1878, and it was not shown that the proceedings were adjourned from time to time, the court would not presume a loss of jurisdiction from the omission to show regular adjournments. *Wright v. Nosstrand*, 94 N. Y. 31, reversing 15 Jones & S. (N. Y.) 441.

[e] **An erroneous decision** (1) on matters of law that it has no jurisdiction (*Griffin Co. v. Howell*, 38 Utah 357, 113 Pac. 326), (2) or any erroneous judgment which it may render,

and which after ascertaining the error, it caused to be vacated (*Kent v. Williams*, 146 Cal. 3, 79 Pac. 527), does not oust the court of jurisdiction.

17. *Ripkey v. Binns*, 264 Mo. 505, 513, 175 S. W. 206; *Stutz v. Cameron*, 254 Mo. 340, 162 S. W. 221; *Bennett v. Hall*, 184 Mo. 407, 83 S. W. 439.

18. *Boston Nat. Bank v. Hammond*, 21 Wash. 158, 57 Pac. 365.

19. *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799; *Ablowich v. Greenville Nat. Bank*, 95 Tex. 429, 67 S. W. 79, 881; *Hoffman v. Cleburne B. & L. Assn.*, 85 Tex. 409, 22 S. W. 154; *Tenison v. Hagendorn* (Tex. Civ. App.), 155 S. W. 690; *Suduth v. Du Bose*, 42 Tex. Civ. App. 226, 93 S. W. 235. See *infra*, XII, J.

20. *Farmers' College v. Cary*, 35 Ohio St. 648.

21. *Peirce v. National Bank of Germantown*, 44 Wash. 404, 87 Pac. 488.

22. *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349.

23. *Demaris v. Barker*, 33 Wash. 200, 74 Pac. 362.

24. *Shaffer v. Vandewater & Co.*, 78 Misc. 133, 137 N. Y. Supp. 857; *Van Valis v. Charcona*, 40 Misc. 226, 81 N. Y. Supp. 630.

25. *Sanford v. Sanford*, 28 Conn. 6. As to reinstatement of dismissed case, see 7 STANDARD PROC. 689.

26. *Cahill Swift Mfg. Co. v. Hayes*, 97 Kan. 740, 156 Pac. 735.

acquired is not lost by any subsequent elimination of allegations essential to the complaint,²⁷ or by the addition of a supplemental cause of action,²⁸ or by an amendment averring additional matter which the court is not competent to consider,²⁹ or by the filing of an amended petition out of time,³⁰ or by pleading a counterclaim, or claim in re-convention, or intervention, of which the court has not original jurisdiction,³¹ or by pleading a defense which is available in another jurisdiction only,³² or by sustaining a demurrer to the answer,³³ or by striking defendant's answer from the files of the cause.³⁴ Jurisdiction over a cause of action is not lost by the fact that the petition states two causes of action over one of which it has no jurisdiction,³⁵ or because defendant denies plaintiff's title to the land involved in the suit,³⁶ or the truth of the allegations contained in the original bill in respect to the amount in dispute,³⁷ or because a defense is established to the whole or any portion of the claim, whether by demurrer, or by evidence on the trial.³⁸

5. By Change in County Boundaries.—Where a suit was commenced in the proper county, it will not be defeated by the subsequent division of the county.³⁹ Nor does a court having jurisdiction of a proceeding relating to land lose jurisdiction by a change in the county boundaries so that the land lies in another county.⁴⁰

6. Absence of Party.—Absence of a party from the trial cannot deprive the court of jurisdiction to proceed unless, indeed, there be some statutory provision to that effect.⁴¹ Statutes sometimes provide that the defendant is not bound to remain more than a specified time after the time fixed for trial, if the plaintiff fails to appear,⁴² and under such provisions the court loses jurisdiction to render any judgment except one of nonsuit, if the plaintiff fails to appear within the specified time.⁴³

27. *Shankle v. Ingram*, 133 N. C. 254, 259, 45 S. E. 578.

28. *Dittman v. Iselt* (Tex. Civ. App.), 52 S. W. 96.

29. *Finch v. Baskerville*, 85 N. C. 205.

30. *Linn County Bank v. Clifton*, 263 Mo. 200, 172 S. W. 388.

31. *Dyett v. Harney*, 53 Colo. 381, 127 Pac. 226; *Hoover v. York*, 30 La. Ann. 752, 757.

32. *Scarborough v. Powell*, 2 Wills. Civ. Cas. (Tex.), §734.

33. *Brooks v. Chatham*, 57 Tex. 31.

34. *Newell v. Newell*, 88 Neb. 705, 130 N. W. 743, though service was merely by publication.

35. *Leachman v. Capps*, 89 Tex. 690, 36 S. W. 250, reversing 35 S. W. 397.

36. *Victoria v. Schott*, 9 Tex. Civ. App. 332, 29 S. W. 681.

37. *Put-in-Bay Waterworks, Light & R. Co. v. Ryan*, 181 U. S. 409, 21 Sup. Ct. 709, 45 L. ed. 927.

38. *Gardiner v. Royer*, 167 Cal. 238, 244, 139 Pac. 75.

39. U. S.—*Culver v. Woodruff County*, 5 Dill. 392, 6 Fed. Cas. No. 3,469. Ga.—*Barnes v. Underwood*, 54 Ga. 87. Ind.—*Buckinghouse v. Gregg*, 19 Ind. 401. Ky.—*Lindsay's Heirs v. McCormack*, 2 A. K. Marsh. 229, 12 Am. Dec. 387.

40. *Graham's Heirs v. Kitchen*, 118 Ky. 18, 27, 80 S. W. 464; *Cornell Univ. v. Wisconsin Cent. R. Co.*, 49 Wis. 158, 5 N. W. 329.

41. *Comstock v. Boyle*, 134 Wis. 613, 114 N. W. 1110, 126 Am. St. Rep. 1033. See also *Zimmerman v. Bradford-Kennedy Co.*, 14 Idaho 681, 95 Pac. 825.

42. *Cahill Swift Mfg. Co. v. Hayes*, 97 Kan. 740, 156 Pac. 735.

43. Ill.—*Dickinson v. Hoffman*, 90 Ill. App. 83. Kan.—*Cahill Swift Mfg. Co. v. Hayes*, 97 Kan. 740, 156 Pac. 735; *True v. Mendenhall*, 67 Kan. 497, 73 Pac. 67. Mich.—*Brady v. Taber*, 29

7. By Lapse of Time.—The mere fact that the court passed over from term to term without a judgment having been rendered on the findings, or any order of the court continuing the case, does not divest the court of jurisdiction, either of the subject-matter of the action, or of the person of the parties.⁴⁴

8. By Repeal of Statute.—Upon the repeal of a statute giving a court jurisdiction in particular cases, the court cannot proceed under the repealed statute even as to cases pending at the time of the repeal,⁴⁵ unless they are saved by a clause in the repealing statute.⁴⁶ And if the

Mich. 199. **N. Y.**—*Todd v. Doremus*, 60 Hun 385, 15 N. Y. Supp. 470, 21 Civ. Proc. 74, 39 N. Y. St. 859; *Sprague v. Shed*, 9 Johns. 140.

[a] **The evidence must be clear and convincing** that the plaintiff failed to appear within the time. *Cahill Swift Mfg. Co. v. Hayes*, 97 Kan. 740, 156 Pac. 735; *Lindsay's Heirs v. McCormack*, 2 A. K. Marsh. (Ky.) 229, 12 Am. Dec. 387.

44. *Seiberling & Co. v. Newlon*, 16 Ind. App. 374, 43 N. E. 151.

As to terms of court, see the title "Courts."

[a] **Where a statute directs that the court shall hear and determine a case "at the next term," the jurisdiction does not expire with the term.** The case may be heard and decided at a second or subsequent term. *Gibbons v. Sheppard*, 2 Brewst. (Pa.) 1.

45. U. S.—*Bird v. United States*, 187 U. S. 118, 23 Sup. Ct. 42, 47 L. ed. 100; *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. ed. 1070; *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. ed. 1088; *Hendrix v. United States*, 219 U. S. 79, 31 Sup. Ct. 193, 55 L. ed. 102; *Gates v. Osborne*, 9 Wall. 567, 19 L. ed. 748. **Cal.**—*Ball v. Tolman*, 135 Cal. 375, 67 Pac. 339, 87 Am. St. Rep. 110; *Anderson v. Byrnes*, 122 Cal. 272, 54 Pac. 821; *First Nat. Bank v. Henderson*, 101 Cal. 307, 35 Pac. 899. **Colo.**—*Smith v. District Ct.*, 4 Colo. 235; *Remington v. Smith*, 1 Colo. 53. **Ill.**—*Kruse v. Wilson*, 79 Ill. 233. **Ind.**—*Zintsmaster v. Aiken*, 173 Ind. 269, 88 N. E. 509, 90 N. E. 82; *Joseph v. Burk*, 46 Ind. 59; *Whitehurst v. State*, 43 Ind. 473; *Norton v. Board Comrs.*, 8 Ind. 43; *Taylor v. State*, 7 Blackf. 93; *Langdon v. Applegate*, 5 Ind. 327; *Spencer v. State*, 5 Ind. 41; *Smith v. State*, 4 Ind. 500; *Sprigs v. State*, 2 Ind. 75; *State v. Lackey*, 2 Ind. 285; *Hunt v. Jennings*, 5 Blackf. 195, 33 Am. Dec. 465. **La.**—*Knox v.*

Gurnett, 28 La. Ann. 601; *Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 502; *State v. Judge*, 22 La. Ann. 565; *Todd v. Landry*, 5 Mart. (O. S.) 459, 12 Am. Dec. 479. **Md.**—*Keller v. State*, 12 Md. 322, 71 Am. Dec. 596. **Mass.** *Com. v. Highway Comrs.*, 6 Pick. 501. **Mo.**—*State ex rel. Church v. Weeks*, 38 Mo. App. 566, 579. **N. Y.**—*Olcott v. Maclean*, 10 Hun 277, 282. **N. C.**—*State v. Perry*, 71 N. C. 522; *Carson v. Cleveland County*, 64 N. C. 566. **S. D.** *McClain v. Williams*, 10 S. D. 332, 336, 73 N. W. 72, 43 L. R. A. 287. **Tenn.** *State v. Bank of Tenn.*, 3 Baxt. 395, 409. **Tex.**—*Texas Mexican Ry. Co. v. Jarvis*, 80 Tex. 456, 15 S. W. 1039; *Hardeman & Son v. Morgan*, 48 Tex. 103; *Wall v. State*, 18 Tex. 682, 70 Am. Dec. 302; *Neill v. Brown*, 11 Tex. 17. **Va.**—*Dulin v. Lillard*, 91 Va. 718, 20 S. E. 821; *Sharpe v. Robertson*, 5 Gratt. (46 Va.) 518. **W. Va.**—*Norfolk & W. R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414. **Wyo.**—*Mahoney v. State*, 5 Wyo. 520, 42 Pac. 13, 63 Am. St. Rep. 64. **Eng.**—*Miller's Case*, 1 W. Bl. 451, 96 Eng. Reprint 259.

[a] **Under the pretense of deciding whether such enactment has been repealed, the court cannot take jurisdiction of a cause of action, and, if he does so, he is subject to restraint by prohibition.** *Norfolk & W. R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574, 30 S. E. 196, 41 L. R. A. 414.

[b] **But if the repealing act contains a substantial re-enactment of the repealed statute, it does not require the discontinuance of suits previously commenced under the repealed statute.** *McMullen v. Guest*, 6 Tex. 275.

46. Cal.—*Ball v. Tolman*, 135 Cal. 375, 67 Pac. 339, 87 Am. St. Rep. 110. **Ind.**—*Langdon v. Applegate*, 5 Ind. 327; *Hunt v. Jennings*, 5 Blackf. 195, 33 Am. Dec. 465. **Mass.**—*Kennedy v. Palmer*, 6 Gray 316. **Va.**—*Pennybacker*

statute is repealed before the final action of the appellate court in a criminal case, it will prevent an affirmance of conviction, and the prosecution must be dismissed or the judgment reversed.⁴⁷

9. **By Removal of Cause.**—The effect of removal of the cause from a state to a federal court is elsewhere treated.⁴⁸

10. **By Change of Venue.**—Upon the transfer of a cause by change of venue the court from which it has gone cannot proceed further in it,⁴⁹ except to make such further orders as may be necessary to give effect to the transfer of the same.⁵⁰

11. **Upon Transfer of Cause.**—The effect of the transfer of a cause is treated elsewhere in this work.⁵¹

12. **Contracts Ousting Courts of Jurisdiction.**—a. *In General.* While a party after a right has accrued or an obligation has been incurred, may waive his rights or refuse and neglect to enforce them, or bind himself to submit the matter to arbitration or other special remedy,⁵² it is against public policy for a party to bar himself in advance from resorting to the courts for some future controversy of which he could have no knowledge at the time he acted,⁵³ except as such agreements have been legitimated by the legislatures of the various

v. Switzer, 75 Va. 671. **Wyo.**—Mahoney v. State, 5 Wyo. 520, 42 Pac. 13, 63 Am. St. Rep. 64.

[a] **Construction of Statute.**—A statute taking away part of the territorial jurisdiction of the court but reserving jurisdiction as to cases which have been commenced does not reserve the power to enforce judgments in such detached territory. *Needles v. Frost*, 2 Okla. 19, 35 Pac. 574.

47. **U. S.**—*Yeaton v. United States*, 5 Cranch 281, 3 L. ed. 101. **Cal.**—*Ball v. Tolman*, 135 Cal. 375, 67 Pac. 339, 87 Am. St. Rep. 110. **Colo.**—*Hirschburg v. People*, 6 Colo. 145. **La.**—*State v. King*, 12 La. Ann. 593. **Md.**—*Keller v. State*, 12 Md. 322, 71 Am. Dec. 596. **N. Y.**—*Hartung v. People*, 22 N. Y. 95.

48. See the title "**Removal of Causes.**"

49. *Bowles v. State*, 5 Sneed 360; *Davis v. Jones*, 3 Head 603. See generally the title "**Change of Venue.**"

50. *Bowles v. State*, 5 Sneed (Tenn.) 360.

51. See generally the title "**Transfer of Causes.**"

52. *Supreme Council O. C. F. v. For-singer*, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; *Myers v. Jenkins*, 63 Ohio St. 101, 120, 57 N. E. 1089, 81 Am. St. Rep. 613.

53. **U. S.**—*Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365 (*reversing*

30 Wis. 496, 11 Am. Rep. 580); *Western Assur. Co. v. Decker*, 98 Fed. 381, 39 C. C. A. 383; *Mitchell v. Dougherty*, 90 Fed. 639, 33 C. C. A. 205, 62 U. S. App. 443; *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. 488; *Harrison v. German-American Fire Ins. Co.*, 67 Fed. 577. **Ala.**—*Western Assur. Co. v. Hall*, 112 Ala. 318, 20 So. 447; *Meaher v. Cox*, 37 Ala. 201; *Bank of State v. Martin*, 4 Ala. 615; *Stone v. Dennis*, 3 Port. 231; *Bozeman v. Gilbert*, 1 Ala. 90. **Cal.**—*California Annual Conf. v. Seitz*, 74 Cal. 287, 15 Pac. 839; *Loup v. California Southern R. Co.*, 63 Cal. 97. **Conn.**—*Hall v. Norwalk Fire Ins. Co.*, 57 Conn. 105, 17 Atl. 356; *Chamberlain v. Connecticut Cent. R. Co.*, 54 Conn. 472, 9 Atl. 244. **Del.**—*Crumlish v. Wilmington & W. R. Co.*, 5 Del. Ch. 270; *Randel v. Chesapeake & D. Canal Co.*, 1 Harr. 233. **D. C.**—*Campbell v. American Popular Life Ins. Co.*, 1 MacArthur 246, 29 Am. Rep. 591. **Ill.**—*Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; *Crilly v. Philip Rinn Co.*, 135 Ill. App. 198; *Sanitary Dist. v. McMahon, etc. Co.*, 110 Ill. App. 510; *Waugh v. Schlenk*, 23 Ill. App. 433. **Ind.**—*Supreme Council, C. B. L. v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Supreme Council, etc. v. For-singer*, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501;

- Bauer v. Samson Lodge, K. P., 102 Ind. 262, 1 N. E. 571; Kistler v. Indianapolis & St. L. R. Co., 88 Ind. 460; Voluntary Relief Dept. v. Spencer, 17 Ind. App. 123, 46 N. E. 477; Ross v. Conwell, 7 Ind. App. 375, 34 N. E. 752.
- Kan.**—Supreme Lodge of O. of S. F. v. Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373; Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597; Cupples v. Alamo Irr. & Mfg. Co., 7 Kan. App. 692, 51 Pac. 920.
- Ky.** Hager v. Shuck, 120 Ky. 574, 87 S. W. 300; Continental Ins. Co. v. Vallandigham, 116 Ky. 287, 76 S. W. 22, 105 Am. St. Rep. 208; Hartford F. Ins. Co. v. Bourbon County Court, 115 Ky. 109, 72 S. W. 739; Ison v. Wright, 21 Ky. L. Rep. 1368, 55 S. W. 202.
- La.** State v. North Am. L., etc. Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.
- Me.**—Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354; Hobbs v. Manhattan Ins. Co., 56 Me. 417, 96 Am. Dec. 472; Stephenson v. Piscataqua, etc. Ins. Co., 54 Me. 55; Hill v. More, 40 Me. 515.
- Md.**—Contee v. Dawson, 2 Bland Ch. 264.
- Mass.**—Bauer v. International Waste Co., 201 Mass. 197, 87 N. E. 637; Lewis v. Brotherhood Acc. Co., 194 Mass. 1, 79 N. E. 802, 17 L. R. A. (N. S.) 714; White v. Abbott, 188 Mass. 99, 74 N. E. 305; Webber v. Cambridgeport Sav. Bank, 186 Mass. 314, 71 N. E. 567; Mittenenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 97 Am. St. Rep. 404, 60 L. R. A. 812; Reed v. Washington F. & M. Ins. Co., 138 Mass. 572.
- Mich.**—Chippewa Lumb. Co. v. Phoenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.
- Minn.** Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531; Fidelity & Casualty Co. v. Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586; Whitney v. National Masonic Acc. Assn., 52 Minn. 378, 54 N. W. 184; Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252.
- Mo.**—First Nat. Bank v. White, 220 Mo. 717, 120 S. W. 36, 132 Am. St. Rep. 612, 16 Ann. Cas. 869; Stevens v. Norwich Union etc. Co., 120 Mo. App. 88, 96 S. W. 684; Bales v. Gilbert, 84 Mo. App. 675; State v. Union Merchants' Exch., 2 Mo. App. 96.
- Mont.**—Wortman v. Montano C. R. Co., 22 Mont. 266, 56 Pac. 316; Randall v. American F. Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50.
- Neb.**—Havens v. Robertson, 75 Neb. 205, 106 N. W. 335; Hartford F. Ins. Co. v. Hon, 66 Neb. 555, 92 N. W. 746, 103 Am. St. Rep. 725, 60 L. R. A. 436; Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; National Masonic Acc. Assn. v. Burr, 44 Neb. 256, 62 N. W. 466; Home F. Ins. Co. v. Bean, 42 Neb. 537, 60 N. W. 907, 47 Am. St. Rep. 711; Ins. Co. of N. A. v. Bachler, 44 Neb. 549, 62 N. W. 911.
- N. H.** Leach v. Republic Fire Ins. Co., 58 N. H. 245.
- N. Y.**—Nat. Cont. Co. v. Hudson R. W. P. Co., 170 N. Y. 439, 63 N. E. 450; Sanford v. Commercial Trav., etc. Assn., 147 N. Y. 326, 41 N. E. 694; Seward v. Rochester, 109 N. Y. 164, 16 N. E. 348; Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Smith v. Compton, 20 Barb. 262.
- N. C.** Williams & Bro. v. Branning, 154 N. C. 205, 70 S. E. 290, 47 L. R. A. (N. S.) 337; Braddy v. New York Bowery Fire Ins. Co., 115 N. C. 354, 20 S. E. 477.
- Ohio.**—Myers v. Jenkins, 63 Ohio St. 101, 57 N. E. 1089, 81 Am. St. Rep. 613; Baltimore & O. R. Co. v. Stankard, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381; Tilden v. Bernard, 12 Ohio C. C. (N. S.) 193.
- Ore.**—Ball v. Doud, 26 Ore. 14, 37 Pac. 70.
- Pa.**—Mentz v. Armenia F. Ins. Co., 79 Pa. 478, 21 Am. Rep. 80; Gray v. Wilson, 4 Watts 39; Horton v. Stanley, 1 Miles 418; Phoenix Pottery Co. v. Griffin, 16 Phila. 569.
- R. I.**—Grady v. Home Fire & M. Ins. Co., 27 R. I. 435, 63 Atl. 173, 4 L. R. A. (N. S.) 288; Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 49 Atl. 387, 91 Am. St. Rep. 620.
- S. C.**—Jones v. Enoree Power Co., 92 S. C. 263, 75 S. E. 452.
- Tex.** Scottish Union & Nat. Ins. Co. v. Claney, 71 Tex. 5, 8 S. W. 630; Florida Athletic Club v. Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10.
- Va.** Corbin v. Adams, 76 Va. 58.
- W. Va.** Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924; Kinney v. Baltimore & O. E. Relief Assn., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142.
- Wis.**—Fox v. Mason's Fraternal Acc. Assn., 96 Wis. 390, 71 N. W. 363.
- Eng.**—Cooke v. Cooke L. R. 4 Eq. 77, 36 L. J. Ch. N. S. 480; Scott v. Avery, 5 H. L. Cas. 811, 2 Jur. N. S. 815, 25 L. J. Exch. N. S. 303, 4 Wkly. Rep. 746, 10 Eng. Reprint 1121; Mexborough v. Bower, 7 Beav. 127, 49 Eng. Reprint 1011, 2 Mor. Min. Rep.

states.⁵⁴ The right to appeal to the courts for the redress of wrongs, is one of those constitutional rights which is in its nature inalienable, and cannot be thrown off, or bargained away.⁵⁵ Upon this principle agreements to abide the result of a submission of a cause to arbitration and not to resort to the courts for redress are invalid at common law,⁵⁶

92, *affirmed* 2 L. T. (O. S.) 205; *Thompson v. Charnock*, 8 T. R. 139, 101 Eng. Reprint 1310; *Scott v. Liverpool*, 3 De G. & J. 334, 44 Eng. Reprint 1297; *Horton v. Sayer*, 4 Hurlst. & N. 643, 5 Jur. N. S. 989, 29 L. J. Exch. N. S. 28; *Kill v. Hollister*, 1 Wils. K. B. 129, 95 Eng. Reprint 532.

[a] Reason.—While courts usually base their decisions upon the ground that parties cannot by contract in advance oust the courts of their jurisdiction of actions, a more satisfactory ground is that the constitution of most states provide that all courts are open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law. *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 231, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381.

[b] If this could be done an association might be formed which would renounce our constitution and laws, and set up a different system of government for themselves, and in case of wrongs and oppression they would be debarred from resorting to our courts, and would be compelled to submit to the decisions of their own tribunals, and would most likely become dissatisfied and disorderly, resulting in riot and bloodshed. The whole state has an interest in all its inhabitants, and it is to its interest that the rights of all should be protected and enforced according to the course of jurisprudence it has provided; and for that reason its courts are always open for the redress of wrongs, and no person can by contract in advance, deprive himself of the right to appeal to them. *Myers v. Jenkins*, 63 Ohio St. 101, 120, 57 N. E. 1089, 81 Am. St. Rep. 613.

[c] A covenant never to sue upon a demand is in effect a release thereof (*Contee v. Dawson*, 2 Bland Ch. [Md.] 264), though where such covenant is for a limited time only and is good. *Condon v. South Side R. Co.*, 14 Gratt. (55 Va.) 302. See annotation 47 L. R. A. (N. S.) 338, 348.

54. *Riley v. Jarvis*, 43 W. Va. 43, 48, 26 S. E. 366; *Zindorf Const. Co. v. West-*

ern Am. Co., 27 Wash. 31, 67 Pac. 374. 55. *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381.

56. **U. S.**—*Potomac S. B. Co. v. Baker Salvage Co.*, 123 U. S. 40, 8 Sup. Ct. 33, 31 L. ed. 75; *Memphis Trust Co. v. Brown-Ketchum Iron Works*, 166 Fed. 398, 92 C. C. A. 162; *Jefferson F. Ins. Co. v. Bierce*, 183 Fed. 588; *Munson v. Straits of Dover S. S. Co.*, 99 Fed. 787; *Harrison v. Ger. Amer. F. Ins. Co.*, 67 Fed. 577; *Grievance Committee v. Brown*, 61 Fed. 541. **Ala.** *Wright v. Evans*, 53 Ala. 103; *Meaher v. Cox*, 37 Ala. 201; *Mason v. Bullock*, 6 Ala. App. 141, 60 So. 432; *Bank of State v. Martin*, 4 Ala. 615; *Stone v. Dennis*, 3 Port. 231. **Cal.**—*Greiss v. State Invest. & Ins. Co.*, 98 Cal. 241, 33 Pac. 195; *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; *Loup v. Cal. Southern R. Co.*, 63 Cal. 97; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54. **Ga.**—*Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638; *Liverpool, L. & G. Ins. Co. v. Creighton*, 51 Ga. 95; *Leonard v. House*, 15 Ga. 473. **Haw.**—*Hind v. Low*, 14 Hawaii 438. **Ill.**—*Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598; *Frink v. Rijan*, 4 Ill. 322; *Crilly v. Philip Rinn Co.*, 135 Ill. App. 198; *Sanitary Dist. v. McMahon, & M. Co.*, 110 Ill. App. 510; *Farmers' Mut. F. & Lighting Ins. Co. v. Leeroy*, 91 Ill. App. 41. **Ind.**—*Supreme Council, O. C. F. v. Forsinger*, 125 Ind. 52, 25 N. E. 129, 21 Am. St. Rep. 196, 9 L. R. A. 501; *Bauer v. Samson Lodge K. of P.* 102 Ind. 262, 1 N. E. 571; *Kistler v. Indianapolis & St. L. R. Co.*, 88 Ind. 460; *Maitland v. Reed*, 37 Ind. App. 469, 77 N. E. 290; *Munk v. Kanzler*, 26 Ind. App. 105, 58 N. E. 543; *Manchester Fire Assur. Co. v. Koerner*, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231. **Ia.** *Barry v. Farmers' Mut. Hail Assn.*, 114 Iowa 186, 86 N. W. 290; *Read v. State Ins. Co.*, 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180; *Zalesky v. Home*

and a court of equity will not specifically enforce such an agreement.⁵⁷

Ins. Co., 102 Iowa 613, 71 N. W. 566; Gere v. Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159. **Kan.**—Supreme Lodge O. S. F. v. Raymond, 57 Kan. 647, 47 Pac. 533, 49 L. R. A. 373; Continental Ins. Co. v. Wilson, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720. **Ky.**—Hartford Fire Ins. Co. v. Bourbon County Ct., 115 Ky. 109, 72 S. W. 739; Peter's Admr. v. Craig, 6 Dana 307; Gore v. Chadwick, 6 Dana 477; Ison v. Wright, 21 Ky. L. Rep. 1368, 55 S. W. 202; Gaither v. Dougherty, 18 Ky. L. Rep. 709, 38 S. W. 2. **Me.**—Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Perry v. Cobb, 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389; Robinson v. Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239. **Md.**—Contee v. Dawson, 2 Bland Ch. 264; Allegre v. Maryland Ins. Co., 6 Har. & J. 408, 14 Am. Dec. 289. **Mass.**—Bauer v. International Waste Co., 201 Mass. 197, 87 N. E. 637; Lewis v. Brotherhood Acc. Co., 194 Mass. 1, 79 N. E. 802, 17 L. R. A. (N. S.) 714; Mittenenthal v. Mascagni, 183 Mass. 19, 66 N. E. 425, 97 Am. St. Rep. 404, 60 L. R. A. 812; Clement v. British American Assur. Co., 141 Mass. 298, 5 N. E. 847; Reed v. Washington F. & M. Ins. Co., 138 Mass. 572; Vass v. Wales, 129 Mass. 38; Pearl v. Harris, 121 Mass. 290; Rowe v. Williams, 97 Mass. 163; Cavanagh v. Dooley, 6 Allen 66. **Mich.**—Chadwick v. Phoenix Acc. & Sick Ben. Asso., 143 Mich. 481, 106 N. W. 1122, 8 Ann. Cas. 170; Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338; Callanan v. Port Huron & N. W. R. Co., 61 Mich. 15, 27 N. W. 718; McGunn v. Hanlin, 29 Mich. 476. **Minn.**—Whitney v. National Masonic Acc. Assn., 52 Minn. 378, 54 N. W. 184; Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. 252. **Mo.**—Bowen v. Lazalere, 44 Mo. 383. **Mont.**—Cotler v. Grand Lodge A. O. U. W., 23 Mont. 82, 57 Pac. 650; Randall v. American F. Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50. **Neb.**—Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; Home Fire Ins. Co. v. Kennedy, 47 Neb. 138, 66 N. W. 278, 53 Am. St. Rep. 521. **N. H.**—March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Smith v. Boston, etc. R. Co., 38 N. H. 458. **N. J.**—Knaus v. Jenkins, 40 N. J. L. 288, 29 Am. Rep. 237; Paulison v. Halsey, 38 N. J. L. 488. **N. Y.**—Hurst v. Litchfield, 39 N. Y. 377; Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350; Sinclair v. Tallmadge, 35 Barb. 602; Smith v. Compton, 20 Barb. 262; Smith v. Barse, 2 Hill 387; Gibbs v. Continental Ins. Co., 13 Hun 611. **N. C.**—Carpenter v. Tucker, 98 N. C. 316, 3 S. E. 831; Swaim v. Swaim, 14 N. C. 24. **Ohio.**—Tilden v. Bernard, 12 Ohio C. C. (N. S.) 193; Dayton & Union R. Co. v. Pittsburgh, C. C. & St. L. R. Co., 6 Ohio C. C. (N. S.) 537, 25 Ohio C. C. 705, affirmed, 67 Ohio St. 523, 67 N. E. 1100. **Pa.**—Commercial Union Assur. Co. v. Hocking, 115 Pa. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Carr v. Raleigh, 2 Phila. 242. **S. C.**—Fercival v. Herbemont, 1 McMull. L. 59. **Tenn.**—Cole Mfg. Co. v. Collier, 91 Tenn. 525, 19 S. W. 672, 30 Am. St. Rep. 898. **Tex.**—Florida Athletic Club v. Hope Lumber Co., 18 Tex. Civ. App. 161, 44 S. W. 10. **Vt.**—Welch v. Miller, 70 Vt. 108, 39 Atl. 749. **Va.**—Rison v. Moon, 91 Va. 384, 22 S. E. 165; Corbin v. Adams, 76 Va. 58; Baltimore & O. R. Co. v. Polly, Woods & Co., 14 Gratt. (55 Va.) 447; Condon v. South Side R. Co., 14 Gratt. (55 Va.) 302; Kidwell v. Baltimore & O. R. Co., 11 Gratt. (52 Va.) 676. **W. Va.**—Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258; Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Kinney v. Baltimore & O. Relief Assn., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142. **Wis.**—Oakwood Retreat Assn. v. Rathborne, 65 Wis. 177, 26 N. W. 742. **Eng.**—Edwards v. Aberayron Mut. Ship Ins. Soc., L. R. 1 Q. B. Div. 563, 34 L. T. N. S. 457; Cooke v. Cooke, L. R. 4 Eq. 77, 36 L. J. Ch. N. S. 480, 15 Week. Rep. 981; Dawson v. Fitzgerald, L. R. 1 Exch. Div. 257, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Wkly. Rep. 773; Thompson v. Charnock, 8 T. R. 139, 101 Eng. Reprint 1310; Kill v. Hollister, 1 Wils. K. B. 129, 95 Eng. Reprint 532; Street v. Rigby, 6 Ves. Jr. 815, 31 Eng. Reprint 1323. **Can.**—Griggs v. Billington, 27 U. C. Q. B. 520. As to arbitration see generally the title "Arbitration."

57. **U. S.**—Union P. R. Co. v. Chicago R. I. & P. R. Co., 51 Fed. 309, 2

Especially are such agreements void where they provide for the submission to arbitrators of every question of law or fact which may arise between parties.⁵⁵ This matter arises very often in insurance cases with reference to the clauses of the policy requiring the submission to arbitrators of every question of difference arising between the insurer

C. C. A. 174, 10 U. S. App. 98; Tobey v. Bristol, 3 Story. 800, 24 Fed. Cas. No. 14,065. **Ala.**—Caldwell v. Caldwell, 157 Ala. 119, 47 So. 268; Bozeman v. Gilbert, 1 Ala. 90. **Cal.**—Cal. Annual Conference v. Seitz, 74 Cal. 287, 15 Pac. 839. **Conn.**—Meeker v. Meeker, 16 Conn. 403. **Ill.**—Tobey Furniture Co. v. Rowe, 18 Ill. App. 293. **Ia.**—Kennedy v. Monarch Mfg. Co., 123 Iowa 344, 98 N. W. 796. **La.**—Saint v. Martel, 127 La. 73, 53 So. 432; Gauche v. Metropolitan Bldg. Co., 125 La. 530, 51 So. 578; Mirandona v. Burg, 49 La. Ann. 656, 21 So. 723. **Md.**—Griffith v. Frederick County Bank, 6 Gill & J. 424; Contee v. Dawson, 2 Bland Ch. 264. **Mass.**—Reed v. Washington F. & M. Ins. Co., 138 Mass. 572; Noyes v. Marsh, 123 Mass. 286. **Mich.**—McGunn v. Haulin, 29 Mich. 476. **Mo.**—Bales v. Gilbert, 84 Mo. App. 675; Black v. Rogers, 75 Mo. 441; St. Louis v. St. Louis Gaslight Co., 70 Mo. 69; Hug v. Van Burkleo, 58 Mo. 202; Biddle v. Ramsey, 52 Mo. 153; Strohmaier v. Zepfenfeld, 3 Mo. App. 429. **N. H.**—March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Smith v. Boston, C. & M. R. Co., 36 N. H. 458. **N. J.**—Copper v. Wells, 1 N. J. Eq. 10. **N. Y.**—People ex rel. Union Ins. Co. v. Nash, 111 N. Y. 310, 18 N. E. 630, 7 Am. St. Rep. 747, 2 L. R. A. 180; Smith v. St. Philip's Church, 107 N. Y. 610, 14 N. E. 825; Hurst v. Litchfield, 39 N. Y. 377; Greason v. Keteltas, 17 N. Y. 491; Robinson v. Ketteltas, 4 Edw. Ch. 67; Johnson v. Conger, 14 Abb. Cr. 195; Dunnell v. Keteltas, 16 Abb. Pr. 205. **Ohio.**—Conner v. Drake, 1 Ohio St. 166. **R. I.**—Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 49 Atl. 387, 91 Am. St. Rep. 620; Grosvenor v. Flint, 20 R. I. 21, 37 Atl. 304. **Va.**—Rison v. Moon, 91 Va. 384, 22 S. E. 165; Corbin v. Adams, 76 Va. 58; Baker v. Glass, 6 Munf. (20 Va.) 212; Smallwood v. Mercer, 1 Wash. 290. **W. Va.**—Kinney v. Baltimore & O. E. Relief Assn., 35 W. Va. 385, 14 S. E. 8; 15 L. R. A. 142. **Wis.**—Schneider v. Reed, 123 Wis. 488, 101 N. W. 682; Hopkins v. Gilman, 22 Wis. 476. **Eng.**—Cheslyn v. Dalby, 2 Younge & C. Exch. 170; Gourlay v. Somerset, 19 Ves. Jr. 429, 13 Rev. Rep. 234, 34 Eng. Reprint 576; Blundell v. Brettargh, 17 Ves. Jr. 232, 241, 34 Eng. Reprint 90; Waters v. Taylor, 15 Ves. Jr. 10, 24, 13 Rev. Rep. 91, 33 Eng. Reprint 658; Milnes v. Gery, 14 Ves. Jr. 400, 9 Rev. Rep. 307, 6 Eng. Rul. Cas. 684, 33 Eng. Reprint 574; Street v. Rigby, 6 Ves. Jr. 815, 31 Eng. Reprint 1323.

58. **U. S.**—Jefferson F. Ins. Co. v. Bierce, 183 Fed. 588; Smith v. Preferred Masonic Mut. Acc. Assn., 51 Fed. 520; Yeomans v. Girard F. & M. Ins. Co., 30 Fed. Cas. No. 18,136; Trott v. City Ins. Co., 1 Cliff. 439, 24 Fed. Cas. No. 14,189. **Ala.**—Western Assur. Co. v. Hail, 112 Ala. 318, 20 So. 447. **Cal.**—Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232. **Ill.**—Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105. **Ia.**—Prader v. Nat. Masonic Acc. Assn., 95 Iowa 149, 63 N. W. 601. **Kan.**—Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597. **Ky.**—Continental Ins. Co. v. Vallandigham, 116 Ky. 287, 76 S. W. 22, 105 Am. St. Rep. 218. **Me.**—Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428. **Mass.**—Bauer v. International Waste Co., 201 Mass. 197, 87 N. E. 637; Jones v. Brown, 171 Mass. 318, 50 N. E. 648. **Mich.**—Chipewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1035. **Mo.**—Easter v. Brotherhood of American Yeomen, 154 Mo. App. 456, 135 S. W. 964; Stevens v. Norwich Union F. Ins. Co., 120 Mo. App. 88, 96 S. W. 684; McNees v. Southern Ins. Co., 61 Mo. App. 335. **Neb.**—Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406. **N. Y.**—Sanford v. Commercial Travelers' Mut. Acc. Assn., 147 N. Y. 326, 41 N. E. 694; Keefe v. National Acc. Soc., 4 App. Div. 392, 38 N. Y. Supp. 854; Baldwin v. Fraternal Acc. Assn., 21 Misc. 124, 46 N. Y. Supp. 1016. **R. I.**—Pepin v. Societe St. Jean

and the insured.⁵⁹ Agreements discriminating between the various courts of the county are against public policy,⁶⁰ such as contracts not to bring any suit or action upon an obligation except in a specified court;⁶¹ but a contract to submit a cause to a certain court without

Baptiste, 23 R. I. 81, 49 Atl. 387, 91 Am. St. Rep. 620. **Wis.**—Fox v. Masons' Fraternal Acc. Assn., 96 Wis. 390, 71 N. W. 363. **Eng.**—Thompson v. Charnock, 8 T. R. 139, 101 Eng. Reprint 1310.

59. **U. S.**—Mitchell v. Dougherty, 90 Fed. 639, 33 C. C. A. 205, 62 U. S. App. 443; Jefferson F. Ins. Co. v. Bierce, 183 Fed. 588; Smith v. Preferred Masonic Mut. Acc. Assn., 51 Fed. 520; Knoche v. Chicago, M. & St. P. R. Co., 34 Fed. 471; Yeomens v. Girard, etc. Co., 30 Fed. Cas. No. 18,136; Trott v. City Ins. Co., 1 Cliff. 439, 24 Fed. Cas. No. 14,189. **Ala.**—Western Assur. Co. v. Hall, 112 Ala. 318, 20 So. 447; Bozeman v. Gilbert, 1 Ala. 90. **Cal.**—Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232; Loup v. California Southern R. Co., 63 Cal. 97. **Del.**—Randel v. Chesapeake & D. Canal Co., 1 Harr. 233. **Ga.**—Leonard v. House, 15 Ga. 473. **Ill.**—Niagara Fire Ins. Co. v. Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; Sanitary Dist. v. McMahon & M. Co., 110 Ill. App. 510. **Ind.**—Kistler v. Indianapolis & St. L. R. Co., 88 Ind. 460. **Ia.**—Prader v. Nat. Masonic Acc. Assn., 95 Iowa 149, 63 N. W. 601; Des Moines v. Des Moines Waterworks Co., 95 Iowa 348, 64 N. W. 269. **Kan.**—Walker v. German Ins. Co., 51 Kan. 725, 33 Pac. 597; Cupples v. Alamo Irr. & Mfg. Co., 7 Kan. App. 692, 51 Pac. 920. **Ky.**—Continental Ins. Co. v. Vallandingham, 116 Ky. 287, 76 S. W. 22, 105 Am. St. Rep. 218. **Me.**—Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058; Fisher v. Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428; Dugan v. Thomas, 79 Me. 221, 9 Atl. 354; Hill v. More, 40 Me. 515. **Mass.**—Miles v. Schmidt, 168 Mass. 339, 47 N. E. 115. **Mich.**—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055. **Mo.**—Easter v. Brotherhood of American Yeomen, 154 Mo. App. 456, 135 S. W. 964; Stevens v. Norwich Union F. Ins. Co., 120 Mo. App. 88, 96 S. W. 684; McNees v. Southern Ins. Co., 61 Mo. App. 335. **Mont.**—Wortman v.

Montana C. R. Co., 22 Mont. 266, 56 Pac. 316. **Neb.**—Aetna Ins. Co. v. Simmons, 49 Neb. 811, 69 N. W. 125; German-American Ins. Co. v. Etherton, 25 Neb. 505, 41 N. W. 406. **N. H.**—March v. Eastern R. Co., 40 N. H. 548, 77 Am. Dec. 732; Smith v. Boston C. & M. R. Co., 36 N. H. 458. **N. Y.**—National Contracting Co. v. Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. 965 (reversing 118 App. Div. 665, 103 N. Y. Supp. 641); Sanford v. Commercial Travelers' Mut. Acc. Assn., 147 N. Y. 326, 41 N. E. 694; Seward v. Rochester, 109 N. Y. 164, 16 N. E. 348 (affirming 39 Hun 44); Keeffe v. Nat. Acc. Soc., 4 App. Div. 392, 38 N. Y. Supp. 854; Baldwin v. Fraternal Acc. Assn., 21 Misc. 124, 46 N. Y. Supp. 1016. **Ohio.**—Tilden v. Bernard, 12 Ohio C. C. (N. S.) 193. **Ore.**—Ball v. Doud, 26 Ore. 14, 37 Pac. 70. **Pa.**—Snodgrass v. Gavit, 28 Pa. 221; Gray v. Wilson, 4 Watts 39. **R. I.**—Pepin v. Societe St. Jean Baptiste, 23 R. I. 81, 49 Atl. 387, 91 Am. St. Rep. 620. **S. C.**—Jones v. Enoree Power Co., 92 S. C. 263, 75 S. E. 452. **W. Va.**—Baer's Sons Grocer Co. v. Cutting Fruit Packing Co., 42 W. Va. 359, 26 S. E. 191; Kinney v. Baltimore & O. E. Relief Assn., 35 W. Va. 385, 14 S. E. 8, 15 L. R. A. 142. **Wis.**—Fox v. Mason's Fraternal Acc. Assn., 96 Wis. 390, 71 N. W. 363.

60. **U. S.**—Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212, 54 U. S. App. 290. **La.**—State v. North Am. Land etc. Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309. **Mass.**—Nute v. Hamilton Mut. Ins. Co., 6 Gray 174. **N. Y.**—Sanford v. Commercial Trav. etc. Asso., 147 N. Y. 326, 41 N. E. 694.

[a] A contract containing a clause providing that any action arising upon it might be brought where plaintiff carried on business, and waiving the benefit of statute as to place of trial is invalid. Shupe v. Young, 10 Ont. W. R. (Can.) 185.

61. **U. S.**—Mutual Reserve Fund Life Assn. v. Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212, 54 U. S. App. 290. **La.**—State v. North Am. etc. Co., 106 La. 621, 31 So. 172, 87 Am.

words of restriction as to other courts, will be construed as not ousting the jurisdiction of other courts,⁶² since such contracts are strictly construed and should not be extended by implication.⁶³ On the other hand provisions in contracts requiring the submission to third parties and making their decision final upon preliminary, incidental, auxiliary and collateral questions, the decision of which is not conclusive of anything as to the right of the parties, are valid and enforceable.⁶⁴

There is a class of contracts which provide that the value of certain property, the amount of loss sustained, the quantity, quality, character and value of work performed on improvements, and the acceptance of a building by an architect, and other like matters, shall be determined by a certain person named in the contract, and his determination shall be final. Such contracts are lawful, and are usually upheld. They do not oust the courts of their jurisdiction over the subject matter, but only provide a safe and speedy manner of fixing definitely some fact which is usually of a complex and difficult nature,⁶⁵ and merely make

St. Rep. 309. **Mass.**—*Nute v. Hamilton Mut. Ins. Co.*, 6 Gray 174; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray 185. **N. Y.**—*Darling v. Protective Assur. Soc.*, 71 Misc. 113, 127 N. Y. Supp. 486.

62. *Engel v. Shubert Theatrical Co.*, 166 App. Div. 394, 151 N. Y. Supp. 593.

63. *Engel v. Shubert Theatrical Co.*, 166 App. Div. 394, 151 N. Y. Supp. 593.

64. **U. S.**—*Harrison v. German American Fire Ins. Co.*, 67 Fed. 577. **Cal.**—*Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54. **Del.**—*Crumlsh v. Wilmington & W. R. Co.*, 5 Del. Ch. 270. **Ga.**—*Parsons v. Ambros*, 121 Ga. 98, 48 S. E. 696. **Ia.**—*Prader v. Nat. Masonic Acc. Assn.*, 95 Iowa 149, 63 N. W. 601; *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa 348, 64 N. W. 269. **Kan.**—*Walker v. German Ins. Co.*, 51 Kan. 725, 33 Pac. 597. **Ky.**—*Continental Ins. Co. v. Vallandigham*, 116 Ky. 287, 76 S. W. 22, 105 Am. St. Rep. 218. **Me.**—*Dugan v. Thomas*, 79 Me. 221, 9 Atl. 354. **Mass.**—*Mittenthal v. Mascagni*, 183 Mass. 19, 66 N. E. 425, 97 Am. St. Rep. 404, 60 L. R. A. 812; *Wood v. Humphrey*, 114 Mass. 185; *Palmer v. Clark*, 106 Mass. 373. **N. Y.**—*National Cont. Co. v. Hudson R. W. P. Co.*, 170 N. Y. 439, 63 N. E. 450, (*reversing* 67 App. Div. 620, 73 N. Y. Supp. 1142 and 34 Misc. 652, 70 N. Y. Supp. 585); *Seward v. Rochester*, 109 N. Y. 164, 16 N. E. 348; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Garr v. Gomez*, 9 Wend. 649. **Ohio.**—*Tilden v. Bernard*, 12 Ohio Cir. Ct. (N. S.) 193. **Ore.**—*Ball v. Doud*, 26 Ore.

14, 37 Pac. 70. **S. C.**—*Jones v. Enoree Power Co.*, 92 S. C. 263, 75 S. E. 452. **Va.**—*Condon v. South Side R. Co.*, 14 Gratt. (55 Va.) 302. **Wis.**—*Montgomery v. American Cent. Ins. Co.*, 108 Wis. 146, 84 N. W. 175; *Fox v. Mason's Fraternal Acc. Assn.*, 96 Wis. 390, 71 N. W. 363; *Hudson v. McCartney*, 33 Wis. 331.

[a] The distinction between the two classes of cases is marked and well defined. In one class the parties undertake by an independent covenant or agreement to provide for an adjustment and settlement of all disputes and differences by arbitration, to the exclusion of the courts, and in the other they merely, by the same agreement which creates the liability and gives the right, qualify the right by providing that before a right of action shall accrue certain facts shall be determined or amounts and values ascertained, and this is made a condition precedent either in terms or by necessary implication. *President of D. & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250.

65. **U. S.**—*Hamilton v. Liverpool & L. & G. Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. ed. 419; *Toledo S. S. Co. v. Zenith Transp. Co.*, 184 Fed. 391, 106 C. C. A. 501; *Mundy v. Louisville & N. R. Co.*, 67 Fed. 633, 14 C. C. A. 583. **Cal.**—*Cal. Annual Conference v. Seitz*, 74 Cal. 287, 15 Pac. 839. **Fla.**—*Hanover Fire Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297. **Ga.**—*Parsons v. Ambros*, 121 Ga. 98, 48 S. E. 696. **Ill.**—*Stose v. Heissler*, 120 Ill. 433, 11 N. E.

compliance with such provision a condition precedent to an action, which is permissible. The parties after a decision of the matter thus provided for, may go into court and litigate such differences as still exist between them.⁶⁶

b. *Appellate Courts.*—Agreements not to appeal cannot deprive the appellate courts of jurisdiction,⁶⁷ nor can litigants contract as to what court shall decide a case on appeal.⁶⁸

E. *FRAUD IN OBTAINING JURISDICTION.*⁶⁹—Upon the principle that the courts will not lend their assistance to effectuate fraudulent or unlawful practices of suitors, if a person residing in one jurisdiction is induced by false representations or pretenses to come into another jurisdiction for the purpose of there getting service upon him the jurisdiction thus acquired is fraudulently acquired and will not support⁷⁰ a

161, 60 Am. Rep. 563; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173. **Ia.**—*Des Moines v. Des Moines Waterworks Co.*, 95 Iowa 348, 64 N. W. 269. **Mass.** *Falmer v. Clark*, 106 Mass. 373. **Mich.** *Noble v. Grandin*, 125 Mich. 383, 84 N. W. 465. **Mo.**—*Curry v. Lackey*, 35 Mo. 389; *Garred v. Macey*, 10 Mo. 161. **N. J.**—*Stout v. Phoenix Assur. Co.*, 65 N. J. Eq. 566, 56 Atl. 691. **Ohio.**—*Myers v. Jenkins*, 63 Ohio St. 101, 121, 57 N. E. 1089, 81 Am. St. Rep. 613; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 232, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381; *Kane v. Stone Co.*, 39 Ohio St. 1; *Mansfield & S. City R. Co. v. Veeder & Co.*, 17 Ohio 385. **Pa.**—*North Lebanon R. Co. v. McGrann*, 33 Pa. 530, 75 Am. Dec. 624; *Faunee v. Burke*, 16 Pa. 469, 55 Am. Dec. 519; *Monongahela Navigation Co. v. Fenlon*, 4 Watts & S. 205. **R. I.**—*Flint v. Pearce*, 11 R. I. 576. **Eng.**—*Collins v. Collins*, 26 Beav. 306, 28 L. J. Ch. N. S. 184, 5 Jur. N. S. 30, 7 Wkly. Rep. 115, 53 Eng. Reprint 916.

Building Contracts.—See 2 STANDARD PROC. 719.

[a] **Construction of Contract.**—But the court cannot be deprived of its jurisdiction to finally determine such questions as the construction of a written contract by the act of the parties. Such a provision being void and against public policy. *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381.

66. *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 232, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381.

67. *Cal.*—*Muldrow v. Norris*, 2 Cal.

74, 56 Am. Dec. 313. **Ill.**—*Fahs v. Darling*, 82 Ill. 142. **N. Y.**—*Stedeker v. Bernard*, 93 N. Y. 589. But see *Townsend v. Masterson*, etc. *Stone Dressing Co.*, 15 N. Y. 587. **Pa.**—*Hos-tetter's Appeal*, 92 Pa. 132; *Watson v. Wetter*, 91 Pa. 385; *Bingham's Trustees v. Guthrie*, 19 Pa. 418.

68. *Mexican Nat. R. Co. v. Mussette*, 86 Tex. 708, 26 S. W. 1075, 24 L. R. A. 642.

69. In divorce actions as to effect on jurisdiction, of purpose in acquiring residence, see 7 STANDARD PROC. 743.

Collusive and fictitious suits, see the title "**Suits and Actions.**" See also the titles "**Agreed Case,**" "**Amicable Actions.**"

70. **U. S.**—*Commercial Mut. Acc. Co. v. Davis*, 213 U. S. 245, 29 Sup. Ct. 445, 53 L. ed. 782; *Fitzgerald & M. Const. Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. ed. 608; *Blair v. Turtle*, 5 Fed. 394, 1 McCrary 372; *Steiger v. Bonn*, 4 Fed. 17, 59 How. Pr. (N. Y.) 496. **Ark.**—*Wernimont v. State*, 101 Ark. 210, 142 S. W. 194, Ann. Cas. 1913D, 1156. **Ala.**—*Sessoms Groc. Co. v. International Sugar Feed Co.*, 188 Ala. 232, 66 So. 479; *Cunningham v. Baker*, 104 Ala. 160, 16 So. 68, 53 Am. St. Rep. 27; *Ex parte Hurn*, 92 Ala. 102, 9 So. 515, 25 Am. St. Rep. 23, 13 L. R. A. 120. **Ill.**—*Wanzer v. Bright*, 52 Ill. 35. **Ia.**—*Dunlap & Co. v. Cody*, 31 Iowa 260, 7 Am. Rep. 129; *Pomroy & Co. v. Parmlee*, 9 Iowa 140, 74 Am. Dec. 328. **Kan.**—*Van Horn v. Great West. Mfg. Co.*, 37 Kan. 523, 15 Pac. 562. **Ky.**—*Wood v. Wood*, 78 Ky. 624. **Mich.**—*Stilson v. Greeley*, 2 Mich. N. P. 222. **Minn.**—*Chubbuck v. Cleveland*, 37 Minn. 466, 35 N. W. 362, 5

judgment rendered in such action, if timely objection is made thereto,⁷¹ an appearance without objection being a waiver of the objection.⁷² The same is true when a party is compelled by force of criminal process to go to another jurisdiction where he is served with civil process.⁷³ In criminal cases the interests of the public control and a different rule is applicable,⁷⁴ and in such cases the jurisdiction of the court in which the indictment is found or to which the accusation is made is not impaired by the manner in which the accused is brought before it.⁷⁵

F. JURISDICTION OVER POLITICAL AND RELIGIOUS QUESTIONS. Courts can enforce only legal obligations and redress injuries to legal

Am. St. Rep. 864. **Mo.**—Holker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 64 Am. St. Rep. 524, 39 L. R. A. 165; Christian v. Williams, 111 Mo. 429, 20 S. W. 96, *overruling* Byler v. Jones, 22 Mo. App. 623. **N. J.**—Heston v. Heston, 52 N. J. Eq. 91, 28 Atl. 8; Reed v. Williams, 29 N. J. L. 385. **N. Y.** Metcalf v. Clark, 41 Barb. 45; Wyckoff v. Packard, 20 Abb. N. C. 420; Baker v. Wales, 14 Abb. Pr. (N. S.) 331, 45 How. Pr. 137; Steiger v. Bonn, 59 How. Pr. 496, 4 Fed. 17; Dunham v. Cressy, 51 Hun 641, 4 N. Y. Supp. 13, 21 N. Y. St. 266. **Ohio.**—*Ex parte* Everts, 2 Disn. 33, 13 Ohio Dec. 21. **Ore.**—*Compare* Commercial Nat. Bank v. Davidson, 18 Ore. 57, 22 Pac. 517. **Pa.** Fearl v. Hanna, 129 Pa. 588, 18 Atl. 556; Hevener v. Heist, 9 Phila. 274, 30 Leg. Int. 46. **S. C.**—Granite Brick Co. v. Titus, 95 S. C. 47, 78 S. E. 540. **Tenn.**—Battelle & Co. v. Youngstown Rolling Mill Co., 16 Lea 355. **Va.** Steele v. Boyd, 6 Leigh (33 Va.) 547, 29 Am. Dec. 218. **Vt.**—Steele v. Bates, 2 Aikens, 338, 16 Am. Dec. 720. **Wis.** Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793.

As to service generally see the title "Service of Process and Papers."

As to validity of service on agent of foreign corporation inveigled into state, see 5 STANDARD PROC. 737.

71. U. S.—Fitzgerald & M. Const. Co. v. Fitzgerald, 137 U. S. 93, 11 Sup. Ct. 36, 34 L. ed. 608. **Mo.**—Holker v. Hennessey, 141 Mo. 527, 42 S. W. 1090, 64 Am. St. Rep. 524, 39 L. R. A. 165; Christian v. Williams, 111 Mo. 429, 435, 20 S. W. 96; Byler v. Jones, 79 Mo. 261. **Vt.**—Steele v. Bates, 2 Aikens 338, 16 Am. Dec. 720.

72. Steele v. Bates, 2 Aikens (Vt.) 338, 16 Am. Dec. 720.

73. Luttin v. Benin, 11 Mod. 50, 88 Eng. Reprint 377.

74. Ex parte Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. ed. 103.

[a] Where the state accuses a person of the commission of an offense against its laws, the mere apprehension of the accused, although in an unlawful manner, and subjecting him to the jurisdiction of the courts to answer the charge cannot amount to a legal advantage any more than if the accused had voluntarily surrendered himself to the authorities. The wrongful or unlawful means employed in making an arrest, however criminal they might be, could not be chargeable to the sovereignty, which can commit no crime, but would be the crime of the individual who committed the act and would furnish no reason or justification for discharging the prisoner when brought before the court. *In re Moyer*, 12 Idaho 250, 85 Pac. 897, 118 Am. St. Rep. 214, 12 L. R. A. (N. S.) 227.

75. U. S.—*Ex parte* Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. ed. 103; Lascelles v. State, 148 U. S. 537, 13 Sup. Ct. 687, 37 L. ed. 549; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. 1204, 32 L. ed. 283; *Ex parte* Ker, 18 Fed. 167. **Ala.**—*Ex parte* Barker, 87 Ala. 4, 6 So. 7, 13 Am. St. Rep. 17. **Idaho.**—*In re Moyer*, 12 Idaho 250, 85 Pac. 897, 118 Am. St. Rep. 214, 12 L. R. A. (N. S.) 227. **Ia.**—State v. Ross, 21 Iowa 467. **Mo.**—State v. Patterson, 116 Mo. 505, 22 S. W. 696. **N. C.**—State v. Glover, 112 N. C. 896, 17 S. E. 525. **Pa.**—*In re Dow's Case*, 18 Pa. 37.

Contra, **U. S.**—Eaton v. West Virginia, 91 Fed. 760, 34 C. C. A. 68. **Neb.**—*In re* Robinson, 29 Neb. 135, 45 N. W. 267, 26 Am. St. Rep. 378, 8 L. R. A. 398. **S. C.**—State v. Smith, 1 Bailey 283, 19 Am. Dec. 679. **Tenn.** Tartar v. State, 2 Shann. Cas. 418. **Tex.** Brookin v. State, 26 Tex. App. 121, 9 S. W. 735. **Wyo.**—Kingen v. Kelley, 3 Wyo. 566, 128 Pac. 36, 15 L. R. A. 177.

rights.⁷⁶ In absence of statute, courts do not exercise jurisdiction to interfere or control in matters purely political, pertaining to the management and proceedings of a political party⁷⁷ or in church questions,⁷⁸ unless there is an invasion of legal rights.⁷⁹

V. COURTS OF GENERAL ORIGINAL JURISDICTION. — **A. IN GENERAL.**⁸⁰ — Some courts are of general jurisdiction, by which is meant that their authority extends to a great variety of matters,⁸¹ while others are only of special and limited jurisdiction, by which it is understood that they have authority extending only to certain special cases.⁸² Whether a court is one of inferior or general jurisdiction is to be determined from the nature of the jurisdiction and not from the territorial limits within which such jurisdiction is to be exercised.⁸³

B. NATURE AND EXTENT OF JURISDICTION. — **1. In General.** — Constitutional provisions in many states fix the jurisdiction of the courts,⁸⁴ and divide and distribute the whole judicial power of the state among tribunals of its own creation.⁸⁵ In such case the legislature cannot either limit or extend the jurisdiction conferred upon the various courts of the state,⁸⁶ unless the constitution authorizes it,⁸⁷ though it may regu-

76. *Orr v. Home Mut. Ins. Co.*, 12 La. Ann. 255, 68 Am. Dec. 770. See generally the title "**Suits and Actions.**"

77. **Ky.**—*Moody v. Trimble*, 109 Ky. 139, 58 S. W. 504, 50 L. R. A. 810; *Cain v. Page*, 19 Ky. L. Rep. 977, 42 S. W. 336. **N. Y.**—*In re Fairchild*, 151 N. Y. 359, 45 N. E. 943; *In re Pollard*, 25 N. Y. Supp. 385, 387, 55 N. Y. St. 155. **N. D.**—*State v. Lindahl*, 11 N. D. 320, 91 N. W. 950. **W. Va.**—*Bogges v. Buxton*, 67 W. Va. 679, 69 S. E. 367, 21 Ann. Cas. 289; *Kump v. McDonald*, 64 W. Va. 323, 61 S. E. 908; *Marcum v. Ballot Comrs.*, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296.

78. See generally "**Religious Societies.**"

79. *Grace v. Dempsey*, 75 Wis. 313, 43 N. W. 1127.

80. **General, special or limited jurisdiction defined**, see *supra*, I. G.

81. *Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431.

82. *Fausler v. Parsons*, 6 W. Va. 486, 20 Am. Rep. 431.

83. *State v. La Crosse County Judge*, 11 Wis. 50.

84. **Ark.**—*Wright v. Johnson*, 5 Ark. 687. **Cal.**—*Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594. **Ga.**—*Adair v. Spellman Seminary*, 13 Ga. App. 600, 79 S. E. 589. **Minn.**—*Agin*

v. Heyward, 6 Minn. 110. **Tex.**—*State v. De Gress*, 72 Tex. 242, 11 S. W. 1029; *Harrell v. Lynch*, 65 Tex. 146; *Messner v. Giddings*, 65 Tex. 301, 309; *Ex parte Whitlow*, 59 Tex. 273; *Williamson v. Lane*, 52 Tex. 335; *Ex parte Towles*, 48 Tex. 413.

85. *Lee v. Elba Drug Co.*, 3 Ala. App. 570, 58 So. 58.

86. **Cal.**—*Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *People v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *In re Jessup's Estate*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; *Hicks v. Bell*, 3 Cal. 219. **N. J.**—*Goldstein v. Ewing*, 62 N. J. Eq. 69, 49 Atl. 517. **Tex.**—*State v. De Gress*, 72 Tex. 242, 11 S. W. 1029; *Harrell v. Lynch*, 65 Tex. 146; *Messer v. Cross*, 26 Tex. Civ. App. 34, 63 S. W. 169.

[a] Statutes creating new rights and new equities, and cutting off other rights whereby certain cases cognizable in equity no longer can arise do not enlarge or diminish the jurisdiction of the court so as to render the statute unconstitutional where the statute gives a specified court exclusive jurisdiction of all equity cases. *Spreckels v. Hawaiian Com. etc. Co.*, 117 Cal. 377, 49 Pac. 353.

87. See generally the constitutions. [a] **Power given by the Constitution** to the legislature to withdraw certain jurisdiction from some of the courts created by the constitution and

late the jurisdiction conferred.⁸⁸ Thus if the constitution in express terms confers jurisdiction upon one court over a particular subject matter such jurisdiction is exclusive,⁸⁹ unless otherwise clearly or expressly manifested,⁹⁰ neither the lapse of time,⁹¹ nor practice of the court,⁹² can vindicate the exercise of jurisdiction under acts repugnant to the constitution.

A court cannot give itself jurisdiction by finding as a fact that which is not a fact.⁹³ Some constitutional provisions, however, merely confer general law and equity jurisdiction upon specified courts,⁹⁴ and consequently the jurisdiction of the courts of such states depends to no small extent upon the statutes of the states,⁹⁵ though they are not limited to the powers so conferred, as they possess judicial powers independent of legislation,⁹⁶ such statutes being passed not as introductory of any new power, but either as declaratory of law, as it already existed, or as directory of the mode in which the powers should be exercised as adapted to modern conditions.⁹⁷

conferring the power upon courts of its own creation, provided it is conferred upon some other tribunal or tribunals, does not preclude the legislature from abolishing a court of its own creation without conferring the jurisdiction exercised by such court upon another court. If the legislature does not put into exercise its power to supersede any of those courts which it is authorized to supersede, the mere abolition of any court of legislative creation would not result in leaving in abeyance any fraction or fragment of the judicial power of the state, as the part of such power which had been invested in the abolished court would in such event revert to the court or courts provided by the constitution for its exercise. *Lee v. Elba Drug Co.*, 3 Ala. App. 570, 58 So. 58.

88. *In re Jessup*, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

89. *Macklot v. Davenport*, 17 Iowa 379; *Messner v. Giddings*, 65 Tex. 301.

90. *Macklot v. Davenport*, 17 Iowa 379.

91. *Titus v. Latimer*, 5 Tex. 433.

92. *Titus v. Latimer*, 5 Tex. 433.

93. *Holman v. Austin*, 34 Tex. 668, 673.

94. See the constitutions and the following cases: *Ga.*—*Cook v. Walker*, 15 Ga. 457. *La.*—*Henry v. Keays*, 12 La. 214. *S. C.*—*Barrett v. Watts*, 13 S. C. 441.

95. *U. S.*—*Harvey v. Tyler*, 2 Wall. 223, 17 L. ed. 871. *Cal.*—*Wright v. Central California Colony Water Co.*,

67 Cal. 532, 8 Pac. 70. *Ia.*—*Laird Bros. v. Dickerson*, 40 Iowa 665. *Kan.*—*McGregor v. Morrow*, 40 Kan. 730, 21 Pac. 157; *English v. Woodman*, 40 Kan. 412, 20 Pac. 262. *Md.*—*O'Brian v. Baltimore*, 51 Md. 15. *Ore.*—*Wright v. Young*, 6 Ore. 87. *Pa.*—*Ainey's Appeal*, 2 Penny. 192. *Tex.*—*Henderson v. State*, 14 Tex. 503, 518.

[a] There is no objection to conferring special statutory jurisdiction upon courts of general jurisdiction. *Calkins v. Calkins*, 229 Ill. 68, 82 N. E. 242.

96. *Ga.*—*Cook v. Walker*, 15 Ga. 457. *Ind.*—*Curtis v. Gooding*, 99 Ind. 45; *Earle v. Earle*, 91 Ind. 27; *Little v. State*, 90 Ind. 338, 46 Am. Rep. 224; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Cavanaugh v. Smith*, 84 Ind. 280; *Nealis v. Dicks*, 72 Ind. 374. *Me.*—*Brown v. Moore*, 79 Me. 216, 9 Atl. 355. *Can.*—*Connor v. Vroom*, 33 N. Bruns. 178.

[a] A court having general equity jurisdiction may entertain a proceeding to set aside an election of directors of a corporation not in conformity with law, notwithstanding no specific statute conferred the power. *Wright v. Cent. Cal. C. W. Co.*, 67 Cal. 532, 8 Pac. 70.

[b] Where a cause of action is created and no particular mode of recovery is limited, the proceeding must be in a court of general jurisdiction. *Anderson v. Fowler*, 1 Hill (S. C.) 226.

97. *Cook v. Walker*, 15 Ga. 457.

It is incumbent upon those who deny jurisdiction in any particular case to point out the constitutional or statutory provision which abridges such general jurisdiction,⁹⁸ since the ordinary general jurisdiction should not be restricted, except by the unequivocal will of the legislature.⁹⁹

2. Where Jurisdiction Limited to Specified Time.—Where jurisdiction is conferred upon a court for a limited time only, its jurisdiction expires at such time and it has no power to take any action even as to matters previously adjudicated.¹

3. Over Particular Subject Matters.—*a. In General.*—Constitutional or statutory provisions in some states confer jurisdiction in a specified court over particular matters,² such as cases respecting title to land,³ or the probate of wills,⁴ or over Indians,⁵ minors,⁶ or persons otherwise incompetent.⁷

b. Cases Respecting Title to Land.—Statutes in some states give exclusive jurisdiction to cases involving the title or possession of lands to specified courts,⁸ or to the courts of a specified county.⁹

c. Special Cases.—Constitutional provisions in some states permit the legislature to confer upon certain courts jurisdiction in special cases.¹⁰ This clause does not include any class of cases for which courts of general jurisdiction have always supplied a remedy,¹¹ and is confined to such new cases as are the creation of statutes, and the proceedings under which are unknown to the general framework of courts of common law and equity.¹²

d. Civil Cases.—Constitutions and statutes sometimes confer juris-

98. *Barrett v. Watts*, 13 S. C. 441.

99. *Henry v. Keays*, 12 La. 214. See also *Anderson v. Fowler*, 1 Hill (S. C.) 226.

1. *Texas-Mexican R. Co. v. Jarvis*, 80 Tex. 456, 15 S. W. 1089.

2. See the statutes of the various states and cases herein cited.

3. *Black v. Fritz*, 98 Ga. 32, 25 S. E. 188; *Smith v. Bryan*, 34 Ga. 53.

4. *Beatty v. Clegg*, 214 Ill. 34, 73 N. E. 383 (county court has jurisdiction); *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700, county court. See generally the title "Probate Courts."

[a] In Illinois equity court has no jurisdiction to probate wills. *Beatty v. Clegg*, 214 Ill. 34, 73 N. E. 383.

5. See generally the title "Indians."

6. See the titles, "Guardian and Ward;" "Infants."

7. See generally the titles "Insane Persons;" "Incompetents."

8. See the statutes, and the following cases: *Hatch v. Allen*, 27 Me. 85;

People v. Wolverine Mfg. Co., 141 Mich. 455, 104 N. W. 725, 113 Am. St. Rep. 544.

As to jurisdiction of justice's of the peace in such case, see the title "Justices of the Peace."

9. *Graham's Heirs v. Kitchen*, 118 Ky. 18, 80 S. W. 464.

10. See the constitutions and *Parsons v. Tuolumne County W. Co.*, 5 Cal. 43, 63 Am. Dec. 76.

[a] The following have been held to be special cases within the above provision: (1) Suits to enforce mechanics liens (*McNiel v. Borland*, 23 Cal. 144), (2) to condemn lands (*Spencer Creek W. Co. v. Vallejo*, 48 Cal. 70), (3) insolvency proceedings. *Harper v. Freelon*, 6 Cal. 76.

As to what are special proceedings, see the title "Suits and Actions."

11. *Parsons v. Tuolumne County W. Co.*, 5 Cal. 43, 63 Am. Dec. 76.

12. *Parsons v. Tuolumne County W. Co.*, 5 Cal. 43, 63 Am. Dec. 76; *Hall v. Nelson*, 23 Barb. (N. Y.) 88; *Beecher v. Allen*, 5 Barb. (N. Y.) 169.

diction upon a specified court or courts, of "civil cases,"¹³ and in determining the meaning of such a provision resort should be had not only to the meaning of the term but also to the provision creating the court and conferring such jurisdiction upon it.¹⁴

e. *Amount in Controversy as Affecting Jurisdiction*.—This matter is discussed elsewhere in this article.¹⁵

VI. JURISDICTION OF APPELLATE COURTS.¹⁶—A. IN GENERAL.—The jurisdiction of the appellate courts of the various states is generally fixed by the state constitution,¹⁷ and the statutes made in pursuance thereof,¹⁸ and where defined by the constitution the legislature can neither define nor limit the jurisdiction thus conferred;¹⁹

13. *In re Youmans*, 133 Ga. 559, 66 S. E. 941.

14. *Gilbert v. Thomas*, 3 Ga. 575.

15. See *infra*, XII.

16. Appellate jurisdiction defined, see *supra*, I, D.

17. See the constitutions and the following cases: Ark.—*State v. Clay County*, 93 Ark. 228, 93 S. W. 757; *Ex parte Batesville & B. R. Co.*, 39 Ark. 82. Cal.—*Edsall v. Short*, 122 Cal. 533, 55 Pac. 327; *Hyatt v. Allen*, 54 Cal. 353. Ill.—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717; *Richards v. People*, 100 Ill. 423. Ind.—*State ex rel. Neal v. Beal*, 113 N. E. 225, construing statute. La.—*Brown v. Ragland*, 35 La. Ann. 837; *State ex rel. Kramer v. Judge*, 32 La. Ann. 217; *State v. Civil Sheriff*, 32 La. Ann. 1225. Mo.—*Vail v. Dinning*, 44 Mo. 210. Mont.—*State ex rel. Helena v. Helena Waterworks Co.*, 43 Mont. 169, 115 Pac. 200; *In re Weston*, 28 Mont. 207, 72 Pac. 512. N. Y. *People v. Cullen*, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420. Ore.—*Boon v. McClane*, 2 Ore. 331. Tex.—*Missouri, K. & T. R. Co. v. Trinity County Lumb. Co.*, 85 Tex. 405, 21 S. W. 539; *Dunn v. St. Louis*, 5 S. W. R. Co., 40 Tex. Civ. App. 242, 88 S. W. 532. Wis.—*Northwestern Mut. L. Ins. Co. v. State*, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

[a] In New York, (1) the jurisdiction of the court of appeals, except where the judgment is of death, is limited to the review of questions of law. No unanimous decision of the appellate division of the supreme court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the court of appeals. Except where the judgment is

of death, appeals to this court can be taken to this court as of right only from final judgments or orders of the appellate division and from orders granting new trials on exceptions where the appellant stipulates that judgment absolute shall be rendered against him on affirmance. The appellate division may, however, allow an appeal upon any question of law which in its opinion ought to be reviewed by the court of appeals. N. Y. Const. Art. VI, §9; *Israel v. Manhattan R. Co.*, 158 N. Y. 624, 53 N. E. 517; *In the Matter of Wilson*, 160 App. Div. 521, 145 N. Y. Supp. 557; *Hopper v. Willecox*, 155 App. Div. 224, 140 N. Y. Supp. 423. (2) The legislature may impose further restrictions. N. Y. Const. Art. VI, §9 See N. Y. Code Civ. Proc. §§190, 191; *Boyd v. Gorman*, 157 N. Y. 365, 52 N. E. 113; *Coatsworth v. Lehigh Val. R. Co.*, 156 N. Y. 451, 51 N. E. 301. (3) The court of appeals has no original jurisdiction. *In re Caruthers*, 158 N. Y. 131, 52 N. E. 742. (4) The appellate division of the supreme court has the jurisdiction formerly exercised by the supreme court at its general terms and at the general terms of the common pleas for the city and county of New York. N. Y. Const. Art. VI, §2. See *Judson v. Central Vermont R. Co.*, 158 N. Y. 597, 53 N. E. 514. As to certification of case from the appellate jurisdiction to the court of appeals, see 4 STANDARD PROC. 729.

18. *McKay v. Stephens*, 81 Wash. 306, 142 Pac. 662.

19. Ark.—*Ex parte Jones*, 2 Ark. 93. Cal.—*Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580; *Hyatt v. Allen*, 54 Cal. 353; *People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295. Mo.—*State ex rel. York v. Locker*, 266 Mo. 384, 181 S. W. 1001; *Vail v. Dinning*, 44 Mo. 210;

nor extend that jurisdiction,²⁰ unless the constitution so provides, as it does in some states.²¹ Where the constitution specifies the courts from which appeals may be taken to a designated court, the legislature cannot authorize an appeal from any others.²² Some constitutions merely prescribe the courts, and leave it to the legislature to define their jurisdiction,²³ and in such case the jurisdiction is wholly dependent upon the will of the legislature subject to any limitations in the constitution,²⁴ and the nature of the court.²⁵ It may be enlarged or restricted as the legislature prescribes.²⁶ The fact that no method of review has been prescribed for certain cases affords no ground for disregarding the plain text of the statute by assuming jurisdiction where none exists.²⁷

Jurisdiction over an appeal can not be taken under an unconstitutional statute.²⁸ A constitution conferring upon a specified court appellate jurisdiction only does not preclude the legislature from giving appellate jurisdiction to another court.²⁹ Notwithstanding the highest court is created by the constitution, the legislature may by the establishment of courts of intermediate appellate jurisdiction or other appropriate legislation, limit and restrict the right of litigants to resort to it, and regulate the mode of doing so, but not so as to unreasonably interfere with or embarrass its ultimate revisory powers.³⁰

The jurisdiction of supreme and appellate courts is of three kinds, appellate, original and supervisory;³¹ the first forms the principal juris-

Foster v. State, 41 Mo. 61. **Mont.** State *ex rel.* Helena v. Helena Water-works Co., 43 Mont. 169, 176, 115 Pac. 200.

20. **U. S.**—Marbury v. Madison, 1 Cranch 157, 2 L. ed. 60. **Cal.**—Chinn v. Superior Court, 156 Cal. 478, 105 Pac. 580. **Wash.**—Winsor v. Bridges, 24 Wash. 540, 64 Pac. 780.

21. People v. Cullen, 153 N. Y. 629, 47 N. E. 894, 44 L. R. A. 420.

[a] Notwithstanding a constitutional provision that "except in cases otherwise provided in this constitution, the Supreme Court shall have appellate jurisdiction only the legislature may designate the Supreme Court as the court in which suits against the state may be instituted where the Constitution provides that the legislature may provide in what courts suits against the state may be brought." Northwestern M. L. Ins. Co. v. State, 163 Wis. 484, 155 N. W. 609, 158 N. W. 328.

22. Chinn v. Superior Court, 156 Cal. 478, 105 Pac. 580.

23. Chicago, K. & W. R. Co. v. Comrs. of Chase Co., 42 Kan. 223, 21 Pac. 1071; Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575.

24. Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575.

25. Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575.

26. Auditor of State v. Atchison, T. & S. F. R. Co., 6 Kan. 500, 7 Am. Rep. 575.

27. Tefft, W. & Co. v. Munsuri, 222 U. S. 114, 32 Sup. Ct. 67, 56 L. ed. 118.

28. **Cal.**—Chinn v. Superior Court, 156 Cal. 478, 105 Pac. 580. **Ill.**—Aurora v. Schoeberlein, 230 Ill. 496, 82 N. E. 860. **N. J.**—Hauser v. Farrell (N. J. L.), 46 Atl. 784.

29. People v. Richmond, 16 Colo. 274, 26 Pac. 929.

30. Eagle Cliff Fishing Co. v. McGowan, 70 Ore. 1, 137 Pac. 766.

31. **Ark.**—Price v. Page, 25 Ark. 527. **Cal.**—Whipple v. Stevenson, 25 Colo. 447, 55 Pac. 188. **Ill.**—Crull v. Keener, 17 Ill. 246. **Mont.**—In re Weston, 28 Mont. 207, 212, 72 Pac. 512; State v. District Court, 24 Mont. 539, 557, 63 Pac. 395. **S. D.**—In re Constitution of Constitution, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575. **Wis.** State *ex rel.* Bolens v. Frear, 148 Wis. 456, 479, 134 N. W. 673, 135 N. W. 674,

diction of appellate courts,³² while the second and third, so far as they may be possessed by courts of last resort, are rather exceptions to the rule that the court has appellate jurisdiction only,³³ and may be more or less limited according to the particular jurisdiction.³⁴ Although the court itself may have only appellate jurisdiction, original jurisdiction in certain cases is sometimes conferred upon the individual members of the court.³⁵

The grant of jurisdiction over particular matters to the appellate court does not necessarily deprive the court of general jurisdiction of this jurisdiction.³⁶ Nor, on the other hand, will the fact that the court

Ann. Cas. 1913A, 1147; L. R. A. 1915B, 569; *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425; *Attorney General v. Blossom*, 1 Wis. 317.

As to original jurisdiction, see *infra*, VI, C.

As to supervisory jurisdiction see *infra*, VI, D.

32. **Ariz.**—*State ex rel. Bullard v. Jones*, 15 Ariz. 215, 137 Pac. 544. **Ill.** *Crull v. Keener*, 17 Ill. 246. **Ky.** *Marchand v. Russell*, 78 Ky. 516, 1 Ky. L. Rep. 126. See *Gorham v. Luckett*, 6 B. Mon. 146. **Mo.**—*State v. Tracy*, 94 Mo. 217, 6 S. W. 709; *Vail v. Dinning*, 44 Mo. 210. **Mont.**—*State ex rel. Helena v. Helena Waterworks Co.*, 43 Mont. 169, 115 Pac. 200. **N. D.**—*State v. Nichols*, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413. **Okla.**—*State ex rel. Brett v. Kenner*, 21 Okla. 817, 97 Pac. 258, no original jurisdiction to issue injunction. **S. D.**—*State ex rel. Egan v. Norbeck*, 160 N. W. 524; *Everitt v. Hughes*, 1 S. D. 365, 47 N. W. 296. **Utah.**—*Godbe v. Salt Lake City*, 1 Utah 68. **Va.**—*Mayo v. Clark*, 2 Call (6 Va.) 389.

[a] **The Following Courts Have Appellate Jurisdiction Only.**—**Ark.**—*Ex parte Jones*, 2 Ark. 93. **Ga.**—*In re Youmans*, 133 Ga. 559, 66 S. E. 941; *McRae v. Adams*, 36 Ga. 442; *Johnson v. Lancaster*, 5 Ga. 39. **Ill.**—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717 (the appellate court has appellate jurisdiction only); *Hawes v. People*, 124 Ill. 560, 17 N. E. 13. **Kan.**—*Auditor of State v. Atchison, T. & S. F. R. Co.*, 6 Kan. 500, 7 Am. Rep. 575. **Md.** *Hendrick v. State*, 113 Md. 552, 81 Atl. 18. **Miss.**—*Planters' Ins. Co. v. Cramer*, 47 Miss. 200. **N. Y.**—*In re Caruthers*, 158 N. Y. 131, 52 N. E. 742, court of appeals has appellate jurisdiction only.

Ore.—*Boon v. McClane*, 2 Ore. 331.

[b] **The supreme court of Mississippi** has exclusively revisory and appellate jurisdiction with such incidental cognizance of a quasi original character as is necessary to preserve its dignity and decorum, and to give full effect to its appellate power. *Brown v. Carraway*, 47 Miss. 668; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

33. See cases cited *infra*, this section.

34. See the following: **La.**—*Rapier v. Guedry*, 136 La. 443, 67 So. 322, the supreme court has appellate and supervisory jurisdiction only. **Mont.** *State v. District Court*, 24 Mont. 539, 557, 63 Pac. 395. **Okla.**—*State ex rel. Brett v. Kenner*, 21 Okla. 817, 97 Pac. 258; *Walck v. Murray*, 18 Okla. 712, 91 Pac. 238. **Ore.**—*Boon v. McClane*, 2 Ore. 331. **Tenn.**—*Chattanooga v. Keith*, 115 Tenn. 588, 94 S. W. 62; *McElwee v. McElwee*, 97 Tenn. 649, 37 S. W. 560; *Memphis v. Halsey*, 12 Heisk. 210; *King v. Hampton*, 3 Hayw. 59. **Utah.** *Godbe v. Salt Lake City*, 1 Utah 68. **W. Va.**—*Maxwell v. Maxwell*, 67 W. Va. 119, 67 S. E. 379, 27 L. R. A. (N. S.) 712, cannot award alimony.

See *infra*, VI, C.

Power of court having appellate jurisdiction only, to entertain bill to review its decision. See 4 STANDARD PROC. 435.

[a] **In Utah** the supreme court may make its own findings in equity cases but does so merely as an appellate court. It has no original jurisdiction. *In re Raleigh's Estate*, 158 Pac. 705.

35. See *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132, where the individual justices have supervisory jurisdiction over the clerks acting under the election law.

36. *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067.

is granted original jurisdiction in certain cases interfere with its appellate jurisdiction in such case, should relief be sought in an inferior court.³⁷

B. APPELLATE JURISDICTION. — 1. In General. — Appellate jurisdiction is generally conferred, to a greater or lesser extent, upon all courts except the lowest such as the justice's courts.³⁸ This grant of power implies also all the instrumentalities necessary to make it effective,³⁹ and if the court obtains jurisdiction of the main case, it will thereby have jurisdiction over all matters incidental thereto.⁴⁰

2. As Dependent on the Nature or Cause of Action. — Jurisdiction of appellate courts over appeals is sometimes made dependent upon the nature of the cause of action in the case under review. This is generally the case where there are intermediate appellate courts, which may be given general appellate jurisdiction except over cases within the jurisdiction of the supreme court.⁴¹ Thus a court may be given appellate

37. *People v. Chicago*, 193 Ill. 507, 523, 62 N. E. 179, 58 L. R. A. 833.

38. See generally the title "Appeals."

Jurisdictional requisites, see 2 STANDARD PROC. 138.

Definition, see *supra*, I, D.

39. Ark.—*Carnall v. Crawford*, 11 Ark. 604. Colo.—*Wheeler v. Northern Colo. Irr. Co.*, 9 Colo. 248, 11 Pac. 103. Ill.—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717; *Hawes v. People*, 124 Ill. 560, 17 N. E. 13. Ky.—*Marchand v. Russell*, 78 Ky. 516, 1 Ky. L. Rep. 126. Miss.—*Brown v. Carraway*, 47 Miss. 668; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200. Mont.—*State v. First Jud. Dist. Ct.*, 24 Mont. 539, 558, 63 Pac. 395.

[a] "So soon as the jurisdiction attaches under an appeal or writ of error, this court has full control of the cause and can make such orders concerning it as may be necessary to preserve the rights of the parties and enforce its mandates. This jurisdiction continues until the case, as made by the appeal or writ of error, is fully determined by this court and its judgment is completely executed by the court below. If the judgment below is affirmed, or reversed and rendered or reformed, this court can see that the party in whose favor its decision has been given has the benefit of all proceedings below necessary to enforce its judgment. If remanded for a new trial, it retains control until the new trial is allowed in accordance with its mandate. If reversed and sent down to have some special judgment rendered by the court

below, jurisdiction remains till that particular judgment is entered up and the mandate of the court obeyed. For the purpose of enforcing all such orders coming within the appellate jurisdiction of the court it may resort to the writ of mandamus, or any other appropriate writ, known to our system of jurisprudence." *Wells v. Littlefield*, 62 Tex. 28, 30; *Birchfield v. Bourland* (Tex. Civ. App.), 187 S. W. 422. See also 2 STANDARD PROC. 331, and the title "Mandate and Proceedings Thereafter."

As to authority to issue writs in aid of jurisdiction, see *infra*, VI, E.

40. Ind.—*Lockhart v. Schlotterback*, 141 Ind. 308, 40 N. E. 750; *Dallin v. McIvor*, 140 Ind. 386, 39 N. E. 461; *Parker v. Indianapolis Nat. Bank*, 126 Ind. 595, 26 N. E. 881. La.—*State v. Judges, etc.*, 107 La. 69, 31 So. 645. Mo.—*State v. Francis*, 95 Mo. 44, 8 S. W. 1. Tex.—*Texas & P. R. v. Webb*, 102 Tex. 210, 114 S. W. 1171.

See *infra*, IX.

41. See generally the constitutions and statutes, and the following: Ill. *People v. St. Louis & C. R. Co.*, 106 Ill. 412. Ind.—*Heady v. Brown*, 151 Ind. 75, 49 N. E. 805, 51 N. E. 85; *Indiana Nat. Gas & O. Co. v. Wooters*, 141 Ind. 315, 40 N. E. 669. Mo.—*State ex rel. Sale v. Nortoni*, 201 Mo. 1, 28, 98 S. W. 554; *State v. Rombauer*, 101 Mo. 499, 14 S. W. 726, construing the Missouri constitution; *State v. Allen*, 45 Mo. App. 551. Tex.—*Edwards v. St. Louis S. W. R. Co.*, 105 Tex. 404, 151 S. W. 289.

jurisdiction of cases which involve the title to or possession of real estate or an interest therein,⁴² which directly⁴³ involve a freehold,⁴⁴

[a] It is the nature of the action brought, not of the defence interposed, which ordinarily determines which court has jurisdiction. *Smith v. Downey*, 132 Ind. 83, 31 N. E. 449.

42. Cal.—*Raisch v. Sausalito Land & F. Co.*, 131 Cal. 215, 63 Pac. 346; *Baker v. Southern Cal. Ry. Co.*, 110 Cal. 455, 42 Pac. 975; *People v. Horsley*, 65 Cal. 381, 4 Pac. 384; *Thomas v. Thomas*, 22 Cal. App. 806, 136 Pac. 510. Ind.—*Branson v. Studebaker*, 133 Ind. 147, 33 N. E. 98; *Taylor v. Dahn* (Ind. App.), 31 N. E. 937. Mo.—*State ex rel. Hayes v. Ellison*, 191 S. W. 49; *Stutz v. Cameron*, 254 Mo. 340, 162 S. W. 221; *State v. Henning*, 110 Mo. 82, 19 S. W. 494; *In re Critzer*, 189 Mo. App. 61, 175 S. W. 104. N. Y.—*Morris v. Nesbit*, 123 N. Y. 650, 25 N. E. 377, 5 Silv. 183.

[a] The title to real estate must be directly involved or the case is not within the jurisdiction of the supreme court. *Branson v. Studebaker*, 133 Ind. 147, 33 N. E. 98; *Springfield S. W. R. Co. v. Schweitzer*, 246 Mo. 122, 151 S. W. 128; *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 128, 127 S. W. 72; *State v. Court of Appeals*, 67 Mo. 199.

[b] The judgment appealed from must involve or directly affect title to real estate. *Springfield S. W. R. Co. v. Schweitzer*, 246 Mo. 122, 151 S. W. 128 citing cases.

[c] Where Monetary Judgment Is Rendered.—Although title to real estate be involved in the pleadings, if the judgment appealed was only a money judgment, title to real estate is not involved within the meaning of the constitution (*Kennedy v. Duncan*, 224 Mo. 661, 665, 123 S. W. 856, citing cases), if the parties who claim an interest in the land do not appeal, but it is otherwise if they appeal, still claiming the interest. *Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 130, 127 S. W. 72.

[d] An action to foreclose a mechanic's lien is not an action affecting the title to real property. *Norris v. Nesbit*, 123 N. Y. 650, 25 N. E. 377, 3 Silv. 183.

[e] A suit on a constable's bond for failing to execute a writ of restitution does not involve title to real estate.

State v. Henning, 110 Mo. 82, 19 S. W. 494.

[f] The word "cases" in the California constitution refers to civil, as distinguished from criminal cases. *People v. Johnson*, 30 Cal. 98.

43. *Monte Vista Canal Co. v. San Luis Val. I. L. Co.*, 22 Colo. App. 376, 123 Pac. 835; *Monte Vista Canal Co. v. Centennial Irr. Ditch Co.*, 22 Colo. App. 364, 123 Pac. 831; *Mattoon v. Elliott*, 259 Ill. 72, 102 N. E. 251; *Hitchcock v. Greene*, 252 Ill. 519, 96 N. E. 854; *Bartley v. Peoria Park Dist.*, 251 Ill. 373, 96 N. E. 241; *Herman v. Comrs. of Highways*, 197 Ill. 94, 64 N. E. 337; *Pitts v. Looby*, 142 Ill. 534, 32 N. E. 519.

44. See generally the constitutions and statutes, and *Monte Vista Canal Co. v. San Luis Val. I. L. Co.*, 22 Colo. App. 376, 123 Pac. 835; *Monte Vista Canal Co. v. Centennial Irr. Ditch Co.*, 22 Colo. App. 364, 123 Pac. 831; *Burnham v. Grant*, 22 Colo. App. 506, 125 Pac. 574; *Becker v. Fink*, 273 Ill. 560, 113 N. E. 49; *Hitchcock v. Greene*, 252 Ill. 519, 96 N. E. 854; *Bennett v. Millard*, 239 Ill. 332, 88 N. E. 165 (if a freehold is directly involved the appellate court has no jurisdiction); *Harlem v. Suburban R. Co.*, 198 Ill. 337, 64 N. E. 1010 (defining "freehold"); *Perry v. Bozarth*, 198 Ill. 328, 64 N. E. 1076 (construing the constitution and statute); *Lake Shore & M. S. R. Co. v. Richards*, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33; *Chicago & G. W. R. L. Co. v. Peck*, 112 Ill. 408, 432; *Lehmann v. Rothbarth*, 111 Ill. 185; *Comrs. of Highways v. Chicago & N. W. R. Co.*, 34 Ill. App. 32.

[a] Whether a freehold is involved must be determined with reference to the facts under consideration. *Monte Vista Canal Co. v. Centennial Irr. Ditch Co.*, 22 Colo. App. 364, 123 Pac. 831.

[b] A freehold is involved (1) where the title is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue, although the judgment or decree does not result in one party gaining or the other party losing the estate (*Bartley v. Peoria Park Dist.*, 251 Ill. 373, 96 N. E. 241; *Sanford v. Kane*, 127 Ill. 591, 20 N. E. 810; *Hi-*

which involve a franchise,⁴⁵ or which involve a constitutional question,⁴⁶

bernian Banking Assn. v. Commercial Nat. Bank, 54 Ill. App. 277), (2) and also when by the execution of the decree the defendant in error gains and the plaintiff in error loses a freehold estate. *Monte Vista Canal Co. v. Centennial Irr. Ditch Co.*, 22 Colo. App. 364, 123 Pac. 831; *Bartley v. Peoria Park Dist.*, 251 Ill. 373, 96 N. E. 241; *Ryan v. Sanford*, 133 Ill. 291, 24 N. E. 428; *Chicago, B. & Q. R. Co. v. Watson*, 105 Ill. 217, 221; *McDavid v. Sutton*, 104 Ill. App. 626.

[c] It is the effect of the judgment rendered not of the judgment which might be rendered which is the test. *Monte Vista Canal Co. v. Centennial Irr. Ditch Co.*, 22 Colo. App. 364, 123 Pac. 831.

[d] Where question of freehold depends upon the existence of a lien on land no freehold is involved even though the litigation may result in the loss of a freehold. Nor is a freehold involved if the defendant may prevent a disturbance of his title or do some act to arrest the sale. *Becker v. Fink*, 273 Ill. 560, 113 N. E. 49.

[e] The word freehold is used in its common-law sense. *Kirchoff v. Union Mut. Life Ins. Co.*, 128 Ill. 199, 204, 20 N. E. 808. See *Chicago & G. W. R. L. Land Co. v. Peck*, 112 Ill. 408, 432; *Chicago, B. & Q. R. Co. v. Watson*, 105 Ill. 217, 220; *McIntyre v. Yates*, 100 Ill. 475.

[f] A freehold may be involved by a cross-bill as well as by an original bill. *Chicago, B. & Q. R. Co. v. Watson*, 105 Ill. 217, 221.

[g] Whether the freehold is involved as a question of law or of fact, is immaterial. *Ducker v. Wear & Boogher D. G. Co.*, 45 Ill. App. 153.

[h] If the appeal is from an interlocutory order, it is immaterial whether the issues do or do not involve a freehold. *New Ohio Washed Coal Co. v. Coal Belt Ry. Co.*, 116 Ill. App. 153.

[i] Waiver.—The parties may submit the case upon errors not involving the freehold and thus confer jurisdiction upon the intermediate appellate court. *Bennett v. Millard*, 239 Ill. 332, 88 N. E. 165; *Scott v. Artman*, 237 Ill. 394, 86 N. E. 595; *Schmidt v. Schmidt*, 277 Ill. 191, 115 N. E. 189 (citing cases); *Ward v. Mississippi R. P. Co.*, 183 Ill. App. 305. See also

Scott v. Desire, 175 Ill. App. 215.

45. *St. Louis & S. C. & M. Co. v. Edwards*, 103 Ill. 472; *O'Donnell v. Illinois Steel Co.*, 53 Ill. App. 314; *Citizens' Horse Ry. Co. v. Belleville*, 47 Ill. App. 388, 411, the court of appeals has no jurisdiction if the appeal involves a franchise.

[a] An appeal involves a franchise if the judgment would result in sustaining or ousting a franchise. *Citizens' Horse Ry. Co. v. Belleville*, 47 Ill. App. 388, 410.

[b] A "franchise" as used in the statute "means a privilege emanating from the sovereign power of the state, owing its existence to a grant, or, as at common law, to prescription which presupposes a grant and invested in individuals or a body politic something not belonging to the citizen of common right." *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 137 Ill. 231, 28 N. E. 248; *Hesing v. Attorney General*, 104 Ill. 292; *Board of Trade v. People*, 91 Ill. 80.

[c] The term is used strictly in its legal not in its broad and popular sense. *Chicago & W. I. R. Co. v. Dunbar*, 95 Ill. 571, 577.

[d] An office is not a franchise within the meaning of the statute. *People ex rel. Smith v. Rodenberg*, 259 Ill. 78, 102 N. E. 182; *People v. Holtz*, 92 Ill. 426.

[e] A suit to enjoin the obstructing of a highway which a party denies to be a highway does not involve a franchise. *Richards v. People*, 100 Ill. 423.

46. *Pittsburgh C. C. & St. L. R. Co. v. Peck*, 172 Ind. 19, 87 N. E. 644; *Indiana Bd. of Pharmacy v. Haag*, 60 Ind. App. 218, 110 N. E. 248; *American Maize Prod. Co. v. Widiger*, 60 Ind. App. 709, 110 N. E. 247; *Richey v. Cleveland C. C. & St. L. R. Co.*, 47 Ind. App. 123, 93 N. E. 1022; *Kemper M. & E. Co. v. Missouri P. R. Co. (Mo.)*, 178 S. W. 502; *Stegall v. American P. & C. Co.*, 263 Mo. 719, 173 S. W. 674; *Bennett v. Missouri Pac. Ry. Co.*, 105 Mo. 642, 16 S. W. 947; *State v. Kansas City Court of Appeals*, 105 Mo. 299, 16 S. W. 853; *Baldwin v. Fries*, 103 Mo. 286, 15 S. W. 760; *State v. Francis*, 95 Mo. 44, 8 S. W. 1; *Wabash W. R. v. Siefert*, 41 Mo. App. 35, the court of appeals has no

the legality of any tax, impost, assessment, toll or municipal fine,⁴⁷ city ordinance,⁴⁸ or statute,⁴⁹ or cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question.⁵⁰ And appellate jurisdiction is sometimes given of cases relating

jurisdiction if a constitutional question is involved.

[a] **The constitutional question (1) must be involved in the issues of the case, and the trial court must have an opportunity to and must pass upon the question** (*Ross v. Grand Pants Co.*, 241 Mo. 296, 145 S. W. 410; *Bennett v. Missouri Pac. Ry. Co.*, 105 Mo. 642, 16 S. W. 947; *Baldwin v. Fries*, 103 Mo. 286, 15 S. W. 760), (2) to the disadvantage of the party appealing. *Ranney v. Cape Girardeau*, 255 Mo. 514, 164 S. W. 582; *Miller v. Connor*, 250 Mo. 677, 157 S. W. 81. (3) The question cannot be injected into the case for the first time on appeal, to confer jurisdiction. *Miller v. Connor*, 250 Mo. 677, 157 S. W. 81; *Baldwin v. Fries*, 103 Mo. 286, 15 S. W. 760. (4) The question must really exist (*Kemper M. & E. Co. v. Missouri P. R. Co.* [Mo.], 178 S. W. 502; *Stegall v. American P. & C. Co.*, 263 Mo. 719, 173 S. W. 674; *Brookline Canning & P. Co. v. Evans*, 238 Mo. 599, 142 S. W. 319), (5) and must be essential to the determination of the case. *Ranney v. Cape Girardeau*, 255 Mo. 514, 164 S. W. 582. (6) *Compare Skinner v. St. Louis, I. M. & S. R. Co.*, 254 Mo. 228, 162 S. W. 237, where the court entertained jurisdiction although a decision of the constitutional question was not essential to the final disposition of the appeal.

[b] **The mere raising of the question does not vest jurisdiction in the supreme court.** *State v. Price*, 124 La. 670, 50 So. 647.

[c] **Where the Validity of a Law Is Involved.**—*Albertype Co. v. Gust Feist Co.*, 102 Tex. 219, 114 S. W. 791.

[d] **An issue of compliance with or construction of a statute is not a constitutional question.** *Miller v. Connor*, 250 Mo. 677, 157 S. W. 81.

[e] **Validity of Claim Immaterial.** It is not a matter of whether the constitutional question is well taken. *King v. Estate of Stotts*, 254 Mo. 198, 208, 162 S. W. 246.

[f] **But if the constitutional question is firmly settled, it is not subject to challenge, so as to lodge jurisdiction**

over the appeal in the supreme court. *Pittsburgh C. C. & St. L. R. Co. v. Peck*, 172 Ind. 562, 88 N. E. 939; *Blair v. Ft. Wayne*, 51 Ind. App. 652, 98 N. E. 736. See also *King v. Estate of Stotts*, 254 Mo. 198, 208, 162 S. W. 246.

47. *Bottle Min. & Mill. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25; *Tebault v. City of New Orleans*, 108 La. 686, 32 So. 983; *State v. Delgado*, 107 La. 72, 31 So. 389; *City of New Orleans v. Reems*, 49 La. Ann. 792, 21 So. 599; *Patterson v. City of New Orleans*, 47 La. Ann. 275, 16 So. 815; *Sweeney v. Seiler & Son*, 37 La. Ann. 585.

[a] **The word "assessment"** in this connection refers to assessments relating to public taxation or to raise funds for local public improvements. Assessments by private corporations on its stock are not included. *Bottle Min. & Mill. Co. v. Kern*, 154 Cal. 96, 97 Pac. 25.

[b] **"Municipal fine"** is used in its strictest sense as indicating a fine imposed by an inferior power or jurisdiction. It does not include fines imposed by the laws of the state. *People v. Johnson*, 30 Cal. 98.

48. *State v. Deffes*, 44 La. Ann. 581, 10 So. 812.

[a] **That the pleadings raise the question of the legality or constitutionality of a municipal ordinance is not alone sufficient.** The judgment rendered must have turned on that issue. *Moss v. Newhouse*, 52 La. Ann. 945, 27 So. 536.

49. *Pearson v. Zehr*, 125 Ill. 573, 18 N. E. 204; *Cairo v. Bross*, 99 Ill. 521.

[a] **That the construction of a statute is involved is insufficient.** *Pearson v. Zehr*, 125 Ill. 573, 18 N. E. 204; *Kemper M. & E. Co. v. Missouri P. R. Co.* (Mo.), 178 S. W. 502.

50. *Kemper M. & E. Co. v. Missouri P. R. Co.* (Mo.), 178 S. W. 502; *Kettelhake v. American C. & F. Co.*, 243 Mo. 412, 147 S. W. 479.

[a] **This jurisdiction rests upon grounds similar to those authorizing a removal of a cause from a state to a federal court for the protection of federal officers with respect to such acts.**

to revenue,⁵¹ or the construction of revenue laws,⁵² in cases where the state,⁵³ county,⁵⁴ or other political subdivision of the state,⁵⁵ or a state officer,⁵⁶ is a party, in cases involving the title to any office⁵⁷ under the

Kettelhake v. American C. & F. Co., 243 Mo. 412, 147 S. W. 479.

51. See the constitutions and statutes, and the following cases: *People v. Holten*, 259 Ill. 219, 102 N. E. 171; *Lippincott v. Board of Education*, 86 Ill. App. 522; *Phoenix G. & S. Exchange v. Gleason*, 22 Ill. App. 373; *Milne v. Blair*, 136 Tenn. 325, 189 S. W. 685.

[a] **Revenue Must Be Directly Affected.**—*People v. Holten*, 259 Ill. 219, 102 N. E. 171; *People ex rel. Moffitt v. Turnbull*, 256 Ill. 532, 100 N. E. 221.

[b] **Suits for the collection of revenue** (1) such as taxes, are intended. Every case which may affect revenue, however remotely, is not within the statute. *Hodge v. People*, 96 Ill. 423. (2) But it is not necessary, according to *Milne v. Blair*, 136 Tenn. 325, 189 S. W. 685, that the suit be brought to obtain a money decree for the revenue. A bill to enjoin the collection of revenue is within the statute.

[c] **Revenue** as used in the statute embraces all taxes and assessments imposed by public authority. *People v. Springer*, 106 Ill. 542; *Webster v. People*, 98 Ill. 343.

52. *State ex rel. Hadley v. Adkins*, 221 Mo. 112, 119 S. W. 1091; *Morrow v. Surber*, 97 Mo. 155, 11 S. W. 48; *State v. Angert*, 53 Mo. App. 349; *Cape Girardeau v. Burrough*, 43 Mo. App. 298.

[a] **Revenue Laws Defined.**—*State ex rel. Hadley v. Adkins*, 221 Mo. 112, 118, 119 S. W. 1091, citing cases.

53. *Hitchcock v. Greene*, 252 Ill. 519, 96 N. E. 854; *Steffen v. City of St. Louis*, 135 Mo. 44, 36 S. W. 31; *State v. Coleman*, 33 Mo. App. 470.

[a] **Cases "in which the state is interested as a party or otherwise"** contemplates those in which the state has a direct and substantial interest as distinguished from a purely nominal interest. *Hodge v. People*, 96 Ill. 423, approved by *People ex rel. Smith v. Rodenberg*, 259 Ill. 78, 102 N. E. 182, and *Hitchcock v. Greene*, 252 Ill. 519, 96 N. E. 854.

[b] **Must Be a Monetary Interest.** *Hitchcock v. Greene*, 252 Ill. 519, 96 N. E. 854, citing cases.

54. See cases cited in the preceding note.

55. See cases cited below.

[a] **A city is not a subdivision of the state** (*Louisiana v. Lang*, 251 Mo. 664, 158 S. W. 1; *Smith v. Sedalia*, 228 Mo. 505, 128 S. W. 735; *Kansas City v. Neal*, 122 Mo. 232, 26 S. W. 695, *Kansas City*), unless it has powers similar to a county. *Kansas City v. Neal*, 122 Mo. 232, 26 S. W. 695, such as *St. Louis*.

[b] **A drainage district is not a political subdivision of the state in the sense contemplated by the constitution.** *Wilson v. King's Lake D. & L. Dist.*, 237 Mo. 39, 139 S. W. 136.

[c] **Nor Is a Township or School District.**—*Wilson v. King's Lake D. & L. Dist.*, 237 Mo. 39, 139 S. W. 136; *School Dist. No. 6 v. Burris*, 84 Mo. App. 654.

56. *State v. Smith*, 131 Mo. 176, 33 S. W. 11 (jurisdiction is in the supreme court); *State v. Coleman*, 33 Mo. App. 470.

[a] **A sheriff is not a "state officer"** within the constitution. *State v. Spencer*, 91 Mo. 206, 3 S. W. 410.

[b] **Members of the city board of health** are not state officers. *State ex rel. Horstkotte v. Board of Health*, 90 Mo. 169, 2 S. W. 191.

57. *Ramsey v. Huck*, 267 Mo. 333, 184 S. W. 966.

[a] **Any office held under the authority of the laws of the state is meant.** *Ramsey v. Huck*, 267 Mo. 333, 184 S. W. 966.

[b] **Illustrations.**—This provision applies to "contests involving the title to the following offices: (1) Clerk of the circuit court (*State v. Rombauer*, 101 Mo. 499, 14 S. W. 726), (2) members of a school board (*State v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502; *State v. Rombauer*, 105 Mo. 103, 16 S. W. 695; *State v. Bus*, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616), (3) school directors (*State v. Fasse*, 189 Mo. 532, 88 S. W. 1; *State v. Stone*, 152 Mo. 202, 53 S. W. 1069; *State v. Hill*, 152 Mo. 234, 53 S. W. 1062), (4) county collectors (*Sanders v. Laeks*, 142 Mo. 255, 43 S. W. 653), (5) certain township officers (*Macrae*

state, in all cases in equity,⁵⁸ in civil cases,⁵⁹ and in criminal cases,⁶⁰ or in criminal cases of a certain grade.⁶¹

3. As Dependent on the Amount in Controversy.—The appellate jurisdiction of a court is sometimes limited by the amount in controversy.⁶²

4. Over Intermediate Appellate Courts.—Intermediate appellate courts are sometimes given final and exclusive jurisdiction over certain named classes of cases,⁶³ except in so far as the exercise of its powers may be controlled by the court of last resort by virtue of its superintending control,⁶⁴ although the rule is otherwise in some states, an appeal being allowed from their decisions.⁶⁵ In some states the supreme

v. Coles, 183 S. W. 578)" (6) and to the office of the justice of the peace. *Ramsey v. Huck*, 267 Mo. 333, 184 S. W. 966.

58. *Beswick v. Churchill Co.*, 21 Cal. App. 721, 132 Pac. 771; *Rickey Land & C. Co. v. Glader*, 6 Cal. App. 113, 91 Pac. 414.

[a] The district court of appeals has no appellate jurisdiction in equity cases where such jurisdiction is given the supreme court. *Aetna Indemnity Co. v. Altadena Min. & Inv. Co.*, 11 Cal. App. 26, 104 Pac. 470; *Rickey Land & C. Co. v. Glader*, 6 Cal. App. 113, 91 Pac. 414.

59. *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Jeter v. State*, 86 Tex. 555, 26 S. W. 49.

[a] The Texas court of civil appeals has no jurisdiction of an appeal in a criminal case. *Jeter v. State*, 86 Tex. 555, 26 S. W. 49.

[b] A proceeding for the forfeiture of a bail bond is a criminal case within the rule. *Jeter v. State*, 86 Tex. 555, 26 S. W. 49.

60. *Smythe v. Smythe*, 28 Okla. 266, 114 Pac. 257; *Brown v. State*, 6 Okla. Crim. 442, 119 Pac. 447; *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Jeter v. State*, 86 Tex. 555, 26 S. W. 49; *Ex parte Berry*, 34 Tex. Crim. 36, 28 S. W. 806.

61. Cal.—*People v. Johnson*, 30 Cal. 98. Ill.—*New Ohio Washed Coal Co. v. Coal Belt Ry. Co.*, 116 Ill. App. 153; *Hill v. Tarbel*, 91 Ill. App. 272. Mo.—*State v. McNeary*, 88 Mo. 143.

62. See *infra*, XII, D.

63. Ala.—*Williams v. Louisville & N. R. Co.*, 58 So. 315. Cal.—*Edsall v. Short*, 122 Cal. 533, 55 Pac. 327. La.—*Brown v. Ragland*, 35 La. Ann. 837. Mo.—*State ex rel. Miles v. Ellison*, 190 S. W. 274; *State ex rel. Sale v. Nortoni*,

201 Mo. 1, 26, 98 S. W. 554; *State v. Smith*, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901; *State v. Rombauer*, 101 Mo. 499, 14 S. W. 726; *State v. Philips*, 97 Mo. 331, 340, 10 S. W. 853, 3 L. R. A. 476.

[a] "All Cases of Boundary."—A test of a boundary case is would there be a case if there had been no question of boundary. *Mansfield v. Gilbert*, 99 Tex. 18, 86 S. W. 922; *Cox v. Finks*, 91 Tex. 318, 43 S. W. 1.

[b] In cases *ex contractu* where the amount involved is less than \$1000. In the Matter of Landfield, 182 Ill. 264, 55 N. E. 371.

[c] In Missouri the supreme court has no appellate jurisdiction over the court of appeals. *State ex rel. Sale v. Nortoni*, 201 Mo. 1, 28, 98 S. W. 554; *State v. Rombauer*, 101 Mo. 499, 14 S. W. 726.

64. Ala.—*Williams v. Louisville & N. R. Co.*, 58 So. 315. La.—*Brown v. Ragland*, 35 La. Ann. 837. Mo.—*State ex rel. Sale v. Nortoni*, 201 Mo. 1, 26, 98 S. W. 554; *State v. Smith*, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901; *State v. Rombauer*, 101 Mo. 499, 14 S. W. 726.

As to supervisory control, see *infra*, VI, D.

65. *Livermore v. Truesdell*, 7 Colo. App. 470, 43 Pac. 663.

[a] In Colorado, the court of appeals has jurisdiction, not final, where a franchise or freehold is involved, or where the construction of a provision of the constitution of the state or United States is necessary to the decision, and also in criminal cases or upon writs of error to the judgment of the county court. Writs of error from or appeals to the supreme court lie to review every final judgment of the court of appeals which might have

court is given appellate jurisdiction of cases in which the judges of the court of appeals may disagree upon any material question of law,⁶⁶ or in which one of the courts of appeals holds differently from a prior decision of such court, of another court of appeals, or of the supreme court.⁶⁷ The statutes just mentioned do not apply to cases in which the court has final jurisdiction, however.⁶⁸

C. ORIGINAL JURISDICTION.—Original jurisdiction of certain classes of cases is frequently conferred upon appellate courts,⁶⁹ but such courts have no original jurisdiction except that conferred⁷⁰ upon

been taken for review to the supreme court in the first instance. *Crawford v. Brown*, 21 Colo. 272, 40 Pac. 692. See also *Weiss v. Gullett*, 29 Colo. 121, 67 Pac. 155; *First Nat. Bank v. Board of Comrs.*, 29 Colo. 114, 66 Pac. 890; *McCarthy v. Crump*, 28 Colo. 398, 65 Pac. 49; *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445; *Hurd v. Carlile*, 18 Colo. 461, 33 Pac. 164.

66. *Texas & P. R. Co. v. Langsdale*, 88 Tex. 513, 32 S. W. 523.

67. *Galveston, H. & S. A. R. Co. v. Herring*, 102 Tex. 100, 113 S. W. 521; *Hanway v. Galveston, H. & S. A. R. Co.*, 94 Tex. 76, 58 S. W. 724; *Sun Mut Ins. Co. v. Roberts W. & T. Co.*, 90 Tex. 78, 37 S. W. 311; *Gallagher v. Rahm*, 88 Tex. 514, 32 S. W. 523.

[a] A well defined conflict is necessary to give jurisdiction to the supreme court. *Hanway v. Galveston, H. & S. A. R. Co.*, 94 Tex. 76, 58 S. W. 724; *Bassett v. Sherrod*, 90 Tex. 32, 36 S. W. 400.

[b] Same Question Decided.—In order to give the supreme court jurisdiction of a reversed and remanded case on the ground that two courts of civil appeals have held differently on the same question of law, that question must be the same as that presented in the case in which the writ of error is sought. *Mann v. Durst*, 90 Tex. 76, 37 S. W. 311.

[c] In Missouri, if the court of appeals holds contrary to the decision of another court of appeals, it must certify the case to the supreme court. See 4 STANDARD PROC. 725.

68. *Paschal v. Inman*, 106 Tex. 128, 157 S. W. 1158; *Gallagher v. Rahm*, 88 Tex. 514, 32 S. W. 523; *Texas & P. R. Co. v. Langsdale*, 88 Tex. 513, 32 S. W. 523.

69. See generally the constitutions and statutes.

As to jurisdiction of proceedings to

disbar attorneys, see 3 STANDARD PROC. 864.

70. **Ark.**—*Massey-Herndon Shoe Co. v. Powell*, 64 Ark. 514, 43 S. W. 506; *Ex parte Jones*, 2 Ark. 93. **Cal.**—*People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295; *Ex parte Attorney General*, 1 Cal. 85. **Ill.**—*People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717; *Crull v. Keener*, 17 Ill. 246. **Kan.**—*Hess v. Conway*, 93 Kan. 246, 144 Pac. 205; *Chicago, K. & W. R. Co. v. Comrs. of Chase County*, 42 Kan. 223, 21 Pac. 1071. **Mo.**—*State v. Flentge*, 49 Mo. 488; *Vail v. Dinning*, 44 Mo. 210; *Foster v. State*, 41 Mo. 61. **Mont.**—*State ex rel. Helena v. Helena Waterworks Co.*, 43 Mont. 169, 115 Pac. 200. **N. D.**—*State v. Nichols*, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413; *Christianson v. Farmers' Warehouse Assn.*, 5 N. D. 438, 67 N. W. 300, 32 L. R. A. 730. **Ohio.**—*Kent v. Mahaffy*, 2 Ohio St. 498; *Ex parte Logan Branch Bank*, 1 Ohio St. 432. **Ore.**—*Central Oregon Irr. Co. v. Public Service Com.*, 80 Ore. 607, 157 Pac. 1070. **Pa.**—*In re Nichols*, 180 Pa. 591, 37 Atl. 95. **R. I.**—*Parker v. Barstow*, 5 R. I. 232, holding supreme court has not original jurisdiction of an action of debt by the state treasurer to recover a statutory penalty. **Utah.** See *In re Raleigh's Est.*, 158 Pac. 705. **Wash.**—*State ex rel. Hoppe v. Superior Court*, 68 Wash. 500, 123 Pac. 786. **Wyo.**—*Nagle v. Robins*, 9 Wyo. 211, 255, 62 Pac. 154, 62 Pac. 796, supreme court cannot allow counsel fees.

[a] The Missouri court of appeals has original jurisdiction of such matters only which are not within the appellate jurisdiction of the supreme court. *State ex rel. Sale v. Norton*, 201 Mo. 1, 28, 98 S. W. 554; *State v. Rombauer*, 101 Mo. 499, 14 S. W. 726 (construing constitution); *State v. Allen*, 45 Mo. App. 551; *State v. Coleman*, 33 Mo. App. 470.

them by the constitution, or the statutes.⁷¹ Applying the maxim *expressio unius est exclusio alterius*, where the constitution has given the appellate court original jurisdiction in certain specified cases, the legislature cannot add to the numerated subjects of original jurisdiction.⁷² And, on the other hand, the legislature cannot abridge the grant of original jurisdiction.⁷³

Original jurisdiction is generally conferred upon appellate courts to issue the prerogative writs of the common law,⁷⁴ and some constitutions confer original jurisdiction in all cases relating to revenue,⁷⁵ in civil cases in which the state is a party,⁷⁶ of proceedings against state officers,⁷⁷ over controversies arising in county seat contests,⁷⁸ and in such remedial cases as may be prescribed by law.⁷⁹

71. *Dunn v. St. Louis S. W. R. Co.*, 40 Tex. Civ. App. 242, 88 S. W. 532.

72. *Ark.—Ex parte Jones*, 2 Ark.

93. *Colo.—People v. Richmond*, 16 Colo

274, 26 Pac. 929. *Neb.—Miller v.*

Wheeler, 33 Neb. 765, 51 N. W. 137.

N. D.—Christianson v. Farmers' Ware-

house Assn., 5 N. D. 438, 67 N. W.

300, 32 L. R. A. 730. *Ohio.—State v.*

Board, etc., 70 Ohio St. 341, 71 N. E.

717; *State v. Hahn*, 50 Ohio St. 714,

35 N. E. 1052; *Kent v. Mahaffy*, 2

Ohio St. 498. *Tenn.—State v. Ganna-*

way, 16 Lea 124; *State v. Bank of*

East Tennessee, 5 Sneed 573; *State*

v. Hall, 6 Baxt. 3; *Ward v. Thomas*,

2 Coldw. 565. *Wash.—Winsor v.*

Bridges, 24 Wash. 540, 64 Pac. 780.

73. *People v. Chicago*, 193 Ill. 507,

62 N. E. 179, 58 L. R. A. 833; *Camp-*

bell v. Campbell, 22 Ill. 664; *Bryant*

v. People, 71 Ill. 32.

74. See *infra*, VI, E.

75. *Baird v. Hutchinson*, 179 Ill.

435, 53 N. E. 567.

[a] **Jurisdiction Is Not Exclusive.**

Hundley v. Comrs. of Lincoln Park, 67

Ill. 559.

76. *Neb.—State v. Chicago, B. & Q.*

Co., 88 Neb. 669, 130 N. W. 295;

State v. Pacific Express Co., 80 Neb.

823, 834, 115 N. W. 619, 18 L. R. A.

(N. S.) 664; *In re Attorney General's*

Petition, 40 Neb. 402, 58 N. W. 945.

S. D.—State ex rel. Egan v. Norbeck,

etc. Co., 160 N. W. 524, where the

state is party defendant. *Wis.—North-*

western M. L. Ins. Co. v. State, 163

Wis. 484, 155 N. W. 609, 158 N. W.

328.

[a] Any civil action which can be

properly brought by the state is with-

in the original jurisdiction of the su-

preme court. *State v. Chicago, B. & Q.*

R. Co., 88 Neb. 669, 674, 130 N. W.

295, 34 L. R. A. (N. S.) 250.

[b] **Cases Involving Public Franchise.**

All civil cases in which the ex-

istence or regulation or control of a

public franchise, the grant of which

carries with it the exercise of a por-

tion of the sovereign power of the

state are within the jurisdiction of the

court at the suit of the state or the

attorney general on behalf of the

state. *State v. Pacific Express Co.*, 80

Neb. 823, 835, 115 N. W. 619, 18 L.

R. A. (N. S.) 664.

[c] **State must have substantial interest**

and not be a mere nominal party.

State v. Pacific Express Co., 80 Neb.

823, 835, 115 N. W. 619, 18 L. R. A.

(N. S.) 664; *In re Attorney General*,

40 Neb. 402, 410, 58 N. W. 945.

[d] **Although the state has no pecuniary or property interest in the suit**

the supreme court may have original

jurisdiction. *State v. Pacific Express*

Co., 80 Neb. 823, 115 N. W. 619, 18

L. R. A. (N. S.) 664.

[e] **In North Carolina**, the constitu-

tion contemplates that the supreme

court shall decide such questions of

law as may seem to be involved, to-

gether with its impression of the facts

generally, but there shall not be a

trial. *Bledsoe v. State*, 64 N. C. 392.

77. *Hill v. Howell*, 70 Wash. 603,

127 Pac. 211; *State ex rel. North Coast*

Fire Ins. Co. v. Schively, 68 Wash. 148,

122 Pac. 1020; *State v. Clay*, 3 Wyo.

393, 31 Pac. 409.

78. *Town of Grove v. Haskell*, 31

Okl. 77, 116 Pac. 805.

79. *Hunt v. Hoffman*, 125 Minn.

249, 146 N. W. 733.

[a] **The "remedial cases"** are only

those special or extraordinary proceed-

ings where the remedy is afforded sum-

marily through certain original remedial

D. SUPERVISORY JURISDICTION.—1. In General.—According to the common law superior courts are entitled to general superintendence over all subordinate courts for the purpose of keeping them in their prescribed sphere and of preventing usurpation.⁸⁰ This power is frequently conferred upon the supreme courts of the various states,⁸¹ and

writs, such as mandamus and the like. *Hunt v. Hoffman*, 125 Minn. 249, 146 N. W. 733, citing cases.

80. **Ky.**—*Arnold v. Shields*, 5 Dana 18, 30 Am. Dec. 669. **Me.**—*Smyth v. Titecomb*, 31 Me. 272. **N. C.**—*Perry v. Shepherd*, 78 N. C. 83. **Okla.**—*Kelly v. Kemp*, 162 Pac. 1079.

[a] **The English court of King's bench** had a superintending jurisdiction over all the inferior courts of the realm, which it freely exercised by the use of well defined writs from very early times. The Norman idea was that the king was the foundation of all justice, and hence, when an inferior court exercised its jurisdiction, or refused to act within the jurisdiction to the prejudice of a suitor, and no other remedy was provided application could be made by the aggrieved party to the king's court to restrain or compel action. *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33, 55.

81. **Ala.**—*Ex parte Steverson*, 177 Ala. 384, 58 So. 992; *Williams v. Louisville & N. R. Co.*, 58 So. 315 (citing local cases); *Miller v. Jones*, 80 Ala. 89; *Ex parte Hardy*, 68 Ala. 303; *Ex parte Croom*, 19 Ala. 561; *Etheridge v. Hall*, 7 Port. 47. **Ark.**—*Jones v. Coffin*, 96 Ark. 332, 131 S. W. 873; *Carr v. State*, 93 Ark. 585, 122 S. W. 631; *Featherstone v. Folbre*, 75 Ark. 510, 88 S. W. 554; *Ex parte Snoddy*, 44 Ark. 221; *Ex parte Batesville & B. R. Co.*, 39 Ark. 82; *Ex parte Trapnall*, 6 Ark. 9, 42 Am. Dec. 676. **Colo.**—*People v. District Court*, 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768; *People v. Court of Appeals*, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929. **Fla.**—*Ex parte White*, 4 Fla. 165. **Ia.**—*Hutchins v. Des Moines*, 157 N. W. 881; *Westbrook v. Wicks*, 36 Iowa 382. **Ky.**—*Hargis v. Parker*, 27 Ky. L. Rep. 441, 85 S. W. 704, 69 L. R. A. 270; *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006. **La.**—*Reynolds v. Carroll*, 114 La. 610, 38 So. 470; *State v. Foster*, 106 La. 425, 31 So. 57; *State ex rel. Buck v. Hingle*, 104 La. 775, 29 So. 349; *State ex rel. New*

Orleans v. Judge, etc., 52 La. Ann. 1275, 27 So. 697; *State ex rel. Kirsch v. Judge, etc.*, 45 La. Ann. 1206, 14 So. 73. **Me.**—*Harriman v. Waldo*, 53 Me. 83; *Badger v. Towle*, 48 Me. 20; *Smyth v. Titecomb*, 31 Me. 272. **Mass.**—*Attorney General v. Boston*, 123 Mass. 460; *In re Strong*, 20 Pick. 484. **Mich.**—*Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916; *Detroit Tug & W. Co. v. Gartner*, 75 Mich. 360, 42 N. W. 968; *Tawas, etc. Co. v. Iosco Co. Ct. Judge*, 44 Mich. 479, 7 N. W. 65; *People ex rel. Taylor v. St. Clair Circ. Judge*, 32 Mich. 95; *Perkins v. Supts. of Poor of Lapeer*, 1 Mich. 504. **Mo.**—*State v. Arkansas L. Co.*, 190 S. W. 894; *In re Letcher*, 190 S. W. 19; *State ex rel. Evans v. Broaduss*, 245 Mo. 123, 135, 149 S. W. 473, Ann. Cas. 1914A, 823; *Koehler v. Snider*, 177 Mo. 546, 76 S. W. 1032; *State v. Neville*, 157 Mo. 386, 394, 57 S. W. 1012, 51 L. R. A. 95; *State v. Blakemore*, 40 Mo. App. 406, 416. **Mont.**—*State v. District Court*, 30 Mont. 442, 76 Pac. 1005; *State v. District Court*, 25 Mont. 504, 65 Pac. 1020; *State v. First Judicial Dist. Ct.*, 24 Mont. 539, 63 Pac. 395. **Neb.**—*Goetz Brewing Co. v. Waln*, 92 Neb. 614, 139 N. W. 230, Ann. Cas. 1914A, 336. **N. J.**—*State v. Decue*, 31 N. J. L. 302. **N. M.**—*State ex rel. Harvey v. Medler*, 19 N. M. 252, 142 Pac. 376. **N. Y.**—*Sikes v. Ransom*, 6 Johns. 279, supreme court. **N. C.**—*State v. Crook*, 132 N. C. 1053, 44 S. E. 32; *Perry v. Shepherd*, 78 N. C. 83. **N. D.**—*State ex rel. Red River Brick Corp. v. District Court*, 24 N. D. 28, 138 N. W. 988; *State v. Nichols*, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413. **Ohio.**—*State v. Todd*, 4 Ohio 351. **Okla.**—*Kelly v. Kemp*, 162 Pac. 1079; *Parmenter v. Ray*, 158 Pac. 1183; *Homesteaders v. McCombs*, 24 Okla. 201, 103 Pac. 691, 20 Ann. Cas. 181, 38 L. R. A. (N. S.) 1000; *Baker v. Newton*, 22 Okla. 658, 98 Pac. 931. **S. D.**—*State ex rel. Egan v. Norbeck, etc. Co.*, 160 N. W. 524; *State v. Board of Comrs. of Hughes County*, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588. **Wis.**—*State ex rel. McGovern v. Wil-*

sometimes upon the lesser courts as well,⁸² although some supreme courts,⁸³ and courts of general jurisdiction,⁸⁴ have no such authority, unless by virtue of their original jurisdiction to issue writs of mandamus, prohibition and certiorari.⁸⁵

2. General Features of Jurisdiction.—The superintending control granted to the courts refers to that well-known jurisdiction of the court of King's Bench at common law.⁸⁶ It is a distinct and independent branch of the court's power and is exercised regardless⁸⁷ of its appel-

liams, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941; State *ex rel.* Mitchell v. Johnson, 105 Wis. 90, 80 N. W. 1104; State v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 37. Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425. Wyo.—State v. Ausherman, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548; State v. Crocker, 5 Wyo. 385, 40 Pac. 681.

82. Ark.—Cornell v. Crawford, 11 Ark. 604, 614. Mo.—State *ex rel.* Sale v. Nortoni, 201 Mo. 1, 26, 98 S. W. 554; State v. Rombauer, 101 Mo. 499, 14 S. W. 726; State v. Allen, 45 Mo. App. 551, 560. Wis.—State v. Chittenden, 127 Wis. 468, 508, 107 N. W. 500.

[a] **Effect on Jurisdiction of the Supreme Court.**—In Arkansas, the supreme court has no original jurisdiction to control or supervise any proceedings of the probate court or of the courts inferior to the circuit court. That all belongs to the circuit courts, as matter of original jurisdiction, and to the supreme court by appellate and supervisory jurisdiction over the circuit court. Ferguson v. Martineau, 115 Ark. 217, 171 S. W. 472, Ann. Cas. 1916E, 421; Featherstone v. Folbre, 75 Ark. 510, 88 S. W. 554.

[b] **The Missouri court of appeals** has no power to use the original writs by way of a superintending control over trial courts in matters reviewable by the supreme court. State *ex rel.* Sale v. Nortoni, 201 Mo. 1, 26, 98 S. W. 554; State v. Rombauer, 101 Mo. 499, 14 S. W. 726.

83. Kan.—In re Burnette, 73 Kan. 609, 616, 85 Pac. 575. Miss.—Planters' Ins. Co. v. Cramer, 47 Miss. 200. Mo. State v. Stewart, 32 Mo. 379. Tex. Milam County Oil Mill Co. v. Bass, 106 Tex. 260, 163 S. W. 577.

84. Cal.—Faut v. Mason, 47 Cal. 7, county courts. N. C.—Perry v. Shepherd, 78 N. C. 83, superior court. Tex. Galveston, H. & S. A. R. Co. v. Dowe, 70 Tex. 1, 7 S. W. 368 (the district

has not this power under the present constitution); Dunn v. St. Louis S. W. R. Co., 40 Tex. Civ. App. 242, 88 S. W. 532, court of civil appeals.

85. Cal.—See Faut v. Mason, 47 Cal. 7. See also *Ex parte* Attorney General, 1 Cal. 85, holding that the court having general appellate jurisdiction will, however, exercise a supervisory control over all inferior courts. Idaho. Blackwell Lumb. Co. v. Flynn, 27 Idaho 632, 636, 150 Pac. 42. Kan.—Bishop v. Fischer, 94 Kan. 105, 145 Pac. 890; In re Pettit, 84 Kan. 637, 114 Pac. 1071. Neb.—State v. Graves, 66 Neb. 17, 92 N. W. 144. Wash.—In re Clerf, 55 Wash. 465, 104 Pac. 622.

See the titles "Certiorari," "Mandamus," "Prohibition."

[a] "The superintendent authority of the king's bench over inferior tribunals is, to the extent that it may be exercised by the use of the writ of mandamus, included in and part of the original jurisdiction given by the constitution to the supreme court." State *ex rel.* Reynolds v. Graves, 66 Neb. 17, 92 N. W. 144.

86. Ark.—Carnall v. Crawford, 11 Ark. 604. Okla.—State *ex rel.* Freeling v. Kight, 152 Pac. 362; Matney v. King, 20 Okla. 22, 93 Pac. 737. Wis. State *ex rel.* McGovern v. Williams, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941; State v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

87. Colo.—People v. Richmond, 16 Colo. 278, 26 Pac. 929. Ia.—Hutchins v. Des Moines, 157 N. W. 881. La. State *ex rel.* Patton v. Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532; State *ex rel.* Wintz v. Judge, 32 La. Ann. 1222. Mo.—State *ex rel.* Sale v. Nortoni, 201 Mo. 1, 26, 98 S. W. 554; Koehler v. Snider, 177 Mo. 546, 558, 76 S. W. 1032; State v. Rombauer, 101 Mo. 499, 14 S. W. 726. Mont. In re Weston, 28 Mont. 207, 216, 72 Pac. 512; State v. District Court, 24

late jurisdiction, and of its jurisdiction to issue prerogative writs.⁸⁸

Its primary purpose is to insure uniformity in the administration of the general law,⁸⁹ but it is not designed and will not be exercised for the purpose of reviewing judgments in connection with ordinary appellate jurisdiction.⁹⁰ The power of superintending control will be used only under extraordinary circumstances, and then guardedly and with circumspection.⁹¹

Mont. 539, 548, 63 Pac. 395. **N. D.**—State *ex rel.* Red River Brick Corp. v. District Court, 24 N. D. 28, 138 N. W. 988. **Okla.**—Kelly v. Kemp, 162 Pac. 1079; State *ex rel.* Freeling v. Knight, 152 Pac. 362. **Wis.**—State v. Johnson, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33; Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425; Attorney General v. Blossom, 1 Wis. 317.

88. Heintz v. Hold, 132 La. 859, 61 So. 850; *In re* Weston, 28 Mont. 207, 217, 72 Pac. 512; State v. District Court, 24 Mont. 539, 560, 562, 63 Pac. 395.

89. People v. Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; State *ex rel.* Evans v. Broadbudd, 245 Mo. 123, 135, 149 S. W. 473, Ann. Cas. 1914A, 823. See Arnold v. Shields, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

[a] The supervisory jurisdiction is "to enable us to compel inferior courts to perform their functions, to prevent them from exceeding the bounds of their jurisdiction, and to enforce the observance of that regularity in their proceedings which is essential to fairness in the conduct of contradictory litigations." State *ex rel.* Wintz v. Judge Criminal Dis. Court, 32 La. Ann. 1222.

[b] The power may be exercised when a court is proceeding without jurisdiction or refuses to be guided by the law as laid down in previous jurisdictions but not where it misconceives a settled rule. People v. Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; State v. District Court, 25 Mont. 504, 65 Pac. 1020.

90. Colo.—People v. Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; People v. Richmond, 16 Colo. 274, 26 Pac. 929. **La.**—State *ex rel.* Patton v. Houston, 40 La. Ann. 393, 4 So. 50, 8 Am. St. Rep. 532; State *ex rel.* Wintz v. Judge, 32 La. Ann. 1222, 1225. **Mont.**—State v. District Court, 24 Mont. 539, 559, 63 Pac. 395. **Okla.**—Kelly v. Kemp, 162 Pac. 1079.

[a] Under guise of its supervisory power over subordinate courts, the supreme court cannot review a judgment of a court of appeals on the ground that it erred in estimating the weight of testimony. People *ex rel.* Baxter v. Court of Appeals, 24 Colo. 186, 49 Pac. 36.

[b] The power does not extend to the correction of intemperate language of the inferior judge, Gove v. Breedlove, 5 Rob. (La.) 78.

91. **Ala.**—Williams v. Louisville & N. R. Co., 58 So. 315. **Colo.**—People v. Court of Appeals, 27 Colo. 405, 61 Pac. 592, 51 L. R. A. 105; People v. Richmond, 16 Colo. 278, 26 Pac. 929. **La.**—*In re* Ingersoll, 50 La. Ann. 748, 23 So. 889; Brown v. Ragland, 35 La. Ann. 837, citing cases. **Mo.**—State *ex rel.* Evans v. Broadbudd, 245 Mo. 123, 135, 149 S. W. 473, Ann. Cas. 1914A, 823. **N. D.**—State *ex rel.* Red River Brick Corp. v. District Court, 24 N. D. 28, 138 N. W. 988. **Wis.**—State *ex rel.* Umbreit v. Helms, 136 Wis. 432, 118 N. W. 158 (citing local cases); State v. Pollard, 112 Wis. 232, 87 N. W. 1107.

[a] It will be exercised only where the duty of the inferior court to act within its jurisdiction is plain and imperative, where such court threatens to violate that duty to the substantial prejudice of the rights of the petitioner, where all other remedies are inadequate and the application for relief prompt. State *ex rel.* Milwaukee Elec. R. & L. Co. v. Circuit Court, 133 Wis. 442, 113 N. W. 722. To same effect State *ex rel.* Schultz v. Halsey, 149 Wis. 551, 136 N. W. 285; State *ex rel.* Umbreit v. Helms, 136 Wis. 432, 118 N. W. 158.

[b] The court's supervisory power is not vested for the purpose of interfering at every stage of the proceedings in the inferior court, and directing the conduct of business there, but only under extraordinary circumstances where there is no other legal remedy,

This power is granted in general terms and is as broad as the exigencies of the case demands,⁹² limited only by the necessities of justice,⁹³ although generally it will not be exercised if there is another remedy.⁹⁴ Another remedy is not always regarded as an insuperable obstacle to the exercise of the power, however.⁹⁵ The court's supervisory⁹⁶ control

and the party litigant is, by some wrong committed by the court, liable to suffer irreparable injury. *State v. District Court*, 30 Mont. 442, 76 Pac. 1005.

92. Mo.—*State v. Philips*, 97 Mo. 331, 341, 10 S. W. 855, 3 L. R. A. 476. N. D.—*State ex rel. Red River Brick Corp. v. District Court*, 24 N. D. 28, 138 N. W. 988. Okla.—*State ex rel. Freeling v. Kight*, 152 Pac. 362.

[a] Definition.—To supervise is "to oversee for direction; to superintend; to inspect with authority;" and to control means "to exercise restraining of governing influence over; . . . to regulate; to govern; to overpower." *Hutchins v. City of Des Moines (Iowa)*, 157 N. W. 881.

[b] Supervisory control being granted by the fundamental law, may not be restricted, save by obviating the necessity for its exercise, and opportunities for its exercise may be increased by legislation. *Hutchins v. City of Des Moines (Iowa)*, 157 N. W. 881.

[c] In Missouri, the supreme court has no appellate jurisdiction over courts of appeals, but has superintending control over such court by mandamus, etc. This jurisdiction is not limited to the single case where a cause may be certified to the supreme court but is as broad as the exigency of the case demands. *State v. Philips*, 97 Mo. 331, 341, 10 S. W. 855, 3 L. R. A. 476.

[d] As Limited by Writ Used. "The extent of the power . . . as to any particular group of circumstances is not measurable by that of the common-law writ most adaptable in its ordinary scope to vitalize such power in regard to such circumstances. Such extent is referable to the necessities of the case and the ordinary use feature of the writ is to be expanded to meet the exigencies thereof." *State v. Helms*, 136 Wis. 432, 118 N. W. 158. See also *Hutchins v. City of Des Moines (Iowa)*, 157 N. W. 881,

890, approving the case just cited.

[e] The Power Is Both Plenary and Discretionary.—*Loeb v. Collier*, 131 La. 377, 59 So. 816.

93. *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

[a] "The necessities of justice, in a legal sense, do not reach beyond the scope of governmental policy as to righting wrongs by judicial interference; as, for example, it stops in criminal cases at the constitutional prohibition of a second jeopardy." *State v. Helms*, 136 Wis. 432, 118 N. W. 158.

94. Ia.—*Hutchins v. Des Moines*, 157 N. W. 881, 890. Mont.—*State v. District Court*, 30 Mont. 442, 76 Pac. 1005. N. D.—*State ex rel. Red River Brick Corp. v. District Court*, 24 N. D. 28, 138 N. W. 988. Wis.—*State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158; *State ex rel. McGovern v. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941, citing cases; *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

[a] It is a power to be used only when there is no other remedy under our judicial system that will meet the situation and prevent irreparable mischief, and when that mischief springs from something other than mere error of judgment. *State v. Johnson*, 105 Wis. 164, 83 N. W. 320.

[b] If the party has a remedy by appeal or by application for remedial writs, the court will not exercise its supervisory jurisdiction. *Heintz v. Hold*, 132 La. 859, 61 So. 850.

95. *State ex rel. Freeling v. Kight (Okla.)*, 152 Pac. 362; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

[a] Where Inadequate.—*Hargis v. Parker*, 27 Ky. L. Rep. 441, 85 S. W. 704, 69 L. R. A. 270.

96. *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

[a] The power is to be wisely used for the benefit of any citizen when an inferior court either refuses to act within its jurisdiction or acts beyond

extends to judicial, as well as jurisdictional⁹⁷ errors, and to civil,⁹⁸ as well as criminal⁹⁹ cases.

The power refers primarily and exclusively to courts,¹ not to the litigants, parties,² or officers of courts,³ although in some states the power is extended so as to cover all commissions and boards created by law,⁴ and over clerks in the exercise of certain duties.⁵

3. Method of Exercising Power.—The constitutions granting supervisory jurisdiction to the courts of last resort are generally silent as to the means and instrumentalities to be used in exercising the power of superintending control.⁶ By the grant of power, the court is en-

its jurisdiction to the serious prejudice of the citizen. *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33. To same effect, see *Ex parte Batesville & B. R. Co.*, 39 Ark. 82; *State ex rel. McGovern v. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941.

[b] One function of the control is to enable the supreme court to control the course of litigation in the inferior courts, where, although proceeding within their jurisdiction, they, by a mistake of law or wilful disregard of it, are doing a gross injustice and there is no remedy by appeal or it is inadequate. *State v. District Court*, 24 Mont. 539, 563, 63 Pac. 395.

97. *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

98. *State v. Laughlin*, 75 Mo. 358, 366; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

99. *State v. Laughlin*, 75 Mo. 358, 366; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158 (citing cases); *State ex rel. McGovern v. Williams*, 136 Wis. 1, 116 N. W. 225, 20 L. R. A. (N. S.) 941.

1. *Colo.*—*People v. Richmond*, 16 Colo. 274, 26 Pac. 929; *Carnall v. Crawford*, 11 Colo. 604. *La.*—*Alexandria Naval Stores Co. v. J. F. Ball Bro. Lumb. Co.*, 128 La. 632, 54 So. 1035. *N. D.*—*State ex rel. Red River Brick Corp. v. District Court*, 24 N. D. 28, 138 N. W. 988. *Okla.*—*Kelly v. Kemp*, 162 Pac. 1079; *State ex rel. Freeling v. Kight*, 152 Pac. 362.

[a] **Over What Courts.**—The court will not exercise its supervisory control over courts over which it has no power in the exercise of its appellate jurisdiction by direct revision of its judicial acts. *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

[b] Probate courts are "inferior

courts." *Mitchell v. Bay Probate Judge*, 155 Mich. 550, 119 N. W. 916.

[c] A court-martial is not an inferior court over which the supreme court has superintending control. *State v. Nuchols*, 18 N. D. 233, 119 N. W. 632, 20 L. R. A. (N. S.) 413, quoting from *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. ed. 601.

[d] A board of registrars is not an "inferior jurisdiction." *Ex parte Giles*, 133 Ala. 211, 32 So. 167.

2. *In re Weston*, 28 Mont. 207, 215, 72 Pac. 512; *Kelly v. Kemp* (Okla.), 162 Pac. 1079; *State ex rel. Freeling v. Kight* (Okla.), 152 Pac. 362.

3. *Alexandria Naval Stores Co. v. J. F. Ball Bro. Lumb. Co.*, 128 La. 632, 54 So. 1035.

4. *State ex rel. Freeling v. Kight* (Okla.), 152 Pac. 362; *Homesteaders v. McCombs*, 24 Okla. 201, 103 Pac. 691, 38 L. R. A. (N. S.) 1000.

[a] The words "commissions" and "boards" as used in connection with the term "inferior courts" mean such commissions or boards as judicial power may be invested in pursuant to the constitution, and the hearing and determination of matters by commissioners or boards from which appeals may be taken, or to which writs of certiorari, and other like writs, may lie appears to be the test. *Homesteaders v. McCombs*, 24 Okla. 201, 208, 103 Pac. 691.

5. *McDonald v. Morrow*, 119 N. C. 666, 26 S. E. 132 (holding the statute constitutional as the jurisdiction is conferred on the individual members of the court); *Harkins v. Cathey*, 119 N. C. 649, 26 S. E. 136, under election law.

6. *State v. Johnson*, 103 Wis. 591, 611, 79 N. W. 1081, 51 L. R. A. 33; *Attorney General v. Blossom*, 1 Wis. 317.

dowed with all the common law writs applicable to the jurisdiction,⁷ and therefore the court may in the exercise of this power issue the writs of mandamus, prohibition, certiorari and procedendo when appropriate.⁸ If the common law writs are not sufficiently broad or effective to accomplish the results necessary, the courts may enlarge the writ,⁹ or devise new writs¹⁰ to meet the needs of the particular case. Inferior courts may be superintended and controlled by appeal and writs of error also.¹¹

E. TO ISSUE PREROGATIVE AND REMEDIAL WRITS.—1. In the Exercise of Original Jurisdiction.—**a. In General.**—Power is often conferred upon courts of last resort in the exercise of its original jurisdiction to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and other remedial writs with authority to hear and determine the same,¹² which power can be exercised although the court

[a] At common law, the court of Kings Bench in keeping inferior courts within their jurisdiction could remove their proceedings to be determined by it, or prohibit their progress below. *Kelly v. Kemp* (Okla.), 162 Pac. 1079. 3 Bl. Com. 42.

7. *State ex rel. Red River Brick Corp. v. District Court*, 24 N. D. 28, 138 N. W. 988; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158; *State v. Johnson*, 103 Wis. 591, 613, 79 N. W. 1081, 51 L. R. A. 33.

[a] The specific grant of the power to issue certain writs as a means of exercising original jurisdiction does not militate against the authority of the court to use those writs in exercising its superintending control. *State v. Johnson*, 103 Wis. 591, 616, 79 N. W. 1081, 51 L. R. A. 33.

8. See *infra*, VI, E.

[a] **Writs Incidental to Power.** With the constitutional grant of superintending control this court took at the same time all the ancient writs necessary to enable it to exercise that high power, including certainly the writs of mandamus, prohibition, certiorari, and procedendo. *State v. Johnson*, 130 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33, 58.

9. *State ex rel. Freeland v. Kight* (Okla.), 152 Pac. 362; *State ex rel. Umbreit v. Helms*, 136 Wis. 432, 118 N. W. 158.

10. *State ex rel. Red River Brick Corp. v. District Court*, 24 N. D. 28, 138 N. W. 988; *State v. Chittenden*, 127 Wis. 468, 510, 107 N. W. 500.

[a] A writ of supervisory control has been devised in Montana. *State*

v. District Court, 24 Mont. 539, 565, 63 Pac. 395. See *State ex rel. Little v. District Court*, 49 Mont. 158, 141 Pac. 151.

[b] The supervisory writ would afford relief by restraining the inferior court to the bounds of jurisdiction, compel the performance of a duty and correct errors and abuses of discretion requiring prompt action. *State v. District Court*, 24 Mont. 539, 565, 63 Pac. 395.

[c] Habeas corpus and supervisory control are not concurrent remedies. *State ex rel. Coleman v. District Court*, 51 Mont. 195, 149 Pac. 973.

[d] **Form of Writ of Supervisory Control.**—See *State v. District Court*, 25 Mont. 569, 69 Pac. 1131.

11. *State v. Allen*, 45 Mo. App. 551, 561.

12. **Cal.**—*Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941; *Hyatt v. Allen*, 54 Cal. 353; *Miller v. Sacramento*, 25 Cal. 93. **Colo.**—*People v. District Court*, 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768; *People ex rel. Miller v. Tool*, 35 Colo. 225, 86 Pac. 224, 117 Am. St. Rep. 198, 6 L. R. A. (N. S.) 822; *Whipple v. Stevenson*, 25 Colo. 447, 55 Pac. 188; *Wheeler v. Northern C. I. Co.*, 9 Colo. 248, 11 Pac. 103. **Ill.**—*People ex rel. Kocourek v. Chicago*, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833. **Kan.**—*Bishop v. Fischer*, 94 Kan. 105, 145 Pac. 890; *In re Burnette*, 73 Kan. 609, 617, 85 Pac. 575; *State v. Allen*, 5 Kan. 213. **La.**—*State v. Houston*, 35 La. Ann. 1194 (habeas corpus); *State v. Fagin*, 28 La. Ann. 887, habeas corpus. **Mo.** *State v. Tracy*, 94 Mo. 217, 6 S. W.

709; *Ex parte Bethurum*, 66 Mo. 545; *State v. Stewart*, 32 Mo. 379. **Mont.** *In re Weston*, 28 Mont. 207, 212, 72 Pac. 512; *State v. District Court*, 24 Mont. 539, 560, 63 Pac. 395; *In re McKnight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451. **Neb.**—*State ex rel. Thompson v. Donahue*, 91 Neb. 311, 135 N. W. 1030. **N. M.**—*Territory v. Ortiz*, 1 N. M. 5. **N. D.**—*State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561; *Anderson v. Gordon*, 9 N. D. 480, 83 N. W. 993, 52 L. R. A. 134; *State v. Archibald*, 5 N. D. 359, 66 N. W. 234; *State v. Nelson*, 1 N. D. 88, 101, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283. **Ohio.**—*State ex rel. Nolan v. Denning*, 93 Ohio St. 264, 270, 112 N. E. 1029; *State v. Hahn*, 50 Ohio St. 714, 35 N. E. 1052; *State v. Baughman*, 38 Ohio St. 455; *Longworth v. Sturges*, 4 Ohio St. 690; *Kent v. Mahaffy*, 2 Ohio St. 495. **Okla.**—*Tiger v. Creek County Court*, 45 Okla. 701, 146 Pac. 912. **Pa.**—*Com. v. Hyneman*, 242 Pa. 244, 88 Atl. 1015; *In re Nichols*, 180 Pa. 591, 37 Atl. 95; *Com. v. Dumbauld*, 97 Pa. 293 (court has jurisdiction over a quo warranto proceeding to judges of the common pleas as their jurisdiction extends over the state); *Wheeler v. Philadelphia*, 77 Pa. 338, court has jurisdiction in injunction cases where a corporation, either public or private, is a party defendant. **S. D.**—*State ex rel. Byrne v. Ewert*, 36 S. D. 622, 156 N. W. 90; *State v. Board of Comrs.*, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588. **Wash.**—*Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780; *State v. Superior Court*, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111; *State v. Superior Court*, 12 Wash. 677, 42 Pac. 123; *State ex rel. Stearns v. Smith*, 6 Wash. 496, 33 Pac. 974; *Jones v. Reed*, 3 Wash. 57, 27 Pac. 1067. **Wis.**—*State ex rel. Richter v. Chadbourne*, 162 Wis. 410, 156 N. W. 610 (although there is original jurisdiction in the circuit court); *State ex rel. Bolens v. Frear*, 148 Wis. 456, 479, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; L. R. A. 1915B, 569; *State v. Cunningham*, 83 Wis. 90, 53 N. W. 35, 35 Am. St. Rep. 27, 17 L. R. A. 145 (citing numerous local cases); *State v. Cunningham*, 81 Wis. 440, 472, 51 N. W. 724, 15 L. R. A. 561; *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425.

[a] The jurisdiction is both legal and equitable, legal for the use of the common-law writs, and equitable for the use of the chancery writ. *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425, 512.

[b] **Constitution Construed.**—The power of the supreme court to issue prerogative writs, under a constitutional provision granting power to issue writs of mandamus, prohibition, etc., and all other writs "necessary and proper to the complete exercise of its appellate jurisdiction," is not confined to its appellate jurisdiction. The quoted portion of the constitution limits only the words "and all other writs." *State v. District Court*, 24 Mont. 539, 560, 63 Pac. 395; *In re McKnight*, 11 Mont. 126, 27 Pac. 336, 28 Am. St. Rep. 451; *State v. Superior Court*, 15 Wash. 668, 47 Pac. 31, 55 Am. St. Rep. 907, 37 L. R. A. 111. To same effect, see *Miller v. Sacramento Co.*, 25 Cal. 93. But see *People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295; *Ex parte Attorney General*, 1 Cal. 85.

[c] **A writ of prohibition** may be issued (1) where the power is granted specifically (**Ohio.**—*State ex rel. Garrison v. Brough*, 113 N. E. 683; *State ex rel. Nolan v. Denning*, 93 Ohio St. 264, 112 N. E. 1029. **Va.**—*Com. v. Latham*, 85 Va. 632, 8 S. E. 488; *Gresham v. Ewell*, 84 Va. 784, 6 S. E. 134; *James v. Stokes*, 77 Va. 225. **W. Va.**—*McConiha v. Guthrie*, 21 W. Va. 134), (2) where the power is granted to award original remedial writs (*Ramsey v. Huck*, 267 Mo. 533, 184 S. W. 966; *Thomas v. Mead*, 36 Mo. 232; *State v. Allen*, 45 Mo. App. 551, 561), (3) to issue any remedial writs necessary to give general supervision and control over inferior courts (**Ark.**—*Jones v. Coffin*, 96 Ark. 332, 131 S. W. 873. **Ky.**—*Campbellsville Tel. Co. v. Patteson*, 114 Ky. 52, 69 S. W. 1070; *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006; *Louisville & N. R. Co. v. Miller*, 23 Ky. L. Rep. 1714, 66 S. W. 5. **N. C.**—*Perry v. Shepherd*, 78 N. C. 83), (4) to issue all other writs necessary to enforce the jurisdiction of the court (*Cattlemen's Trust Co. v. Willis* [Tex. Civ. App.], 179 S. W. 1115), (5) but not where the constitution grants only such jurisdiction as properly belongs to the supreme court (*Planters' Ins. Co. v. Cramer*, 47 Miss.

may have no appellate jurisdiction in the particular case.¹³ Original jurisdiction to issue these writs is sometimes conferred upon,¹⁴ and is sometimes denied,¹⁵ intermediate and inferior appellate courts also. Certain of these writs,¹⁶ such as injunction,¹⁷ are omitted by some constitutions in their grant of power.

b. *When Writs Will Be Issued.*—Jurisdiction to issue writs bearing the same name being conferred upon inferior courts,¹⁸ it is sometimes held that the courts of last resort have no jurisdiction to issue such writs except for prerogative purposes,¹⁹ but other courts have refused to hold their jurisdiction so limited.²⁰ However this may be, it

200), or (6) where it grants jurisdiction as to certain named writs omitting therefrom prohibition. *People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717; *Central Ore. Irr. Co. v. Public Service Com.*, 80 Ore. 607, 157 Pac. 1070.

[d] In Arkansas, the supreme court has no original jurisdiction except to issue writs of quo warranto to circuit judges, etc., under §5, article 7, of the constitution. *State v. Clay County*, 93 Ark. 228, 124 S. W. 757; *Ex parte Snoddy*, 44 Ark. 221. See *State v. Sams*, 81 Ark. 39, 98 S. W. 955; *Ex parte Batesville & B. R. Co.*, 39 Ark. 82. See however, *Price v. Page*, 25 Ark. 527, under constitution of 1866.

[e] In Oregon, the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings. Before taking jurisdiction the court will consider the condition of the business of the court, the hardships to the petitioner incidental to the denial of the writ, whether he has an adequate remedy in the lower court and whether he can appeal. *Ex parte Jerman*, 57 Ore. 387, 112 Pac. 416, Ann. Cas. 1913A, 149.

13. *Ramsey v. Huck*, 267 Mo. 333, 184 S. W. 966; *State v. Eby*, 170 Mo. 497, 516, 71 S. W. 52 (citing cases); *State v. Tracy*, 94 Mo. 217, 6 S. W. 709.

14. *State v. Tracy*, 94 Mo. 217, 6 S. W. 709; *Cattlemen's T. Co. v. Willis* (Tex. Civ. App.), 179 S. W. 1115.

[a] Superior courts have power to correct errors in inferior courts by writs of certiorari. *Ex parte Carnochan*, T. U. P. Charl. (Ga.) 216, 217.

15. *People v. Circuit Court*, 169 Ill. 201, 209, 48 N. E. 717; *Hawes v. People ex rel. Pulver*, 124 Ill. 560, 17 N. E. 13; *Wetz v. Thompson*, 26 Tex. Civ.

App. 396, 63 S. W. 1050.

[a] The Texas court of civil appeals has power to issue writs of mandamus and such other writs as may be necessary to enforce the jurisdiction of the court, except that the court or any judge thereof, in vacation may issue the writ of mandamus to compel a judge of the district court to proceed to trial and judgment in a cause. It has no original jurisdiction to issue a writ of habeas corpus. *Dunn v. St. Louis, S. W. R. Co.*, 40 Tex. Civ. App. 242, 88 S. W. 532; *Wetz v. Thompson*, 26 Tex. Civ. App. 396, 63 S. W. 1050.

16. See generally the constitutions and *People ex rel. Dickinson v. Board of Trade*, 193 Ill. 577, 62 N. E. 196 (supreme court has original jurisdiction in mandamus and habeas corpus); *People v. Circuit Court*, 169 Ill. 201, 48 N. E. 717; *Campbell v. Campbell*, 22 Ill. 664; *Central Ore. Irr. Co. v. Public Service Com.*, 80 Ore. 607, 157 Pac. 1070, mandamus, quo warranto and habeas corpus.

17. See 12 STANDARD PROC. 1012.

18. See *supra*, and the titles "Certiorari;" "Injunctions;" "Mandamus;" "Prohibition."

19. *State ex rel. Shaw v. Thompson*, 21 N. D. 426, 131 N. W. 231; *In re Court of Honor*, 109 Wis. 625, 85 N. W. 497; *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425, 521. See *People v. District Court*, 37 Colo. 443, 455, 87 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768.

20. Cal.—*Santa Cruz Gap. Tp. J. S. Co. v. Santa Clara*, 62 Cal. 40, holding the supreme and superior courts are peers. Ill.—*People ex rel. Dickinson v. Board of Trade*, 193 Ill. 577, 62 N. E. 196; *Hundley v. Comrs.*, 67 Ill. 559. Pa.—*Wheeler v. Philadelphia*, 77 Pa. 338, 343. S. D.—*Everitt v. Board of Comrs.*, 1 S. D. 365, 47 N. W. 296;

is clear that it was not the intention of the constitution that the two courts should exercise concurrent jurisdiction as to these writs.²¹ So that except where the writs are sought in aid of the appellate²² or supervisory²³ jurisdiction of the court, the writs will be issued only as to the high prerogative writs,²⁴ where the question is *publici juris*,²⁵ or when the proceedings involve the sovereignty of the state, its prerogatives or franchises, or the liberty of its citizens.²⁶ Although the case

State v. Board of Comrs., 1 S. D. 292, 298, 46 N. W. 1127, 10 L. R. A. 588.

21. Cal.—Gallardo v. Hannah, 49 Cal. 136; People *ex rel.* Jackson v. Board of Supervisors, 47 Cal. 205, refusing writ because of an insufficient showing why application was not made below. Colo.—People v. District Court, 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768. Ill.—People *ex rel.* Dickinson v. Board of Trade, 193 Ill. 577, 62 N. E. 196. N. D. Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12; State v. Archibald, 5 N. D. 359, 66 N. W. 234; State v. Nelson, 1 N. D. 88, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283. Pa. Wheeler v. Philadelphia, 77 Pa. 338, 343. S. D.—See Everitt v. Board of Comrs., 1 S. D. 365, 47 N. W. 296. Wash. Winsor v. Bridges, 24 Wash. 540, 64 Pac. 780. Wis.—Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425.

22. Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12. See *infra*, VI, E, 2.

23. Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12. See *infra*, VI, E, 2.

24. Colo.—People *ex rel.* Miller v. Tool, 35 Colo. 225, 86 Pac. 224, 229, 117 Am. St. Rep. 198, 6 L. R. A. (N. S.) 822; People v. District Court, 37 Colo. 443, 87 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768; People v. Clerk of Dist. Court, 22 Colo. 280, 44 Pac. 506. N. D. Duluth Elevator Co. v. White, 11 N. D. 534, 90 N. W. 12; State v. Archibald, 5 N. D. 359, 66 N. W. 234; North Dakota v. Nelson Co., 1 N. D. 88, 101, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283. S. D.—Everitt v. Board of Comrs., 1 S. D. 365, 47 N. W. 296. Wis. State *ex rel.* Johnson v. Board of Suprs., 161 N. W. 356; Attorney General v. Eau Claire, 37 Wis. 400, 443; Attorney General v. Blossom, 1 Wis. 317.

[a] To warrant the assertion of original jurisdiction, "the interest of the state should be primary and proximate, not indirect or remote; peculiar

perhaps to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this [supreme] court to preserve the prerogatives and franchises of the state in its sovereign character; this court judging of the contingency, in each case, for itself. For all else, though raising questions *publici juris*, ordinary remedies and ordinary jurisdictions are adequate. And only when, for some peculiar cause these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights." Attorney General v. Eau Claire, 37 Wis. 400, 444, *quoted in* State v. Cunningham, 81 Wis. 440, 473, 51 N. W. 724, 15 L. R. A. 561. See also People *ex rel.* Kocourek v. Chicago, 193 Ill. 507, 512, 62 N. E. 179, 58 L. R. A. 833.

[b] The distinction between the writs granted to the lower courts and to the supreme court is this; the former courts take the prerogative writs as part of their general jurisdiction with power to put them to all proper uses whereas the latter take the prerogative writs for prerogative jurisdiction, with power to put them to proper prerogative uses only. Attorney General v. Chicago & N. W. Ry. Co., 35 Wis. 425, 521. To same effect, Homesteaders v. McCombs, 24 Okla. 201, 103 Pac. 691, 38 L. R. A. (N. S.) 1000.

25. People *ex rel.* Dickinson v. Board of Trade, 193 Ill. 577, 62 N. E. 196; State v. Cobb, 24 Okla. 662, 104 Pac. 361, 24 L. R. A. (N. S.) 639.

26. Ala.—*Ex parte* Roanoke, 117 Ala. 547, 23 So. 524; Ramagnano v. Crook, 88 Ala. 450, 7 So. 247; State v. Williams, 69 Ala. 311; *Ex parte* Candee, 48 Ala. 386; *Ex parte* Peterson, 33 Ala. 74; *Ex parte* Burnett, 30 Ala. 461; *Ex parte* Pickett, 24 Ala. 91; State v. Williams, 1 Ala. 342. Ariz.—State v. Jones, 15 Ariz. 215, 137 Pac. 544. Ark.—State v. Johnson, 26 Ark. 281; State v. Ash-

may involve a question publici juris, the court will not take jurisdiction if the question is only local in its effect and the interest involved.²⁷ Nor will the writs be issued for the purpose of enforcing strictly private rights or redressing private wrongs,²⁸ except in emergencies, where there

ley, 1 Ark. 279. **Colo.**—*People v. District Court*, 37 Colo. 440, 86 Pac. 322; *People ex rel. Kindel v. Clerk of Dist. Court*, 22 Colo. 280, 44 Pac. 506; *People v. McClees*, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646; *People v. Rogers*, 12 Colo. 278, 20 Pac. 702; *Wheeler v. Northern C. Irrigation Co.*, 9 Colo. 248, 11 Pac. 103. **Fla.**—*Ex parte White*, 4 Fla. 165. **Ill.**—See *People ex rel. Dickinson v. Board of Trade*, 193 Ill. 577, 590, 62 N. E. 196 (holding the court will not limit its jurisdiction to cases. Where the question affects the sovereignty of the state, its franchises or prerogatives or the liberties of the people but reserves the right to issue the writ where the question is publici juris); *People ex rel. Kocourek v. Chicago*, 193 Ill. 507, 522, 62 N. E. 179, 58 L. R. A. 833. **Kan.**—*State v. Woodbury*, 74 Kan. 877, 87 Pac. 701; *In re Burnette*, 73 Kan. 609, 85 Pac. 575; *State v. Breese*, 15 Kan. 123. **La.**—*State v. Hunter*, 117 La. 294, 41 So. 578; *State v. Foster*, 106 La. 425, 31 So. 57. **Mo.**—*Ex parte McAnally*, 199 Mo. 512, 97 S. W. 921; *State v. Lawrence*, 28 Mo. 535. **Neb.**—*State v. Tabitha Home*, 78 Neb. 651, 111 N. W. 586; *Armstrong v. Mayer*, 61 Neb. 355, 86 N. W. 489; *State v. Merrell*, 38 Neb. 510, 56 N. W. 1082. **N. D.**—*State ex rel. Linde v. Robinson*, 160 N. W. 512; *State ex rel. McArthur v. McLean*, 159 N. W. 847; *State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561; *State ex rel. Birdzell v. Jorgenson*, 25 N. D. 539, 553, 142 N. W. 450, 49 L. R. A. (N. S.) 67, citing numerous cases. **Ohio.**—*State v. Todd*, 4 Ohio 351. **Okla.**—*Homesteaders v. McCombs*, 24 Okla. 201, 103 Pac. 691, 38 L. R. A. (N. S.) 1000. **S. D.**—*Everitt v. Board of Comrs.*, 1 S. D. 363, 47 N. W. 296; *State ex rel. Dollard v. Board of Comrs.*, 1 S. D. 292, 298, 46 N. W. 1127, 10 L. R. A. 588. **Wash.**—*State v. Superior Court*, 12 Wash. 677, 42 Pac. 123. **Wis.**—*State ex rel. Bolens v. Frear*, 148 Wis. 456, 488, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569; *State ex rel. Nekoosa-Edwards Paper Co. v. Bancroft*, 118 Wis. 124, 134 N. W. 330, 38 L. R. A. (N. S.) 526;

In re Court of Honor, 109 Wis. 625, 85 N. W. 497. See *In re Petition of Anderson*, 164 Wis. 1, 159 N. W. 559.

[a] "The matters to be litigated must not only be publici juris, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, must be affected." *State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561; *State v. Fabrick*, 17 N. D. 532, 117 N. W. 860. But see *People ex rel. Dickinson v. Board of Trade*, 193 Ill. 577, 590, 62 N. E. 196.

27. *People ex rel. Kocourek v. Chicago*, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833; *State ex rel. Johnson v. Board of Suprs. (Wis.)*, 161 N. W. 356; *State ex rel. Bolens v. Frear*, 148 Wis. 456, 499, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569; *State v. Cunningham*, 81 Wis. 440, 473, 51 N. W. 724, 15 L. R. A. 561; *Attorney General v. Eau Claire*, 37 Wis. 400.

28. **Ark.**—*State v. Ashley*, 1 Ark. 279. **Colo.**—*People v. District Court*, 37 Colo. 443, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768. **Ill.**—*People ex rel. Dickinson v. Board of Trade*, 193 Ill. 577, 62 N. E. 196; *People ex rel. Kocourek v. Chicago*, 193 Ill. 507, 522, 62 N. E. 179, 58 L. R. A. 833. **Minn.**—*State v. Otis*, 58 Minn. 275, 59 N. W. 1015. **Mo.**—*Vail v. Dinning*, 44 Mo. 210. **N. D.**—*State ex rel. Linde v. Taylor*, 33 N. D. 76, 156 N. W. 561; *State v. Fabrick*, 17 N. D. 532, 117 N. W. 860; *State v. Nelson*, 1 N. D. 88, 101, 45 N. W. 33, 26 Am. St. Rep. 609, 8 L. R. A. 283. **Okla.**—*Homesteaders v. McCombs*, 24 Okla. 201, 103 Pac. 691, 38 L. R. A. (N. S.) 1000, citing numerous cases. **S. D.**—*State ex rel. Egan v. Norbeck*, 160 N. W. 524; *Everitt v. Board of Comrs.*, 1 S. D. 365, 47 N. W. 296; *State ex rel. Dollard v. Board of Comrs.*, 1 S. D. 292, 46 N. W. 1127, 10 L. R. A. 588. **Wis.**—*State ex rel. Bolens v. Frear*, 148 Wis. 456, 498, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569; *Attorney General v. Chicago & N. W. R. Co.*, 35 Wis. 425, 521; *Attorney General v. Blossom*, 1 Wis. 317.

is no other adequate remedy and the exercise of such jurisdiction is necessary to prevent a failure of justice. In such case the court will issue its original process, although the sovereign power, prerogatives or franchises of the state are only indirectly drawn in question.²⁹ If, however, there is a necessary public interest, the court will not refuse jurisdiction because there might be a private relator possessing a private interest.³⁰ In such a case the court in administering relief will not ignore the private interest, but will grant full relief.³¹ And despite the dropping out and disappearance of the private interest, the court will proceed and vindicate the public right if separable.³²

Whether or not the case presented is such as to call for the exercise of the court's original jurisdiction is a question addressed to the sound legal discretion of the court.³³ Such jurisdiction should not be exercised unless there is a reasonable certainty that a result can be reached which will be effective,³⁴ and it should not be exercised, when there are

29. Colo.—*People v. Jefferson Dist. Court*, 46 Colo. 386, 391, 104 Pac. 484, 133 Am. St. Rep. 84, 24 L. R. A. (N. S.) 886; *People v. Clerk*, 22 Colo. 280, 44 Pac. 506; *Wheeler v. Northern Colo. Irr. Co.*, 9 Colo. 248, 11 Pac. 103. S. D. *Everitt v. Board of Comrs.*, 1 S. D. 365, 47 N. W. 296. Wis.—*State v. Cunningham*, 81 Wis. 440, 473, 51 N. W. 724, 15 L. R. A. 561; *State v. Baker*, 38 Wis. 71; *Attorney General v. Eau Claire*, 37 Wis. 400, 443.

[a] Whether a sufficient emergency exists depends on the circumstances attending each particular case and will be determined in connection with each application for relief as presented. *Wheeler v. Northern Colo. Irr. Co.*, 9 Colo. 248, 11 Pac. 103.

[b] Such an emergency exists when a party brings suit in condemnation and pays the damages awarded, the parties refuse to surrender possession and the court refuses to enforce its judgment. Mandamus will issue in such case. *People v. Jefferson Dist. Court*, 46 Colo. 386, 104 Pac. 484, 133 Am. St. Rep. 84, 24 L. R. A. (N. S.) 886.

30. *State ex rel. Bolens v. Frear*, 148 Wis. 456, 485, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569; *In re Court of Honor*, 109 Wis. 625, 85 N. W. 497; *Attorney General v. Eau Claire*, 37 Wis. 400.

[a] Where there is an individual relator, the test of jurisdiction is whether he is in fact a necessary party or a mere incident, and whether after all there is a sufficient public interest. *State ex rel. McArthur v. McLean* (N.

D.), 159 N. W. 847; *State ex rel. Bolens v. Frear*, 148 Wis. 456, 500, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, 1162, L. R. A. 1915B, 569.

31. *State ex rel. Bolens v. Frear*, 148 Wis. 456, 485, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569.

32. *State ex rel. Bolens v. Frear*, 148 Wis. 456, 487, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569; *In re Court of Honor*, 109 Wis. 625, 85 N. W. 497.

33. U. S.—*In re Lincoln*, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. ed. 984; *Ex parte Royall*, 117 U. S. 241, 6 Sup. Ct. 734, 29 L. ed. 868. Ariz.—*State v. Jones*, 15 Ariz. 215, 137 Pac. 544. Ill. *People ex rel. Dickinson v. Board of Trade*, 193 Ill. 577, 590, 62 N. E. 196; *People v. Chicago*, 193 Ill. 507, 522, 62 N. E. 179, 58 L. R. A. 833. S. D. *Everitt v. Board of Comrs.*, 1 S. D. 365, 47 N. W. 296. Wis.—*State ex rel. Bolens v. Frear*, 148 Wis. 456, 498, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569; *State v. Cunningham*, 81 Wis. 440, 473, 51 N. W. 724, 15 L. R. A. 561; *Attorney General v. Eau Claire*, 37 Wis. 400, 443.

Right of Court to Decide Own Jurisdiction.—See *supra*, III, B, 1.

34. *In re Petition of Anderson*, 164 Wis. 1, 159 N. W. 559.

[a] An action to determine whose name should, after a primary election, be certified by the secretary of state as the nominee of a party for a state office—in this case that of a member for assembly—is within the original jurisdiction of the supreme court; but

other courts having the same original jurisdiction, when to do so would crowd the docket and interfere with the court's appellate duties.³⁵

What Are Questions of Public Interest.—It is difficult if not unwise to attempt to mark out or define what particular questions affect the sovereignty of the states, its franchises or prerogatives, or the liberties of the people.³⁶

2. In the Exercise of Other Jurisdictions.—In so far as they are appropriate, these writs may be used as aids in the exercise of the other powers of the court,³⁷ whether such powers are appellate³⁸ or merely

in view of the statutory provisions for a recount of the votes, and because there would be an issue of fact which must be sent to the circuit court for trial, with no reasonable certainty that any result could be reached before the time when the secretary of state must act, leave to bring such an action is in this case denied. *In re* Petition of Anderson, 164 Wis. 1, 159 N. W. 559.

35. People *ex rel.* Kocourek v. Chicago, 193 Ill. 507, 62 N. E. 179, 58 L. R. A. 833.

36. State *ex rel.* Bolens v. Frear, 148 Wis. 456, 488, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569.

[a] **Illustrations.**—Original jurisdiction may be "invoked when there is a showing made either that (1) a citizen is wrongfully deprived of his liberty; (2) a state office has been usurped; (3) a franchise grantable only by the state has been usurped, abused or forfeited; (4) a law regulating public-service corporations in the interest of the people is systematically disobeyed and set at naught; (5) a navigable river, . . . is obstructed or encroached upon, or a public railroad built under a charter granted by the state is about to be destroyed; (6) a state officer declines to perform a ministerial duty, in the performance of which the people at large have a material interest; (7) a state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions; or (8) the situation is such, in a matter *publici juris*, that the remedy in the lower courts is entirely lacking or absolutely inadequate." But a case, although involving a question *publici juris*, will not come within the jurisdiction if it be only local in its effect, subject only to the exception

named in the eighth class. Nor will a case involving a mere private interest or one whose private purpose is to redress a private wrong be entertained. State *ex rel.* Bolens v. Frear, 148 Wis. 456, 498, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569. And see cases cited *supra*, this section.

[b] A controversy between the members of the supreme court and successful candidates at an election claiming the right to occupy such offices is a question involving a sufficient public interest. State *ex rel.* Linde v. Robinson (N. D.), 16 N. W. 512.

[c] "Every question of municipal taxation is *publici juris* . . . whether it be raised by a taxpayer, or by the municipality, or by the state." Income Tax Cases, 148 Wis. 456, 485, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147, L. R. A. 1915B, 569.

37. State v. District Court, 24 Mont. 539, 562, 63 Pac. 395.

[a] The writ issues in such case not as an original remedial writ, but as an ancillary writ to prevent encroachment of jurisdiction by inferior courts. People v. Circuit Court, 169 Ill. 201, 211, 48 N. E. 717.

[b] The supreme court, though without original jurisdiction of suits for injunctions, may, in an original action in quo warranto to determine the right of rival boards to exercise official functions, grant an ancillary injunction to protect those having the *prima facie* right from interference by other claimants during the pendency of such original action. State v. Board, 70 Ohio St. 341, 71 N. E. 717.

38. Ark.—State v. Clay County, 93 Ark. 228, 124 S. W. 757. Cal.—Hyatt v. Allen, 54 Cal. 353. Ill.—People v. Circuit Court, 169 Ill. 201, 48 N. E. 717; Hawes v. People, 124 Ill. 560, 17 N. E. 13. Ia.—Wehrman v. Moore, 159 N. W. 218; Manning v. Poling, 114 Iowa

supervisory,³⁹ although the court may have no original jurisdiction to issue them.⁴⁰ Indeed, under some constitutions the supreme or appellate court has no jurisdiction to issue these writs except in aid of its appellate and supervisory jurisdiction.⁴¹

F. TO RENDER OPINIONS ON QUESTIONS SUBMITTED BY THE GOVERNOR OR LEGISLATURE. — Some constitutions grant to the supreme courts a unique jurisdiction requiring them to render opinions upon questions that may be propounded by the governor or the branches of the legislature.⁴² This power in some states extends only to the interpretation

20, 83 N. W. 895, 86 N. W. 30, under statute. **Mont.**—*State v. Helena W. Co.*, 43 Mont. 169, 115 Pac. 200; *In re Weston*, 28 Mont. 207, 72 Pac. 512. **Ohio.**—*Kent v. Mahaffy*, 2 Ohio St. 498. **Okla.**—*Brown v. State*, 6 Okla. Crim. 442, 119 Pac. 447. **Tenn.**—*Memphis v. Halsey*, 12 Heisk. 210. **Wash.**—*Winsor v. Bridges*, 24 Wash. 540, 64 Pac. 780. **Wyo.**—*State v. Clay*, 3 Wyo. 393, 31 Pac. 409.

[a] Appellate jurisdiction must have been acquired in a pending case before the writs may be issued. *People v. Circuit Court*, 169 Ill. 201, 208, 48 N. E. 717.

[b] In Louisiana the supreme court is restricted in the issuance of habeas corpus to cases within its appellate jurisdiction. *State v. Civil Sheriff*, 32 La. Ann. 1225.

39. **Ala.**—*Ex parte Sayre*, 95 Ala. 288, 11 So. 378; *Ex parte Smith*, 23 Ala. 94. **Ark.**—*Jones v. Coffin*, 96 Ark. 332, 131 S. W. 873; *State v. Clay County*, 93 Ark. 228, 124 S. W. 757; *Ex parte Trapnall*, 6 Ark. 9, 42 Am. Dec. 676. **Colo.**—*Wheeler v. Northern Colo. Irr. Co.*, 9 Colo. 248, 11 Pac. 103. **Ky.**—*Campbellsville Tel. Co. v. Patteson*, 114 Ky. 52, 69 S. W. 1070; *Hindman v. Toney*, 97 Ky. 413, 30 S. W. 1006; *Preston v. Fidelity T. & S. V. Co.*, 94 Ky. 295, 22 S. W. 318 (the constitution provides the court of appeals shall have power to issue such writs as may be necessary to give it a general control of inferior jurisdiction); *Hargis v. Parker*, 27 Ky. L. Rep. 441, 85 S. W. 704, 69 L. R. A. 270; *Louisville & N. R. Co. v. Miller*, 23 Ky. L. Rep. 1714, 66 S. W. 5. **La.**—*Reynolds v. Carroll*, 114 La. 610, 38 So. 470; *State v. Foster*, 106 La. 425, 31 So. 57; *State ex rel. New Orleans v. Judge*, etc., 52 La. Ann. 1275, 27 So. 697, 51 L. R. A. 71. **Mich.**—*Renaud v. State Court*, 124 Mich. 648, 83 N. W. 620, 83 Am. St. Rep. 346, 51

L. R. A. 458. **Mo.**—*State ex rel. Sale v. Nortoni*, 201 Mo. 1, 26, 98 S. W. 554; *Koehler v. Snider*, 177 Mo. 546, 558, 76 S. W. 1032; *State v. Neville*, 157 Mo. 386, 394, 57 S. W. 1012, 51 L. R. A. 95; *State v. Smith*, 107 Mo. 527, 16 S. W. 401, 17 S. W. 901; *State v. Rombauer*, 101 Mo. 499, 14 S. W. 726; *State v. Laughlin*, 75 Mo. 358, 366. **Mont.**—*State v. District Court*, 24 Mont. 539, 562, 63 Pac. 395. **N. M.**—*State ex rel. Harvey v. Medler*, 19 N. M. 252, 142 Pac. 376. **Ohio.**—*State v. Todd*, 4 Ohio 351. **Okla.**—*State ex rel. Freeling v. Kight*, 152 Pac. 362; *Homesteaders v. McCombs*, 24 Okla. 201, 103 Pac. 691, 38 L. R. A. (N. S.) 1000. **Wis.**—*State v. Chittenden*, 127 Wis. 468, 509, 107 N. W. 500; *State v. Johnson*, 103 Wis. 591, 79 N. W. 1081, 51 L. R. A. 33.

40. *People v. Circuit Court*, 169 Ill. 201, 210, 48 N. E. 717.

41. **Ariz.**—*Powers v. Superior Court*, 15 Ariz. 275, 138 Pac. 21; *Fancher v. Superior Court*, 15 Ariz. 276, 138 Pac. 20. **Ark.**—*Carr v. State*, 93 Ark. 585, 122 S. W. 631; *State v. Clay County*, 93 Ark. 228, 124 S. W. 757; *Featherstone v. Folbre*, 75 Ark. 510, 88 S. W. 554; *Ex parte Snoddy*, 44 Ark. 221. **Cal.**—*People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295; *Ex parte Attorney General*, 1 Cal. 85. For present rule, see *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941. **La.**—*State ex rel. Kirsch v. Judge*, 45 La. Ann. 1206, 14 So. 73, court of appeals has jurisdiction to issue mandamus, prohibition and certiorari in aid of its appellate jurisdiction. **Tex.**—*Milam County Oil Mill Co. v. Bass*, 106 Tex. 260, 163 S. W. 577; *Boynton v. Brown* (Tex. Civ. App.), 163 S. W. 599, citing local cases.

As to federal practice, see the title, "United States Courts."

42. See the various constitutions.

of constitutional provisions relating to the exercise of the governor's executive duties,⁴³ or to giving an opinion on important questions of law involved in the exercise of the governor's executive powers and on solemn occasions.⁴⁴ By the provision of some constitutions the supreme court occupies much the same position as the attorney general, and is required to give its opinion upon important questions upon solemn occasions, when required by either of the legislative branches or by the governor or by the governor and council.⁴⁵

[a] Justices cannot receive evidence or determine questions of fact. *In re* Opinion of Justices, 76 N. H. 601, 81 Atl. 170, citing local cases.

43. *In re* Advisory Opinion to Governor, 50 Fla. 169, 39 So. 187; *In re* Advisory Opinion to Governor, 39 Fla. 397, 22 So. 681; Opinion Rendered To His Excellency the Governor, 23 Fla. 297, 6 So. 925; In the Matter of the Executive Communication, 14 Fla. 289.

[a] Construction of Statute.—This refers to duties-appertaining to the execution of laws as they exist only. An opinion as to the character of bills the legislature can pass will not be given. Opinion Rendered to His Excellency the Governor, 23 Fla. 297, 6 So. 925.

[b] An opinion as to the constitutionality of statutes affecting the executive powers of the governor will not be given. Advisory Opinion to the Governor, 69 Fla. 632, 68 So. 851; *In re* Opinion of the Judges, 62 Fla. 4, 57 So. 345; *In re* Advisory Opinion to Governor, 50 Fla. 169, 39 So. 187.

[c] The construction of statutes is not within the authority of the court. Advisory Opinion to the Governor, 69 Fla. 653, 68 So. 849.

44. *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729; *In re* House Resolution No. 30, 10 S. D. 249, 72 N. W. 892; *In re* Construction of Constitution, 3 S. D. 548, 54 N. W. 650, 19 L. R. A. 575.

[a] This constitutional provision contemplates two classes of cases when the governor may request the opinion of the judges. First, when an important question of law is involved in the exercise of the executive powers; second, upon solemn occasions. *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729, citing cases.

[b] Questions raising a doubt in the legislative department are not in purview of the constitutional provision. *In re* Construction of Constitution, 3

S. D. 548, 54 N. W. 650, 19 L. R. A. 575.

[c] Where Private Rights Are Involved.—Only the gravest and most urgent necessity justifies rendering an *ex parte* opinion where private rights are involved. *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729, citing cases.

[d] Construction of Constitution. The language of the provision should have a restricted, rather than an enlarged interpretation. *In re* House Resolution No. 30, 10 S. D. 249, 72 N. W. 892.

45. Colo.—*In re* Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009; *In re* Senate Bill No. 27, 23 Colo. 359, 65 Pac. 50; *In re* House Bill No. 99, 26 Colo. 140, 56 Pac. 181. Me.—Questions Submitted By the House of Representatives, 95 Me. 564, 51 Atl. 224; *In re* Opinion of the Justices, 85 Me. 547, 27 Atl. 463. Mass.—*Dinan v. Swig*, 223 Mass. 516, 112 N. E. 91 ("important questions of law"); *In re* Answer of the Justices, 214 Mass. 602, 102 N. E. 644; Opinion of the Justices, 190 Mass. 611, 77 N. E. 820; Opinion of the Justices, 186 Mass. 603, 72 N. E. 95; Opinion of the Justices, 126 Mass. 557. See *Com. v. Smith*, 9 Mass. 531. Mo.—*In re* Inquiries of the Governor, 58 Mo. 369; Opinion of the Court, 55 Mo. 497; *Foster v. State*, 41 Mo. 61. The present constitution has omitted this provision. N. H.—*In re* Opinion of the Justices, 76 N. H. 588, 79 Atl. 31; *In re* Opinion of the Justices, 73 N. H. 625, 63 Atl. 505; *In re* Opinion of the Justices, 67 N. H. 600, 43 Atl. 1074. R. I.—*In re* Legislative Adjournment, 18 R. I. 824, 27 Atl. 324, 22 L. R. A. 716.

[a] Questions respecting pending matters only in order that assistance may be gained in the performance of a present duty will be answered. Opinion of the Justices, 211 Mass. 630, 99

The supreme court must decide for itself whether it should exercise the jurisdiction of answering the question propounded,⁴⁶ but in cases of doubt, it may be the duty of the justices to resolve the doubt in favor of the exercise of jurisdiction.⁴⁷

N. E. 286; Opinion of the Justices, 186 Mass. 603, 72 N. E. 93.

[b] It must appear the answer will be of assistance. *In re* Opinion of Justices, 75 N. H. 624, 75 Atl. 99; *In re* Opinion of the Justices, 75 N. H. 613, 72 Atl. 754.

[c] A question to obtain general information without reference to any proposed legislation will not be answered. Opinion of the Justices, 190 Mass. 611, 77 N. E. 820.

[d] If the governor's term of office expires on the day the question is received, and it is apparent that it is impracticable to return any answers in season to be of any aid, the justices need not render its opinion. *In re* Opinion of the Justices, 70 N. H. 640, 50 Atl. 329.

[e] **Must Be Solemn Occasion.** Questions Submitted by the House of Representatives, 95 Me. 564, 51 Atl. 224; Opinion of the Justices, 148 Mass. 623, 21 N. E. 439; Opinion of the Justices, 126 Mass. 557. A definition of this expression covering all cases is unwise. The phrase contemplates some serious and unusual exigency as exists when the questioning body having some action in view has serious doubts as to its power to take such action under the constitution and existing statutes. Questions Submitted by the House of Representatives, 95 Me. 564, 51 Atl. 224.

[f] **Questions Must Be "Important."**—Opinion of the Justices, 211 Mass. 630, 99 N. E. 286.

[g] **Public rights** must be involved in the question propounded. *In re* Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009; *In re* House Bill No. 99, 26 Colo. 140, 56 Pac. 181; *In re* Appropriations by General Assembly, 13 Colo. 316, 22 Pac. 464.

[h] If the question (1) involves private rights only, it will not be answered (*In re* Interrogatories, etc., 54 Colo. 166, 129 Pac. 811; *In re* House Bill No. 99, 26 Colo. 140, 56 Pac. 181; *In re* Opinion of the Justices, 76 N. H. 597, 79 Atl. 490), (2) as where an opinion is asked as to the construction of private statutes. *In re* Senate Bill No.

27, 28 Colo. 359, 65 Pac. 50; *In re* State Lands, 27 Colo. 99, 60 Pac. 345, citing cases; *In re* House Bill No. 99, 26 Colo. 140, 56 Pac. 181.

[i] **The inquiry as to bills pending** in the legislature will be restricted to the question of their constitutionality. *In re* Senate Bill No. 196, 23 Colo. 508, 48 Pac. 540.

[j] **The constitutionality of bills which have passed** will not be inquired into. *In re* Inquiries of the Governor, 58 Mo. 369.

[k] **Decisions in litigated cases will not be overruled on *ex parte* arguments** in response to legislative questions. *In re* Senate Bill No. 142, 26 Colo. 167, 56 Pac. 564; *In re* Assessment of Property, 25 Colo. 296, 53 Pac. 1056; *In re* House Resolutions, 15 Colo. 598, 26 Pac. 323.

[l] **It must appear that the bill** which is subject of inquiry will likely pass the branch of the legislature submitting the question. *In re* Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009; *In re* Senate Resolution No. 7, 29 Colo. 350, 68 Pac. 224; *In re* House Bill No. 495, 26 Colo. 182, 56 Pac. 900.

[m] **Questions Must Be Pointed Out.**—The particular section of the constitution to be considered in connection with the bill pending must be pointed out. *In re* Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009.

[n] **Questions must be propounded by both the governor "and" council** under a constitution, using the conjunctive. Answer of the Justices, 214 Mass. 602, 102 N. E. 644.

46. **Colo.**—*In re* Interrogatories, etc., 54 Colo. 166, 129 Pac. 811; *In re* Senate Resolution No. 10, 33 Colo. 307, 79 Pac. 1009; *In re* Appropriations by General Assembly, 13 Colo. 316, 22 Pac. 464. **Me.**—Questions Submitted by the House of Representatives, 95 Me. 564, 51 Atl. 224; *In re* Opinion of the Justices, 85 Me. 545, 27 Atl. 454. **Mo.** *In re* Opinion of the Court, 55 Mo. 497; Opinion of the Court in Response to Governor, 49 Mo. 216.

47. Questions Submitted by the House of Representatives, 95 Me. 564,

In giving their opinion the justices do not act as a court.⁴⁸ Their opinion is not a decision or adjudication of the question,⁴⁹ but is merely an advisory opinion which is not binding on the court or any one,⁵⁰ although accorded weight by the public and profession as indicating what the law is.⁵¹

G. OF QUESTION OR CASE CERTIFIED.⁵²—The certification of a question to an appellate court does not invoke any original jurisdiction in such court;⁵³ the case comes within its appellate jurisdiction,⁵⁴ or at least within its superintending control over inferior courts.⁵⁵

H. TERRITORIAL LIMITATION.—The territorial jurisdiction of the supreme court is generally co-extensive with the state,⁵⁶ whereas the jurisdiction of the intermediate appellate courts is generally limited to some defined district within the state.⁵⁷

VII. PROBATE COURTS.—The jurisdiction of probate courts is treated elsewhere in this work.⁵⁸

VIII. COURTS OF LIMITED AND INFERIOR JURISDICTION.⁵⁹

A. NATURE AND EXTENT OF JURISDICTION.—1. In General.—Courts of limited jurisdiction can only exercise their powers in the cases⁶⁰ and

51 Atl. 224; *In re* Opinion of the Justices, 72 Me. 542.

48. *In re* Opinion of the Justices, 73 N. H. 625, 63 Atl. 503.

49. *In re* Opinion of the Justices, 76 N. H. 597, 79 Atl. 490; *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729, citing cases.

50. Fla.—Advisory Opinion to the Governor, 69 Fla. 632, 68 So. 851. Mass.—Answer of the Justices, 214 Mass. 602, 102 N. E. 644. N. H.—*In re* Opinion of the Justices, 76 N. H. 597, 79 Atl. 490, citing local cases. S. D. *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729.

[a] The opinion is not conclusive upon the rights of the parties. *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729, citing cases.

[b] Consequently the duty of the federal court to follow the decisions of a state court in matters relating to the construction of the state constitution does not comprehend the advisory opinion of the judges. *In re* Opinion of the Judges, 34 S. D. 650, 147 N. W. 729.

51. Answer of the Justices, 214 Mass. 602, 102 N. E. 644.

52. Certifying case or question, see 4 STANDARD PROC. 664.

53. *State v. Crocker*, 5 Wyo. 385, 400, 40 Pac. 681. See *White v. Turk*, 12 Pet. (U. S.) 238, 9 L. ed. 1069, if the whole cause is certified, a decision of the questions if it should be given

would be the exercise of original rather than appellate jurisdiction. To same effect see *United States v. Perrin*, 131 U. S. 55, 9 Sup. Ct. 681, 33 L. ed. 88.

[a] For the reason that no process issues from the appellate court, no pleadings are filed and no judgment is rendered. *State v. Crocker*, 5 Wyo. 385, 399, 40 Pac. 681.

54. *State v. Crocker*, 5 Wyo. 385, 400, 40 Pac. 681. *Contra*, *Jones v. Smith*, 14 Mich. 334; *Sanger v. Truesdail*, 8 Mich. 543.

55. *State v. Crocker*, 5 Wyo. 385, 400, 40 Pac. 681.

56. See generally the constitutions and Kan.—*State v. Allen*, 5 Kan. 213. Ky.—*Gorham v. Luckett*, 6 B. Mon. 146. Tex.—*Pevito v. Rodgers*, 52 Tex. 581.

57. *Mott Store Co. v. -St. Louis & S. F. R. Co.*, 254 Mo. 654, 163 S. W. 929; *State ex rel. Dunham v. Nixon*, 232 Mo. 98, 133 S. W. 336; *Gordon v. Rhodes* (Tex. Civ. App.), 104 S. W. 786.

58. See generally the title "Probate Courts."

59. Special or limited jurisdiction defined, see *supra*, I, G.

Justices' courts as courts of limited jurisdiction, see generally the title "Justices of the Peace."

60. U. S.—*Hart v. Gray*, 3 Sumn. 339, 11 Fed. Cas. No. 6,152. Ala.—*Herring v. State*, 153 Ala. 31, 48 So. 476. Ark.—*Collier v. Campbell*, Lumb. Co., 74 Ark. 621, 86 S. W. 295. Cal.—Um-

in the mode prescribed by the legislature, and the powers granted cannot be enlarged by implication.⁶¹

The jurisdiction required must exist at the time it is invoked, and is attempted to be exercised. Jurisdiction thereafter acquired is not sufficient to support previous proceedings.⁶²

2. **As to Subject Matter.**—a. *In Civil Cases.*—The jurisdiction of courts of limited jurisdiction is generally dependent upon the amount in controversy,⁶³ and in general such courts are limited to causes where-

barger v. Chaboya, 49 Cal. 525. **Conn.** Hazzard v. Gallucci, 89 Conn. 196, 93 Atl. 230; Woodmont Assn. v. Milford, 85 Conn. 517, 84 Atl. 307; Sears v. Terry, 26 Conn. 273. **Ga.**—Butler v. Mutual Aid L. & I. Co., 94 Ga. 562, 20 S. E. 101. **Haw.**—Harrison v. McCandless, 22 Hawaii 129. **Ill.**—Hardin v. McFarlan, 82 Ill. 138; Board of School Inspectors v. People, 20 Ill. 525; Bowers v. Green, 2 Ill. 42. **Ind.**—English v. Smock, 34 Ind. 115, 7 Am. Rep. 215; Rhode v. Davis, 2 Ind. 53; White v. Conover, 5 Blackf. 462. **Ky.**—Com. v. Cumberland Tel. & T. Co., 146 Ky. 142, 142 S. W. 392; Brady v. Brannon, 134 Ky. 769, 121 S. W. 679; Tull v. Geohagen, 3 J. J. Marsh. 377. **La.**—Samory v. Hebrard, 17 La. 555. **Mich.** Clark v. Holmes, 1 Dougl. 390; Wight v. Warner, 1 Dougl. 384. **Mo.**—State ex rel. Major v. Patterson, 229 Mo. 373, 129 S. W. 888; Sawyer v. Burris, 141 Mo. App. 108, 121 S. W. 321. **Mont.** In re Tuohy's Estate, 33 Mont. 230, 83 Pac. 486. **N. Y.**—In re Jay, 5 Sandf. 674; Ahern v. National Steamship Co., 3 Daly. 399, 544, 11 Abb. Pr. (N. S.) 356; People v. Jones, 142 App. Div. 180, 126 N. Y. Supp. 1085; Edgerley v. Blackburn, 140 App. Div. 419, 125 N. Y. Supp. 353; People v. Daley, 124 App. Div. 562, 108 N. Y. Supp. 1056; Richards v. Littell, 11 Misc. 637, 32 N. Y. Supp. 919, 66 N. Y. St. 345. **N. C.** State v. Doster, 157 N. C. 634, 73 S. E. 111; Thompson v. Cox, 53 N. C. 311. **Ohio.**—McCleary v. McLain, 2 Ohio St. 368. **Okla.**—Ex parte Moody, 3 Okla. Crim. 590, 108 Pac. 431. **Pa.**—Com. v. Pepperday, 21 Pa. Dist. 389. **P. I.** Narcida v. Bowen, 22 Phil. Isl. 365; Manila v. Laek, 19 Phil. Isl. 324. **S. C.** Pringle v. Carter, 1 Hill 53; McKenzie v. Ramsay, 1 Bailey 457. **S. D.**—Benedict v. Johnson, 4 S. D. 387, 57 N. W. 66. **Vt.**—United States v. Davy, Brayt. 146. **Va.**—Jackson v. Maxwell, 5 Rand. (26 Va.) 636. **Can.**—Yasne v. Kronsen, 17 Manitoba 301; Kelly v. Sullivan,

2 Pr. Edw. Isl. 34.

61. Clark v. Holmes, 1 Dougl. (Mich.) 390; Wight v. Warner, 1 Dougl. (Mich.) 384.

62. **U. S.**—Connolly v. Taylor, 2 Pet. 556, 565, 7 L. ed. 518. **Kan.**—Carney v. Taylor, 4 Kan. 178. **La.**—Edwards v. Marin, 28 La. Ann. 567; Champlin v. Bakewell, 21 La. Ann. 353. **Mass.** Buck v. Dowley, 16 Gray 555. **Mich.** Hart v. Henderson, 17 Mich. 218. **Mo.** Tippack v. Briant, 63 Mo. 580.

63. **Ala.**—Cornelius v. Lowery, 14 Ala. App. 454, 70 So. 305; Louisville & N. R. Co. v. McKenzie, 5 Ala. App. 605, 59 So. 345; Buckner v. Vaught, 4 Ala. App. 593, 58 So. 813. **Ark.**—Dillard v. Noel, 2 Ark. 449. **Cal.**—Napa State Hospital v. Flaherty, 134 Cal. 315, 66 Pac. 322. **Conn.**—Fowler v. Fowler, 50 Conn. 256; Stone v. Platt, 41 Conn. 285. **Dak.**—St. Paul F. & M. Ins. Co. v. Hanson, 4 Dak. 162, 28 N. W. 193. **Ga.**—Baxley Banking Co. v. Carter, 112 Ga. 529, 37 S. E. 728; Lathrop & Co. v. Clewis, 63 Ga. 282. **Haw.** Holt v. Hawaii Land Co., 18 Hawaii 278. **Idaho.**—Idaho Trust Co. v. Miller, 16 Idaho 308, 102 Pac. 360. **Ill.** Haines v. O'Conner, 5 Ill. App. 213. **Ind.**—Brown v. McQueen, 6 Blackf. 208. **Ky.**—Boyer v. Com., 3 Ky. Op. 224. **La.** Conery v. New Orleans Water-Works Co., 39 La. Ann. 770, 2 So. 555; In re Brown, 28 La. Ann. 716; Bynum v. Bynum, 24 La. Ann. 127; Swan v. Gayle, 21 La. Ann. 478. **Mass.**—Hall v. Hall, 200 Mass. 194, 86 N. E. 363; Bossidy v. Branniff, 135 Mass. 290. **Mich.**—Bartlett v. Austin & Western Co., 147 Mich. 58, 110 N. W. 123. **Minn.**—Juster v. Court of Honor, 120 Minn. 325, 139 N. W. 701. **Mo.**—Frazer v. Shittle, 1 Mo. 575; State v. Imel (Mo. App.), 118 S. W. 97. **N. J.**—Corkran v. Taylor, 77 N. J. L. 195, 71 Atl. 124; Bowler v. Osborne, 75 N. J. L. 903, 70 Atl. 149; Hood v. Spaeth, 51 N. J. L. 129, 16 Atl. 163. **N. Y.**—Ferguson v. Kimball, 3 Barb. Ch. 616; Spear v. Given, 9 Paige

in neither the title nor interest in land is involved;⁶⁴ though title is not involved so as to deprive such a court of jurisdiction where title or possession is merely collaterally and incidentally involved.⁶⁵

362; *Smith v. Adams*, 6 Paige 435; *Vredenbergh v. Johnson*, Hopk. Ch. 112; *Warden v. Goldman*, 84 Misc. 87, 145 N. Y. Supp. 989; *Cohen v. Lewsen*, 92 N. Y. Supp. 59. **N. C.**—*Cooper v. Chambers*, 15 N. C. 261, 25 Am. Dec. 710; *Griffin v. Ing*, 14 N. C. 358; *Williams v. Holcombe*, 4 N. C. 523. **Okla.**—*St. Louis & S. F. R. Co. v. Egbert*, 27 Okla. 168, 111 Pac. 202. **Pa.**—*Kline v. Wood*, 9 Serg. & R. 294; *Byrne v. Gordon*, 2 Browne 271. **S. C.**—*Trowell v. Youmans*, 5 Strobb. 67. **Tex.**—*Johnson v. Happell*, 4 Tex. 96; *Texas & P. Ry. Co. v. Butler* (Tex. Civ. App.), 86 S. W. 800; *Cleveland v. People's Nat. Bank* (Tex. Civ. App.), 49 S. W. 523; *Cross v. Peterson*, 1 White & W. Civ. Cas. §1028. **Vt.** *Field v. Randall*, 51 Vt. 33; *Washburn v. Washburn*, 23 Vt. 576; *Hobart v. Wardner*, 15 Vt. 564; *Kittridge v. Rolins*, 12 Vt. 541. **Can.**—*Blachford v. McBain*, 20 Can. Sup. Ct. 269; *Re Green v. Crawford*, 21 Ont. L. R. 36, 15 Ont. W. R. 822; *Thomson v. Eede*, 22 Ont. App. 105; *Ostrom v. Benjamin*, 21 Ont. App. 467.

See *infra*, XII.

64. **Idaho.**—*Fox v. Flynn*, 27 Idaho 580, 150 Pac. 44. **Ill.**—*Pankey v. Modglin*, 116 Ill. App. 6; *Weidner v. Lund*, 105 Ill. App. 454, justice's court. **Ind.** *Lamasco v. Brinkmeyer*, 12 Ind. 349; *Cincinnati, U. & Ft. W. R. Co. v. Sipe*, 11 Ind. 67. **Me.**—*Hatch v. Allen*, 27 Me. 85, justice's court. **Mich.**—*People v. Wolverine Mfg. Co.*, 141 Mich. 455, 104 N. W. 725, 113 Am. St. Rep. 544 (recorder's court); *People v. Stott*, 90 Mich. 343, 51 N. W. 509; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491. **Minn.**—*State v. Cotton*, 29 Minn. 187, 12 N. W. 529. **Tex.**—*Coleman v. Thurmond*, 56 Tex. 514; *Beckham v. Burney* (Tex. Civ. App.), 31 S. W. 718; *Rowan v. Shapard*, 2 Wills. Civ. Cas., §295.

See the title "Justices of the Peace."

65. **Ala.**—*Stein v. Ashby*, 24 Ala. 521. **Cal.**—*Randolph v. Kraemer*, 106 Cal. 199, 39 Pac. 533; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737. **Fla.** *Collier v. Anderson*, 36 Fla. 635, 18 So. 850. **Ga.**—*Black v. Fritz*, 98 Ga. 32, 25 S. E. 188; *Moore v. O'Barr*, 87 Ga. 205, 13 S. E. 464; *Beckwith v. McBride*

& Co., 70 Ga. 642. **Ill.**—*Pankey v. Modglin*, 116 Ill. App. 6; *Weidner v. Lund*, 105 Ill. App. 454. **Ind.**—*Branson v. Studebaker*, 133 Ind. 147, 33 N. E. 98; *Sipe v. Holliday*, 62 Ind. 4; *Bourgette v. Hubinger*, 30 Ind. 296; *Carpenter v. Vanscoten*, 20 Ind. 50; *Macy v. Allee*, 18 Ind. 126; *Woleott v. Wigton*, 7 Ind. 44. **La.**—*State v. Lochte*, 45 La. Ann. 1405, 14 So. 215; *Samory v. Hebrard*, 17 La. 555. **Me.** *Knight v. Dunbar*, 83 Me. 359, 22 Atl. 216; *Hatch v. Allen*, 27 Me. 85. **Minn.** *Judd v. Arnold*, 31 Minn. 430, 18 N. W. 151; *Bassett v. Fortui*, 30 Minn. 27, 14 N. W. 56; *Steele v. Bond*, 28 Minn. 267, 9 N. W. 772. **Mo.**—*State ex rel. Javin v. Muench*, 225 Mo. 210, 124 S. W. 1124. **Neb.**—*In re Buerstetta's Estate*, 83 Neb. 287, 119 N. W. 469; *Youngson v. Bond*, 69 Neb. 356, 95 N. W. 700, 5 Ann. Cas. 191; *Hesser v. Johnson*, 57 Neb. 153, 77 N. W. 406; *Republican Valley R. Co. v. Fink*, 28 Neb. 397, 44 N. W. 434. **Nev.**—*Dangberg v. Ruhenstroth*, 26 Nev. 455, 70 Pac. 320. **N. J.**—*Buttoro v. Whalen*, 64 N. J. L. 461, 45 Atl. 981. **N. Y.** *Cannavan v. Conklin*, 1 Daly 509, 1 Abb. Pr. (N. S.) 271; *Collar v. Ulster & D. R. Co.*, 72 Misc. 274, 131 N. Y. Supp. 56. **N. C.**—*Henderson v. Davis*, 106 N. C. 88, 11 S. E. 573. **Okla.** *Newell v. Long Bell Lumb. Co.*, 14 Okla. 185, 78 Pac. 164; *Choctaw O. & G. R. Co. v. Deperade*, 12 Okla. 367, 71 Pac. 629. **Pa.**—*Henwood v. Cheeseman*, 3 Serg. & R. 500. **Tex.**—*Hampton v. Hampton*, 9 Tex. Civ. App. 497, 29 S. W. 423; *Myers v. Jones*, 4 Tex. Civ. App. 330, 23 S. W. 562; *Hatch v. Allan*, 2 Wills. Civ. Cas., §229; *Carter Lumber Co. v. De Grazier*, 3 Wills. Civ. Cas. §176. **Vt.**—*Long v. Ober*, 51 Vt. 73. **Can.**—*Municipality of Louise v. Canadian Pac. R. Co.*, 14 Manitoba 1; *McQuaid v. Cooper*, 11 Ont. 213; *O'Brien v. Welsh*, 23 U. C. Q. B. 394; *Portman v. Patterson*, 21 U. C. Q. B. 237.

[a] The test as to whether title to realty is directly involved so as to deprive a court of jurisdiction is whether the issues to be litigated demand a judgment affecting title. **Ill.** *Pankey v. Modglin*, 116 Ill. App. 6. **N. Y.**—*Hogg v. Mack*, 53 Hun 463, 6

b. *In Criminal Cases.*—(1.) **Generally.**—The jurisdiction of inferior courts such as justices, police and recorder's courts is governed entirely by the constitutional and statutory provisions of each state,⁶⁵

N. Y. Supp. 301, 17 Civ. Proc. 338, 25 N. Y. St. 374. Pa.—Hlenwood v. Cheeseman, 3 Serg. & R. 500.

See the title "Justices of the Peace."

[b] **As effective a practical test as can be found** is supplied by the answer to the question: Is the effect of the judgment appealed from such as to divest one of the parties of the title or to invest one of them with the title? It is manifest that if the issues and judgment are of such a character as to settle the question of title and enable the parties to make use of the judgment as the basis of a plea of *res adjudicata*, in a controversy concerning the title, jurisdiction is in this court, but it is equally evident that, where the judgment cannot be regarded as conclusively adjudicating the question of title, jurisdiction is in the appellate court, although the question of title may be incidentally or indirectly involved. *Youngson v. Bond*, 69 Neb. 256, 95 N. W. 700.

[c] The mere fact that in trying title to land within the jurisdiction of the court it may be necessary for the court to incidentally try title to land in another county does not divest the court of jurisdiction as to the land within the jurisdiction of the court. *Carkeek v. Boston Nat. Bank*, 16 Wash. 399, 47 Pac. 884.

[d] **Illustrations.**—The following have been held not to be cases involving title to lands: (1) Suit to charge land held in trust with liability for services and property furnished for its use (*Beckwith v. McBride & Co.*, 70 Ga. 642); (2) suit foreclosing mechanics lien (*Cooper v. Jackson*, 107 Ga. 255, 33 S. E. 60; *Wheatley v. Blalock*, 82 Ga. 406, 9 S. E. 168); (3) suit to recover damages for trespass to land (*Batson v. Iligginbotham*, 7 Ga. App. 835, 68 S. E. 455); (4) suit upon notes given for land where defense was failure of consideration because of bad title. *Black v. Fritz*, 98 Ga. 32, 25 S. E. 188.

[e] **In a prosecution for obstructing a street** if it appears there is a bona fide contention either as to the existence of the highway or the title

to the lands where the alleged obstructions are located, the whole proceeding should be dismissed. *People v. Wolverine Mfg. Co.*, 141 Mich. 455, 104 N. W. 725, 113 Am. St. Rep. 544; *Roberts v. Highway Comrs.*, 25 Mich. 23.

66. Ala.—*Williams v. State*, 171 Ala. 56, 54 So. 535; *Drake v. State*, 68 Ala. 510; *Johnson v. State* (Ala. App.), 75 So. 270; *State v. Bush*, 12 Ala. App. 309, 68 So. 492. Alaska.—*United States v. Bozaravitch*, 4 Alaska 37. Ark.—*Walker v. Fayetteville*, 93 Ark. 443, 125 S. W. 412; *Barnett v. Malvern*, 92 Ark. 483, 123 S. W. 759; *Watson v. State*, 29 Ark. 299; *State v. Smith*, 26 Ark. 149. Cal.—*People v. Fallon*, 154 Cal. 743, 99 Pac. 202; *Ex parte Dolan*, 128 Cal. 460, 60 Pac. 1094; *Ex parte Giambonini*, 117 Cal. 573, 49 Pac. 732; *Ex parte Reilly*, 85 Cal. 632, 24 Pac. 807; *Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *Ex parte Simpson*, 47 Cal. 127; *People v. Pages*, 1 Cal. App. 1, 162 Pac. 137; *Ex parte Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060; *People v. Anderson*, 30 Cal. App. 542, 159 Pac. 211. Conn.—*State v. Fox*, 83 Conn. 286, 76 Atl. 302, 19 Ann. Cas. 682. Del.—*Donaghy v. State*, 100 Atl. 696. Ga.—*Ormond v. Ball*, 120 Ga. 916, 48 S. E. 383. Idaho.—*State v. West*, 20 Idaho 387, 118 Pac. 773; *State v. Raaf*, 16 Idaho 411, 101 Pac. 747. Ill.—*People v. Richardson*, 187 Ill. App. 634. Ind.—*Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460; *Wakefield v. State*, 5 Ind. 195; *State v. Odell*, 8 Blackf. 396. Ky.—*Com. v. Leight*, 1 B. Mon. 107; *Hughes v. Holbrook*, 32 Ky. L. Rep. 1210, 108 S. W. 225. La.—*State v. Landry*, 25 La. Ann. 42; *State v. Peter*, 14 La. Ann. 521. Me.—*In re Hersom*, 39 Me. 476. Mass.—*Com. v. New York Cent. H. & R. R. Co.*, 206 Mass. 417, 92 N. E. 766, 19 Ann. Cas. 529. Mich.—*People v. Gooseman*, 80 Mich. 611, 45 N. W. 369. Minn.—*State v. Marciniaik*, 97 Minn. 355, 105 N. W. 965; *State v. Kemp*, 34 Minn. 61, 24 N. W. 349. Mo.—*State v. Davis*, 194 Mo. 485, 92 S. W. 484, 4 L. R. A. (N. S.) 1023; *State v. Chappell*, 179 Mo. 324, 78 S. W. 585. Neb.—*State v. Dudgeon*, 83 Neb. 371, 119 N. W. 676. N. J.—*Streeter v. Board of Health of Vine-*

and can exercise no jurisdiction other than that expressly conferred upon them.⁶⁷ Such jurisdiction is to be determined by the allegations of the information or complaint and not by the evidence adduced at the trial.⁶⁸

(II.) Of Treason, Felony and Misdemeanors.—Justice's courts had no jurisdiction at common law to try persons accused of treason⁶⁹ or felony, their jurisdiction being ordinarily restricted to misdemeanors,⁷⁰ their jurisdiction as to felonies being ordinarily restricted to examining the accused and committing him to jail to await trial in the proper

land, 84 N. J. L. 67, 85 Atl. 1029; *Bourgeois v. Board of Health of Ocean City*, 77 N. J. L. 162, 71 Atl. 53. **N. Y.** *McCarg v. Burr*, 186 N. Y. 467, 79 N. E. 715; *Ackermann v. Berriman*, 61 Misc. 165, 114 N. Y. Supp. 937; *Matter of Jacobs*, 57 Misc. 655, 109 N. Y. Supp. 1068; *People ex rel. Reynolds v. Prison*, 44 Misc. 149, 89 N. Y. Supp. 830. **N. C.**—*State v. Denton*, 164 N. C. 530, 80 S. E. 401; *State v. Dunlap*, 159 N. C. 491, 74 S. E. 626; *State v. Doster*, 157 N. C. 634, 73 S. E. 111; *State v. Clayton*, 146 N. C. 599, 60 S. E. 415. **Ohio.**—*State v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *In re Hildebrand*, 15 Ohio Cir. Ct. (N. S.) 187; *In re Derrick*, 11 Ohio Cir. Ct. (N. S.) 518; *Dominek v. State*, 27 Ohio Cir. Ct. 305; *Hillier v. State*, 26 Ohio Cir. Ct. 777. **Okla.**—*Ex parte Moody*, 3 Okla. Crim. 590, 108 Pac. 431. **Ore.**—*State v. Browning*, 47 Ore. 470, 82 Pac. 955. **Pa.** *Com. v. Bauer*, 24 Pa. Dist. 210; *Com. v. Oglesby*, 23 Pa. Dist. 979; *Com. v. Graw*, 16 Pa. Dist. 806; *Com. v. Blieden*, 40 Pa. Co. Ct. 22; *Stroudsburg Borough v. Brown*, 11 Pa. Co. Ct. 272. **S. C.**—*State v. Hondros*, 100 S. C. 242, 84 S. E. 781; *State v. Richardson*, 98 S. C. 147, 82 S. E. 353; *State v. Perry*, 87 S. C. 535, 70 S. E. 304; *Anderson v. Seligman*, 85 S. C. 16, 67 S. E. 13; *Central v. Madden*, 81 S. C. 7, 61 S. E. 1028. **Tex.**—*Ex parte McGrew*, 40 Tex. 472; *Brown v. State*, 55 Tex. Crim. 572, 118 S. W. 139; *Ex parte Brown*, 43 Tex. Crim. 45, 64 S. W. 249. **Utah.**—*People v. Douglass*, 5 Utah 283, 14 Pac. 801, *overruling Yearian v. Speirs*, 4 Utah 482, 10 Pac. 618. **Vt.**—*State v. Stanley*, 82 Vt. 37, 71 Atl. 817; *State v. Wilson*, 74 Vt. 323, 52 Atl. 419; *State Treasurer v. Clark*, 19 Vt. 129. **Va.**—*Agner v. Com.*, 103 Va. 811, 48 S. E. 493; *Lacey v. Palmer*, 93 Va. 159, 24 S. E. 930, 57 Am. St. Rep. 795, 31 L. R. A. 822. **Wash.**—*State ex rel. Fugita v. Milroy*, 71 Wash. 592, 129 Pac. 384; *State v. Hagimori*, 57 Wash. 623, 107 Pac. 855; *State v. Davis*, 43 Wash. 116, 86 Pac. 201. **W. Va.**—*Page v. Johnson*, 87 S. E. 849; *Bradberry v. Buffington*, 74 W. Va. 529, 82 S. E. 321; *Howell v. Wysor*, 74 W. Va. 589, 82 S. E. 503, Ann. Cas. 1916C, 519; *State v. McKain*, 56 W. Va. 128, 49 S. E. 20. **Wis.** *State v. Miller*, 23 Wis. 634. **Can.**—*Ex parte Porter*, 28 N. Bruns. 587; *Reg. v. Beemer*, 15 Ont. 266.

[a] Neither convenience nor necessity can authorize the supreme court to confer jurisdiction upon any inferior court. *State ex rel. Garland v. Maughan*, 35 Utah 426, 100 Pac. 934.

67. See cases cited in preceding note and following: **Cal.**—*People v. Hamberg*, 84 Cal. 468, 24 Pac. 298; *In re Kurtz*, 68 Cal. 412, 9 Pac. 449. **Ind.** *Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460; *Wakefield v. State*, 5 Ind. 195; *State v. Odell*, 8 Blackf. 396. **Me.** *In re Hersom*, 39 Me. 476. **Mich.**—*People v. Gooseman*, 80 Mich. 611, 45 N. W. 369. **N. Y.**—*People v. Sparrow*, 93 Misc. 468, 157 N. Y. Supp. 265.

68. *State v. Dolby*, 49 N. H. 483, 6 Am. Rep. 588; *People v. Perrin*, 170 App. Div. 375, 155 N. Y. Supp. 698.

69. 5 Bacon Abr. 204.

70. **Ala.**—*Johnson v. State* (Ala. App.), 75 So. 270. **Ark.**—*Armstrong v. State*, 54 Ark. 364, 15 S. W. 1036; *Watson v. State*, 29 Ark. 299; *State v. Smith*, 26 Ark. 149. **Cal.**—*Green v. Superior Court*, 78 Cal. 556, 21 Pac. 307, 541; *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471, 107 Pac. 712. **Conn.**—*Wolcott v. Stickles*, 85 Conn. 322, 82 Atl. 572. **Fla.**—*Porter v. State*, 62 Fla. 79, 56 So. 406; *Alford v. State*, 25 Fla. 852, 6 So. 857; *McLean v. State*, 23 Fla. 281, 2 So. 5. **Idaho.**—*Fox v. Flynn*, 27 Idaho 580, 150 Pac. 44. **Ind.** *Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460; *Seibert v. State*, 95 Ind. 471; *State v. Hattabough*, 66 Ind. 223; *State v. Morgan*, 62 Ind. 35. **Ia.**—*State v.*

court.⁷¹ Police courts are similarly restricted to misdemeanors of a petty nature in most states.⁷²

(III.) As Determined by Punishment.—Generally the jurisdiction of justices of the peace and police magistrates is limited to offenses involving a specified maximum penalty or period of imprisonment, in which event they have no jurisdiction if the possible punishment may exceed the specified maximum,⁷³ or no limitation is placed on the pun-

Denhardt, 129 Iowa 135, 105 N. W. 385. **Mass.**—*Com. v. Golding*, 14 Gray 49; *Com. v. Rowe*, 14 Gray 47. **Mont.** *In re Jones*, 46 Mont. 122, 126 Pac. 929. **N. M.**—*Territory v. Valdez*, 1 N. M. 548; *Bray v. United States*, 1 N. M. 1. **N. Y.**—*People v. Miller*, 14 Johns. 371; *People v. Scherno*, 140 App. Div. 95, 125 N. Y. Supp. 918; *People v. Hayman*, 94 Misc. 624, 159 N. Y. Supp. 981. **N. C.**—*State v. Hyman*, 164 N. C. 411, 79 S. E. 284; *State v. Wilkes*, 149 N. C. 453, 62 S. E. 430; *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14; *State v. Wilson*, 84 N. C. 777; *State v. Craig*, 82 N. C. 668; *State v. Benthall*, 82 N. C. 664; *State v. Batchelor*, 72 N. C. 468. **Ohio.**—*Cole v. State*, 29 Ohio St. 226. **Okla.**—*Hamlin v. State*, 8 Okla. Crim. 187, 126 Pac. 704. **R. I.** *State v. Nolan*, 15 R. I. 529, 10 Atl. 481. **Tex.**—*Neil v. State*, 43 Tex. 91; *Langbein v. State*, 37 Tex. 162. **Vt.** *State v. Peck*, 32 Vt. 172. **W. Va.** *State v. McKain*, 56 W. Va. 128, 49 S. E. 20.

[a] Distinction between high and low misdemeanors not recognized in California. *Green v. Superior Court*, 78 Cal. 556, 562, 21 Pac. 307.

[b] The municipal court of Chicago has no jurisdiction to entertain criminal prosecution for an infamous offense. *People v. Hunt*, 162 Ill. App. 628.

71. *Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460. See generally the title "Preliminary Examination."

72. See the statutes of the various states, and *In re Monroe* (Okla. Crim.), 162 Pac. 233.

73. **Ala.**—*Graham v. State*, 11 Ala. App. 113, 65 So. 717. **Ariz.**—*Brookzer v. State*, 14 Ariz. 546, 132 Pac. 1136. **Cal.**—*Ex parte Anear*, 114 Cal. 370, 46 Pac. 172; *Ex parte Noble*, 96 Cal. 362, 31 Pac. 224; *Ex parte Neustadt*, 82 Cal. 273, 23 Pac. 124; *In re Kurtz*, 68 Cal. 412, 9 Pac. 449; *People v. Sacramento*, etc. Assn., 12 Cal. App. 471, 107 Pac. 712. **Conn.**—*Wolcott v. Stickles*,

85 Conn. 322, 82 Atl. 572; *State v. Campana*, 76 Conn. 549, 57 Atl. 164. **D. C.**—*United States v. Marshall*, 6 Mackey 34; *United States v. Buell*, 1 MacArthur 502. **Ill.**—*In re Bollig*, 31 Ill. 88. **Ind.**—*Nace v. State*, 117 Ind. 114, 19 N. E. 729. **Ia.**—*State v. Babcock*, 112 Iowa 250, 83 N. W. 908. **Ky.**—*Archer v. Lawson*, 170 Ky. 371, 185 S. W. 1123. **Me.**—*State v. Pierre*, 65 Me. 293; *In re Hersom*, 39 Me. 476. **Mass.**—*Com. v. Woolford*, 108 Mass. 483; *Com. v. Burns*, 14 Gray 35. **Mich.** *People v. Mangold*, 71 Mich. 335, 39 N. W. 6; *In re Berry*, 7 Mich. 467. **Minn.** *State ex rel. Bahr v. Bates*, 105 Minn. 440, 117 N. W. 844. **Miss.**—*Sloan v. State*, 65 Miss. 490, 4 So. 550. **N. H.** *State v. Williams*, 68 N. H. 449, 42 Atl. 898; *State v. Dolby*, 49 N. H. 483, 6 Am. Rep. 588. **N. Y.**—*People v. Hayman*, 94 Misc. 624, 159 N. Y. Supp. 981. **N. C.**—*State v. McAden*, 162 N. C. 575, 77 S. E. 298; *State v. Wiseman*, 131 N. C. 795, 42 S. E. 826; *State v. Deaton*, 101 N. C. 728, 7 S. E. 895; *State v. Edney*, 80 N. C. 360; *Washington v. Hammond*, 76 N. C. 33. **P. I.**—*United States v. Mallari*, 24 Phil. Isl. 366; *United States v. Ang Suyco*, 17 Phil. Isl. 92; *United States v. Mendoza*, 14 Phil. Isl. 198. **P. R.**—*Ex parte Santiago*, 7 Porto Rico 500. **S. C.**—*State v. Mellette*, 91 S. E. 4; *Keels v. Sumter*, 95 S. C. 203, 78 S. E. 893; *State v. Holcomb*, 63 S. C. 22, 40 S. E. 1017; *State v. Cooler*, 30 S. C. 105, 8 S. E. 692, 3 L. R. A. 181. **Tex.**—*State v. Newhous*, 41 Tex. 185; *Ex parte McGrew*, 40 Tex. 472; *Jacobs v. State*, 35 Tex. Crim. 410, 34 S. W. 110. **Wyo.**—*Houtz v. Uinta County*, 11 Wyo. 152, 70 Pac. 840.

[a] The fact that a statute provides a fine in excess of the jurisdiction of a justice of the peace for maintaining a nuisance, but provides that it shall not be imposed except where no other punishment is specially provided, does not deprive a justices court from taking jurisdiction of an offense coming within the designation of a nuis-

ishment to be imposed,⁷⁴ even though the court assesses the fine at a sum within its jurisdiction.⁷⁵ Where a more severe punishment is prescribed for second and third offenses such courts may lose jurisdiction.⁷⁶ Such a court has no jurisdiction over an offense punishable by both fine and imprisonment where the statute gives it jurisdiction only over offenses punishable by fine and imprisonment,⁷⁷ even though in the particular case a fine only is imposed.⁷⁸ The fact however that as incidental to the punishment the defendant is required to pay the costs of prosecution,⁷⁹ and give a bond for good behavior for a specified time,⁸⁰ or is precluded from holding any license,⁸¹ or privilege,⁸² does not deprive the court of jurisdiction.

(IV.) **Repeal of Statute Conferring Jurisdiction.**—Upon the repeal of a statute creating a specified inferior court and giving it exclusive jurisdiction of a certain offense or offenses, jurisdiction vests in such courts as the general law of the state provides,⁸³ without any express provision to that effect.⁸⁴

(V.) **Territorial Limits of Jurisdiction.**⁸⁵ — Jurisdiction of justice,⁸⁶ and

ance, but for which a special penalty is provided. *State v. Meek*, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414.

74. *State v. Madden*, 28 S. C. 50, 4 S. E. 810; *State v. Jenkins*, 26 S. C. 121, 1 S. E. 437.

75. *State v. Wiseman*, 131 N. C. 795, 42 S. E. 826.

76. *People v. Sacramento Butchers' P. Assn.*, 12 Cal. App. 471, 148, 107 Pac. 712; *Ex parte Yee Kim Mah*, 31 Cal. App. 196, 159 Pac. 1060, where offense thereby becomes a felony. Compare *People ex rel. Cosgriff v. Craig*, 60 Misc. 529, 112 N. Y. Supp. 781, holding that though punishable by double the length of imprisonment in a county penitentiary, the offense was not a felony and the police court still had jurisdiction.

77. *State v. Yates*, 36 Neb. 287, 54 N. W. 429.

78. *State v. Yates*, 36 Neb. 287, 54 N. W. 429.

79. *Mass.*—*Com. v. Burns*, 14 Gray 35; *Com. v. Carr*, 11 Gray 463. *Mich.* *Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374. *Minn.*—*State v. Larson*, 40 Minn. 63, 41 N. W. 363.

[a] **Reason.**—There are several reasons for saying that the costs of prosecution in criminal causes are but a mere incident, and no part of the fine proper contemplated by the framers of the constitution. A cogent ground for such ruling is that the right of a justice to proceed in civil actions, where costs always accrue to the successful

party, or in criminal cases, where by statute costs follow a conviction, must be capable of determination at the outset of the proceeding, and not at its termination, which would invariably be the result if the jurisdiction could be permitted to depend upon the amount of costs which might accumulate during trial. *State v. Larson*, 40 Minn. 63, 41 N. W. 363.

80. *Com. v. Burns*, 14 Gray (Mass.) 35.

81. *State v. Larson*, 40 Minn. 63, 41 N. W. 363.

[a] **The disability which attaches for a specified period of time, during which a party declared guilty of violating the law is unable to secure license, is no more a part of the punishment in any greater or other sense than is that loss of social or financial standing and reputation which is the usual result of conviction of crime.** *State v. Larson*, 40 Minn. 63, 41 N. W. 363.

82. *Stevens v. Anderson*, 145 Ind. 304, 44 N. E. 460, disfranchisement.

83. *Ky.*—*Anderson v. Com.*, 8 Ky. L. Rep. 697, 3 S. W. 127. *Ohio.*—*Ex parte Wagener*, 1 Disn. 10, 12 Ohio Dec. (Reprint) 454. *Tex.*—*Galloway v. State*, 23 Tex. App. 398, 5 S. W. 246.

84. *Anderson v. Com.*, 8 Ky. L. Rep. 697, 3 S. W. 127; *Ex parte Wagener*, 1 Disn. (Ohio) 10, 12 Ohio Dec. (Reprint) 454.

85. See generally *infra*, X.

86. *Ala.*—*Murphy v. State*, 68 Ala. 31. *Ariz.*—*Branch v. State*, 15 Ariz.

municipal courts,⁸⁷ in most states is restricted to the trial of crimes committed within the city or county where the court is located and is not extended by a statute conferring the jurisdiction of justices of the peace upon a municipal court within the corporate limits.⁸⁸ Nor is the jurisdiction of a justice court without the limits of a city affected by a statute conferring upon a municipal court exclusive jurisdiction over offenses committed within the city, unless the intention to do so is very clear.⁸⁹

(VI.) **Loss or Divestiture of Jurisdiction.**⁹⁰ — In so far as the jurisdiction of municipal and justices courts are dependent upon the statutes of a state, the legislature may change such jurisdiction,⁹¹ but the conferring of jurisdiction over certain offenses upon a municipal court does not oust a justices⁹² or other court⁹³ of jurisdiction, in the ab-

99, 136 Pac. 628. **Cal.**—*Ex parte* Bagshaw, 152 Cal. 701, 93 Pac. 864; *Ex parte* Yee Kim Mah, 31 Cal. App. 196, 159 Pac. 1060; *Ex parte* Cook, 4 Cal. Unrep. 969, 39 Pac. 16. **Fla.**—*Blue v. State*, 32 Fla. 53, 13 So. 637. **Idaho.**—*State v. Andrus*, 29 Idaho 1, 156 Pac. 421; *State v. Noyes*, 15 Idaho 241, 96 Pac. 435. **Mass.**—*Com. v. Gillon*, 2 Allen 502; *Com. v. Pindar*, 11 Mete. 539. **Mich.**—*Faulks v. People*, 39 Mich. 200, 33 Am. Rep. 374. **Minn.**—*State v. Olson*, 58 Minn. 431, 59 N. W. 1038; *State v. Bowen*, 45 Minn. 145, 47 N. W. 650; *State v. Anderson*, 25 Minn. 66, 33 Am. Rep. 455. **Mont.**—*State v. O'Brien*, 35 Mont. 482, 90 Pac. 514. **N. H.**—*State v. Bean*, 36 N. H. 122; *State v. Ricker*, 32 N. H. 179. **N. Y.**—*People v. Keenan*, 80 Misc. 539, 141 N. Y. Supp. 781; *People v. International Nickel Co.*, 155 N. Y. Supp. 156. **Ohio.**—*Steele v. Karb*, 78 Ohio St. 376, 85 N. E. 580. **Tex.**—*Brown v. State*, 55 Tex. Crim. 572, 118 S. W. 139; *Toliver v. State*, 32 Tex. Crim. 444, 24 S. W. 286; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188.

[a] In Missouri justice of the peace is restricted in trial of misdemeanors to township in which committed. *Holder v. St. Louis & S. F. R. Co.*, 155 Mo. App. 664, 135 S. W. 507.

87. **Ark.**—*Barnett v. City of Malvern*, 92 Ark. 483, 123 S. W. 759; *Searey v. Turner*, 88 Ark. 210, 114 S. W. 472. **Conn.**—*State v. Hanchett*, 38 Conn. 35; *State v. Clegg*, 27 Conn. 593. **Ill.**—*Bell v. People*, 2 Ill. 397. **Ky.**—*Tutt v. Greenville*, 142 Ky. 536, 134 S. W. 890, 33 L. R. A. (N. S.) 331. **Mass.**—*Com. v. Gay*, 153 Mass. 211, 26 N. E. 571, 852. **N. Y.**—*People v. Smith*, 4 Park. Crim. 255; *People v. Duffy*,

49 Hun 276, 1 N. Y. Supp. 896; *People v. Bates*, 38 Hun 180, 4 N. Y. Crim. 214; *People v. Kyser*, 78 Misc. 68, 138 N. Y. Supp. 801; *Griswold's Case*, 1 City Hall Rec. 181. **N. C.**—*State v. Doster*, 157 N. C. 634, 73 S. E. 111. **Ohio.**—*State v. Peters*, 67 Ohio St. 494, 66 N. E. 521, police judge or mayor. **Va.**—*Agner v. Com.*, 103 Va. 811, 48 S. E. 493; *Jordan v. Com.*, 25 Gratt. (66 Va.) 943.

[a] Offenses against city ordinances in Utah must be tried before the justice of the peace of the precinct in which the town is situated. *State ex rel. Garland v. Maughan*, 35 Utah 426, 100 Pac. 934.

88. **Ala.**—*Murphy v. State*, 68 Ala. 31. **Conn.**—*State v. Hanchett*, 38 Conn. 35. **Ill.**—*Laswell v. Hickox*, 5 Ill. 181. **Mass.**—*Piper v. Pearson*, 2 Gray 120, 61 Am. Dec. 438. **Minn.**—*State v. Bowen*, 45 Minn. 145, 47 N. W. 650. **N. C.**—*Ex parte McLaurine*, 63 N. C. 528.

89. *State v. Olson*, 58 Minn. 431, 59 N. W. 1038.

90. See *infra*, IV, D.

91. **Ark.**—*State ex rel. Moose v. Woodruff*, 120 Ark. 406, 179 S. W. 813. **Del.**—*Donaghy v. State*, 100 Atl. 696. **N. Y.**—*People v. Duffy*, 49 Hun 276, 1 N. Y. Supp. 896. **W. Va.**—*Gilbert v. Johnson*, 90 S. E. 111.

92. **Idaho.**—*State v. Raaf*, 16 Idaho 411, 101 Pac. 747. **Mass.**—*Com. v. Brady*, 7 Gray 320; *Com. v. Pindar*, 11 Mete. 539. **Mich.**—*People v. Pond*, 67 Mich. 98, 34 N. W. 647. **Minn.**—*State v. Olson*, 58 Minn. 431, 59 N. W. 1038.

93. *State v. Russell*, 69 Minn. 499, 72 N. W. 837.

sence of a clear intention on the part of the legislature to do so.⁹⁴

3. Amount in Controversy.—This matter is fully treated elsewhere.⁹⁵

IX. SCOPE, EXTENT AND EXERCISE OF JURISDICTION.

A. IN GENERAL.—Courts established by written law cannot transcend the jurisdiction given by the law of their creation.⁹⁶ The power of the court to apply the remedy in the case is co-extensive with its jurisdiction over the subject matter.⁹⁷ Courts are invested with certain inherent powers which form an acknowledged part of their jurisdiction,⁹⁸ so that thus even in the absence of statute authorizing it, the court may punish contempts,⁹⁹ and administer oaths in the trial of cases,¹ though they have no inherent jurisdiction.² When the parties are once properly before the court, jurisdiction continues without further notice as long as any steps can be rightfully taken in any cause,³ and is not

94. Mass.—*Piper v. Pearson*, 2 Gray 120, 61 Am. Dec. 438. **Minn.**—*State v. Russell*, 69 Minn. 499, 72 N. W. 837. **N. H.**—*Marshall v. State*, 62 N. H. 353. **N. J.**—*Adams v. Nash*, 51 N. J. L. 305, 17 Atl. 290; *McLorinan v. Ryno*, 49 N. J. L. 603, 10 Atl. 189; *Duffy v. Britton*, 48 N. J. L. 371, 7 Atl. 679. **N. Y.**—*People v. Duffy*, 49 Hun 276, 1 N. Y. Supp. 896; *People v. McDonald*, 26 Hun 156; *People ex rel. Saloom v. Whitney*, 24 Misc. 264, 53 N. Y. Supp. 570.

95. See *infra*, XII, and the title "Appeals."

96. *State ex rel. Bd. of Education v. Nast*, 209 Mo. 708, 108 S. W. 563; *Baker v. Chisholm*, 3 Tex. 157.

97. *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609.

[a] The right to render the judgment is co-extensive with the authority to inquire into the facts. *Feusier v. Lammon*, 6 Nev. 209.

[b] A state court may render a judgment in favor of a marshal for the return of the property in a replevin suit against him for property seized under attachment, where the property was taken from the marshal. *Feusier v. Lammon*, 6 Nev. 209.

[c] **No Statutory Remedy Provided.** Where a power is conferred upon a court of general jurisdiction, and no special mode for that determination is pointed out, the jurisdiction conferred necessarily implies authority in such court to call to its assistance in determining the particular question, the same aid as is usually employed by it in reaching a judicial determination in other cases. *People v. Chew Lan Ong*,

141 Cal. 550, 75 Pac. 186, 99 Am. St. Rep. 88, holding court could hear evidence to determine degree of crime on plea of guilty.

[d] **Constitution Construed.**—A clause of the constitution empowering certain courts to exercise all the power given, whether the procedure necessary to accomplish that purpose be such as pertains to a court of law or a court of equity, in no manner confers upon such courts the power to exercise any and every power, which, at any time, may have been exercised by courts of chancery in England or elsewhere. *Messner v. Giddings*, 65 Tex. 301.

98. *Brandon v. Carter*, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673.

[a] **Effect of Statute Partially Defining Powers.**—Where the common law or equity power of a court of general jurisdiction is only partially defined by a statute, the inherent power is not impaired by the statute, because the court is greater than the statute. *Central Trust Co. v. Burke*, 3 Ohio N. P. 214.

99. See the title "Contempt."

1. Cal.—*Oaks v. Rodgers*, 48 Cal. 197. **Ind.**—*Masterson v. State*, 144 Ind. 240, 43 N. E. 138; *State v. Polke*, 7 Blackf. 27; *Server v. State*, 2 Blackf. 35. **La.**—*State v. Dreifus*, 38 La. Ann. 877. **Mich.**—*Keator v. People*, 32 Mich. 484. **N. C.**—*State v. Knight*, 84 N. C. 789. **Ohio.**—*State v. Townley*, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636. **Tenn.**—*Stephens v. State*, 1 Swan 157.

2. See *supra*, IV, A, 2.

3. *Burnside v. Ennis*, 43 Ind. 411.

[a] "The court had jurisdiction of

exhausted by the rendition of its judgment,⁴ but continues until that judgment shall be satisfied.⁵

B. ANCILLARY JURISDICTION.—Statutes sometimes give a court cognizance of all incidental matters arising out of a transaction so that the court may finally adjudicate upon the rights of the parties to the controversy.⁶ But even without such a provision, a statute expressly conferring a certain jurisdiction on a court by necessary implication also confers all power necessary to carry such jurisdiction into effect,⁷ and therefore upon rendition of a judgment the court may subsequently direct such process or make such orders as may be necessary to carry its judgment into effect,⁸ and prevent abuse of its process,⁹ and by virtue of its general superintending power over its process has control over

the parties and the subject-matter, and it had the power, and it was its duty to hear and decide every question of fact and law that arose in the progress of the case, until it was finally disposed of." *Phelps v. Mutual Reserve Fund Life Assn.*, 112 Fed. 453, 463, 50 C. C. A. 339, 61 L. R. A. 717. See also *Elder v. Richmond G. & S. Min. Co.*, 58 Fed. 536, 7 C. C. A. 354.

4. *Phelps v. Mutual Reserve Fund Life Assn.*, 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717. See generally the title "Judgments and Decrees, Enforcement of."

5. *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 483, 10 Sup. Ct. 155, 33 L. ed. 400; *Covell v. Heyman*, 111 U. S. 176, 183, 4 Sup. Ct. 355, 28 L. ed. 390; *Riggs v. Johnson Co.*, 6 Wall. (U. S.) 166, 187, 197, 18 L. ed. 768; *Wayman v. Southard*, 10 Wheat. (U. S.) 1, 22, 6 L. ed. 253; *Phelps v. Mutual Reserve Fund Life Assn.*, 112 Fed. 453, 458, 50 C. C. A. 339, 61 L. R. A. 717.

6. *Bank of Mississippi v. Duncan*, 52 Miss. 740.

7. *Ala.—Ex parte State*, 71 Ala. 371. *Idaho.—Fox v. Flynn*, 27 Idaho 580, 150 Pac. 44. *Ia.—State v. Caywood*, 96 Iowa 367, 65 N. W. 385. *Mo.—Brandon v. Carter*, 119 Mo. 572, 24 S. W. 1035, 41 Am. St. Rep. 673; *State v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502. *N. Y.—In re Sinnott*, 82 Misc. 219, 143 N. Y. Supp. 546. *N. C.—In re Propst*, 144 N. C. 562, 57 S. E. 342. *Ohio.—State v. Townley*, 67 Ohio St. 21, 65 N. E. 149, 93 Am. St. Rep. 636.

[a] Jurisdiction "includes the power to compel a person to appear and answer a complaint or to punish him for not doing so; the power to take property in dispute into the custody of

the law; . . . the power to determine the question of right between parties and to enforce the determination.'" *State ex rel. Watkins v. North American L. & T. Co.*, 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309. See *supra*, I, A and B.

8. *U. S.—Phelps v. Mutual Reserve Fund Life Assn.*, 112 Fed. 453, 458, 50 C. C. A. 339, 61 L. R. A. 717. *Colo.—People v. Jefferson Dist. Court*, 46 Colo. 386, 104 Pac. 484, 133 Am. St. Rep. 84, 24 L. R. A. (N. S.) 886. *Idaho.—Taylor v. Hulett*, 15 Idaho 265, 97 Pac. 37, 19 L. R. A. (N. S.) 535. *Mo.—State ex rel. Barker v. Assurance Co. of America*, 251 Mo. 278, 158 S. W. 640, Ann. Cas. 1905A, 247, 46 L. R. A. (N. S.) 955. *Pa.—Loomis v. Lane*, 29 Pa. 242, 72 Am. Dec. 625. *Tex.—Smith v. Miller*, 66 Tex. 74, 17 S. W. 399; *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385; *Buse v. Bartlett*, 1 Tex. Civ. App. 335, 21 S. W. 52, *affirmed*, 93 Tex. 656. *Va.—Dorr's Admr. v. Rohr*, 82 Va. 359, 3 Am. St. Rep. 106.

See generally the title "Judgments and Decrees, Enforcement of."

[a] Notwithstanding a territorial court has ceased to exist upon the admission of a territory as a state, its successor the state court has power to issue process to enforce such judgment by execution and issue supplemental process thereon. *Merchants' Nat. Bank v. Braithwaite*, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

9. *Ex parte State ex rel. Attorney General*, 150 Ala. 489, 43 So. 490, 492; *Hoffman v. Sewell*, 148 Ala. 378, 42 So. 556; *Larkin v. Mason*, 71 Ala. 227; *Loomis v. Lane*, 29 Pa. 242, 72 Am. Dec. 625.

moneys raised upon execution,¹⁰ which power attaches as soon as the money is in court.¹¹

C. JURISDICTION TO DETERMINE ENTIRE CONTROVERSY. — When the court before which the controversy is pending has acquired jurisdiction of the subject matter and the parties to the suit, who are all before it, the jurisdiction extends to all matters between the parties that relate to the subject matter of the suit and that may affect the parties,¹²

[a] This power carries with it, as an indispensable incident of the jurisdiction, the right to determine every question of fact and law which may be involved. *Loomis v. Lane*, 29 Pa. 242, 72 Am. Dec. 625.

10. *Woodruff v. Chapin*, 23 N. J. L. 566, 57 Am. Dec. 416.

[a] This power is not limited to the case where all the contending claims are founded on executions issued out of the same court. *Woodruff v. Chapin*, 23 N. J. L. 566, 57 Am. Dec. 416.

[b] That the court should have jurisdiction over the persons of the parties having conflicting claims by their being parties to the record in a suit pending in court is not essential to the due exercise of this power. *Woodruff v. Chapin*, 23 N. J. L. 566, 57 Am. Dec. 416.

11. *Woodruff v. Chapin*, 23 N. J. L. 566, 57 Am. Dec. 416.

12. **U. S.**—*United States v. Union Pac. R. Co.*, 160 U. S. 1, 16 Sup. Ct. 190, 40 L. ed. 319; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Oelrichs v. Spain*, 15 Wall. 211, 228, 21 L. ed. 43; *Peck v. Jenness*, 7 How. 612, 624, 12 L. ed. 841; *Leighton v. Young*, 52 Fed. 439, 3 C. C. A. 176, 18 L. R. A. 266; *United States v. Guggard*, 79 Fed. 21; *Brooks v. Stolley*, 3 McLean 523, 4 Fed. Cas. No. 1,962. **Ala.**—*Vick v. Beverly*, 112 Ala. 458, 21 So. 325; *Kilgore v. Kilgore*, 103 Ala. 614, 15 So. 897; *Boyd v. Hunter*, 44 Ala. 705; *Masterson v. Masterson*, 32 Ala. 437; *Stow v. Bozeman's Exrs.*, 29 Ala. 397. **Ark.**—*Evans v. Percifull*, 5 Ark. 424. **Colo.**—*Danielson v. Gude*, 11 Colo. 87, 17 Pac. 283. **Conn.**—*Sanford v. Sanford*, 28 Conn. 6; *Sherwood v. Stevenson*, 25 Conn. 431. **Fla.**—*Fries v. Griffin*, 35 Fla. 212, 17 So. 66. **Ga.**—*Bivins v. Marvin*, 96 Ga. 268, 22 S. E. 923; *Leyden v. Hickman*, 75 Ga. 684; *Pope v. Solomons*, 36 Ga. 541, 545; *Martin v. Tidwell*, 36 Ga. 332, 345; *Walker v. Morris*, 14 Ga. 323; *Mays v. Taylor*, 7 Ga. 238, 244. **Idaho.**—*Tay-*

lor v. Hulette, 15 Idaho 265, 97 Pac. 37, 19 L. R. A. (N. S.) 535. **Ill.**—*Griffin v. Griffin*, 163 Ill. 216, 45 N. E. 241; *Wilson v. Dresser*, 152 Ill. 387, 38 N. E. 888; *Grand Tower & C. G. R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920; *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034; *People v. Chicago*, 53 Ill. 424. **Ind.**—*Blair v. Smith*, 114 Ind. 114, 15 N. E. 817, 5 Am. St. Rep. 593; *Quarl v. Abbett*, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; *Pittsburgh, C. C. & St. L. R. Co. v. Peck*, 44 Ind. App. 62, 88 N. E. 627. **Ia.**—*Green Bay Lumb. Co. v. Miller*, 93 Iowa 468, 62 N. W. 742, 67 N. W. 383; *Smith, Stebbins & Co. v. Engle*, 44 Iowa 265; *Franklin Ins. Co. v. McCrea*, 4 G. Gr. 229. **Ky.**—*Handley's Exr. v. Fitzhugh*, 1 A. K. Marsh. 24; *Semon v. Freitag*, 16 Ky. L. Rep. 524, 29 S. W. 320. **La.**—*Wheless v. Fisk*, 28 La. Ann. 731; *McDowell v. Read*, 3 La. Ann. 391. **Me.**—*Gamage v. Harris*, 79 Me. 531, 11 Atl. 422. **Md.**—*McSherry v. McSherry*, 113 Md. 395, 77 Atl. 653; *Middle States Loan, Bldg. & Const. Co. v. Hagerstown Mattress, etc. Co.*, 82 Md. 506, 33 Atl. 886. **Mich.**—*George v. Wyandotte Elec. Light Co.*, 105 Mich. 1, 62 N. W. 985; *Chase v. Boughton*, 93 Mich. 285, 54 N. W. 44. **Miss.**—*Gilliam v. Chancellor*, 43 Miss. 437, 5 Am. Rep. 498; *Hunt v. Knox*, 34 Miss. 655; *Graves & White v. Hull*, 27 Miss. 419; *Parker v. Kelly*, 10 Smed. & M. 184. **Mo.**—*Corby v. Bean*, 44 Mo. 379; *State v. McKay*, 43 Mo. 594; *Keeton v. Spradling*, 13 Mo. 321; *Clem v. German Ins. Co.*, 29 Mo. App. 666. **Neb.**—*Disher v. Disher*, 45 Neb. 100, 103, 63 N. W. 368; *Morrissey v. Broomal*, 37 Neb. 766, 56 N. W. 383. **Nev.**—*Feuster v. Lammon*, 6 Nev. 209. **N. J.**—*Terhune v. Sibbald*, 55 N. J. Eq. 236, 37 Atl. 454; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551; *Jersey City v. Gardner*, 33 N. J. Eq. 622; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Little v. Cooper*, 10 N. J. Eq. 273. **N. Y.**—*Douglass v. Ferris*, 138 N. Y. 192, 33 N. E. 1041,

including facts necessary to the exercise of its jurisdiction.¹³

D. MATTERS NOT IN ISSUE.—A court has no jurisdiction to decide matters not involved in the issues in the case before them, and if it proceeds to decide same, such adjudication is a mere nullity.¹⁴

E. EXERCISE OF JURISDICTION.—Although jurisdiction may be conferred on a court by the constitution, the legislature may regulate the mode and manner of its exercise if it is does not thereby deprive

- 34 Am. St. Rep. 435; *Carpenter v. Osborne*, 102 N. Y. 552, 561, 7 N. E. 823; *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *De Bemer v. Drew*, 39 How. Pr. 466; *Hall v. Hall*, 30 How. Pr. 51; *Cuff v. Dorland*, 55 Barb. 481; *Crane v. Bunnell*, 10 Paige 333; *King v. Baldwin*, 17 Johns. 384, 8 Am. Dec. 415; *Adee v. Hallett*, 3 App. Div. 308, 38 N. Y. Supp. 273, 73 N. Y. St. 754. N. C.—*Balsley v. Balsley*, 116 N. C. 472, 21 S. E. 954; *Currie v. Clark*, 101 N. C. 321, 7 S. E. 776; *Love v. Neilson*, 54 N. C. 339. Ohio.—*Borntraeger v. Borntraeger*, 7 Ohio Dec. (Reprint) 551, 3 Wkly. L. Bul. 891. Ore.—*Salem Imp. Co. v. McCourt*, 26 Ore. 93, 41 Pac. 1105; *Fleischner v. Citizens' R. E. & Inv. Co.*, 25 Ore. 119, 35 Pac. 174; *Haynes v. Whitsett*, 18 Ore. 454, 22 Pac. 1072; *Heatherly v. Hadley*, 4 Ore. 1. Pa.—*Souder's Appeal*, 57 Pa. 498, 502. S. D.—*Probert v. McDonald*, 2 S. D. 495, 51 N. W. 212, 39 Am. St. Rep. 796. Tenn.—*Allen v. Baugus*, 1 Swan 404. Tex.—*Heidenheimer v. Johnston*, 76 Tex. 200, 13 S. W. 46; *Seymour v. Hill*, 67 Tex. 385, 3 S. W. 313; *Kennedy v. Jarvis*, 1 S. W. 191; *Stein v. Frieberg, Klein & Co.*, 64 Tex. 271; *Chambers v. Cannon*, 62 Tex. 293; *Peticolas v. Carpenter*, 53 Tex. 23; *Houghton v. Rice*, 15 Tex. Civ. App. 561, 40 S. W. 349, 1057, *affirmed*, 93 Tex. 686. Utah.—*Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co.*, 5 Utah 3, 11 Pac. 515. Vt.—*Sanborn v. Kittredge*, 20 Vt. 632, 50 Am. Dec. 58; *Day v. Cummings*, 19 Vt. 496. Va.—*Smith v. Smith's Admr.*, 92 Va. 696, 24 S. E. 280; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165; *Walters v. Farmers Bank*, 76 Va. 12; *Zetelle v. Myers*, 19 Gratt. (40 Va.) 62; *Rust v. Ware*, 6 Gratt. (47 Va.) 50, 52 Am. Dec. 100; *Billups v. Sears*, 5 Gratt. (46 Va.) 31, 50 Am. Dec. 105. W. Va.—*Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. Wis.—*Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75; *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550; *Turner v. Pierce*, 34 Wis. 658. Eng. *Pearce v. Creswick*, 2 Hare 286, 67 Eng. Reprint 118; *Mackenzie v. Johnston*, 4 Madd. 373, 56 Eng. Reprint 742; *Ryle v. Haggie*, 1 Jac. & W. 234, 237, 37 Eng. Reprint 364; *Adley v. Whitstable Co.*, 17 Ves. Jr. 315, 324, 34 Eng. Reprint 122; *Jesus College v. Bloom*, 3 Atk. 263, Ambl. 54, 26 Eng. Reprint 953.
- [a] If a federal court actually acquires jurisdiction, that jurisdiction, although acquired because the constitution or law of a state is claimed to be in contravention to the constitution of the United States, extends to all questions involved in the controversy, and not merely to the question of the violation of the federal constitution. *Coulter v. Louisville & N. R. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. ed. 615; *Penn Mut. Life Ins. Co. v. Austin*, 168 U. S. 685, 695, 18 Sup. Ct. 223, 42 L. ed. 626; *Horner v. United States*, 143 U. S. 570, 576, 12 Sup. Ct. 522, 36 L. ed. 266; *Michigan Railroad Tax Cases*, 138 Fed. 223. See the title "United States Courts."
13. *Plant v. Humphries*, 66 W. Va. 88, 92, 66 S. E. 94, 26 L. R. A. (N. S.) 558.
14. U. S.—*Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464. Ind.—*Hutts v. Martin*, 134 Ind. 587, 592, 33 N. E. 676; *McFadden v. Ross*, 108 Ind. 512, 517, 8 N. E. 161. Ky.—*McKinsey v. Anderson*, 4 Dana 62. Mass.—*Staudish v. Parker*, 2 Pick. 20, 13 Am. Dec. 393. N. H.—*Moulton v. Libbey*, 15 N. H. 480; *King v. Chase*, 15 N. H. 9, 41 Am. Dec. 675. N. J. *Munday v. Vail*, 34 N. J. L. 418. N. Y. *Pray v. Hegeman*, 98 N. Y. 351, 358; *Dunham v. Bower*, 77 N. Y. 76, 33 Am. Rep. 570. Ohio.—*Spoors v. Cowen*, 44 Ohio St. 497, 9 N. E. 132. Pa.—*Kille v. Ege*, 82 Pa. 102, 111; *Martin v. Gernandt*, 19 Pa. 124. Vt.—*Lamoille V. R. Co. v. Bixby*, 57 Vt. 548, 563. Va.—*Seamster v. Blackstock*, 83 Va.

the court of the power granted.¹⁵ And where the existence of certain facts is necessary to give a court jurisdiction, such facts must exist at or before the time the jurisdiction is assumed or exercised.¹⁶ The exercise of the jurisdiction may be suspended but the jurisdiction itself is never suspended.¹⁷ However, the court may lose jurisdiction where it departs from the established mode of procedure governing the class of cases to which the case in question belongs.¹⁸

It is the duty of the court, under proper circumstances, to exercise its jurisdiction,¹⁹ and it may be compelled by mandamus to do so.²⁰

X. TERRITORIAL LIMITS OF JURISDICTION.—A. IN GENERAL.—The general jurisdiction of the courts of a state is co-extensive with its sovereignty, which is limited only by the territory of the state²¹ and is exclusive,²² subject to constitutional limitations,²³ as to all the property and persons within the limits thereof.²⁴ The legislature cannot

232, 2 S. E. 36, 5 Am. St. Rep. 262; *Wade v. Hancock*, 76 Va. 620.

As to collateral attack on such judgment, see 15 STANDARD PROC. 422.

15. *Board of Comrs. of White County v. Gwin*, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; *In re North Chester Election Dist.*, 3 Pa. Co. Ct. 247.

16. *Carney v. Taylor*, 4 Kan. 178.

17. *Sanford v. Sanford*, 28 Conn. 6.

18. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914. See *supra*, IV, D.

19. See *supra*, II, F.

Entertaining collusive and fictitious suits, see the title "Suits and Actions."

Deciding moot or abstract questions, see the title "Suits and Actions."

Actions involving foreign citizens and causes of action arising in other countries, see *infra*, X, B, 2.

20. See the title "Mandamus."

21. *Ariz.*—*Hook v. Hoffman*, 16 *Ariz.* 540, 147 *Pac.* 722. *Ga.*—*Adams v. Lamar*, 8 *Ga.* 83. *Mont.*—*State ex rel. Mackey v. District Court*, 40 *Mont.* 359, 106 *Pac.* 1098, 135 *Am. St. Rep.* 622. *Tenn.*—*Boyd v. State*, 12 *Lea* 687. *Wis.*—*In re O'Connor*, 37 *Wis.* 379, 19 *Am. Rep.* 765.

[a] Every superior court of general jurisdiction has *prima facie* power to act upon all the persons and things within the territorial limits, and subject to the legislative power, of the government of which it is the organ. *Manier v. Trumbo*, 30 *Fed. Cas. No.* 18,309.

[b] **Over Soldiers' Home.**—The jurisdiction of state courts over inmates of a home for disabled soldiers of the federal government is not affected by

the fact that such persons are subject to the rules and articles of war the same as if they were in the army, or by the fact that he has been punished under the rules of the home. *In re O'Connor*, 37 *Wis.* 379, 19 *Am. Rep.* 765.

[c] **Military Offenses.**—Civil courts have concurrent jurisdiction with courts martial over all offenses committed by military officers. *Franklin v. United States*, 216 U. S. 559, 30 *Sup. Ct.* 434, 54 L. ed. 615. See the title "Courts Martial."

22. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *Hook v. Hoffman*, 16 *Ariz.* 540, 147 *Pac.* 722, 730.

[a] The jurisdiction of courts is part and parcel of the power inherent in the state by virtue of its sovereignty. The jurisdiction of the state within its own territory is necessarily exclusive and absolute. It is therefore susceptible of no limitation not imposed by itself, for any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in some other power. *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 224 *Fed.* 188, 191; *The Schooner Exchange*, 7 *Cranch* (U. S.) 116, 3 L. ed. 287.

23. See the titles "Admiralty;" "Indians;" "Ministers, Ambassadors and Consuls;" "United States Courts."

24. *Ariz.*—*Hook v. Hoffman*, 16 *Ariz.* 540, 147 *Pac.* 722. *Ga.*—*Adams v. Lamar*, 8 *Ga.* 83. *Mont.*—*State ex rel. Mackey v. District Court*, 40 *Mont.* 359,

abdicate the jurisdiction of the state over its territory:²⁵ except where lands are purchased with the consent of the state for the purpose designated in the constitution of the United States.²⁶ Certain other exceptions have grown up, as when sovereigns,²⁷ or public ministers of foreign states,²⁸ or where troops of a foreign country²⁹ are present or permitted to pass through the state.

B. OVER PROPERTY PURCHASED BY UNITED STATES.—There is an apparent exception to the exclusive control of the courts of a state over all the property within the state in the case of United States property. Where lands within a state are purchased by the United States government for the purposes specified in the constitution of the United States and congress has vested exclusive jurisdiction over such territory in the United States government the United States courts have exclusive control thereof.³⁰ Under such provision land purchased by the United States within a state with the consent of such state for the erection of forts, magazines, arsenals, dockyards and other needful buildings are within the exclusive jurisdiction of the United States.³¹ This provision has no application to the territories, being applicable only to states,³² nor has it any application to purchases or occupancy by the United States where the state has not consented to such purchase or occupancy.³³ The reservation contained in such grants, to the effect

106 Pac. 1098, 135 Am. St. Rep. 622.

25. *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765.

26. See *infra*, X, B.

27. *Schooner Exchange v. McFadden*, 7 Cranch (U. S.) 116, 136, 3 L. ed. 287.

28. See generally the title "Ministers, Ambassadors and Consuls."

29. *Schooner Exchange v. McFadden*, 7 Cranch (U. S.) 116, 136, 3 L. ed. 287.

30. **U. S.**—*Battle v. United States*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. ed. 670; *United States v. Bevans*, 3 Wheat. 336, 4 L. ed. 404; *United States v. Andem*, 158 Fed. 996; *United States v. Tucker*, 122 Fed. 518; *United States v. Carter*, 84 Fed. 622; *In re Kelly*, 71 Fed. 545. **Colo.**—*Reynolds v. People*, 1 Colo. 179; *Franklin v. United States*, 1 Colo. 35. **Me.**—*State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620. **Mass.**—*Mitchell v. Tibbetts*, 17 Pick. 298; *Com. v. Clary*, 8 Mass. 72. **Miss.**—*State v. Seymour*, 78 Miss. 134, 28 So. 799. **Mont.**—*State v. Tully*, 31 Mont. 365, 78 Pac. 760. **N. Y.**—*People v. Godfrey*, 17 Johns. 225. **Tenn.**—*Divine v. Unaka Nat. Bank*, 125 Tenn. 98, 107, 140 S. W. 747, 39 L. R. A. (N. S.) 586; *Wills v. State*, 3 Heisk. 141. **Tex.**—*Baker v. State*, 47 Tex. Crim. 482, 83

S. W. 1122, 122 Am. St. Rep. 703; *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922. **Wis.**—*In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765.

[a] **Crimes committed upon such place are not cognizable in the state courts.** *Wills v. State*, 3 Heisk. (Tenn.) 141.

[b] **Perjury committed in a state court sitting temporarily upon land subject exclusively to the jurisdiction of the federal government is subject to the criminal jurisdiction of the state courts.** *Exum v. State*, 90 Tenn. 501, 17 S. W. 107, 25 Am. St. Rep. 700, 15 L. R. A. 381.

31. U. S. Const., art. 1, §8, ch. 17.

32. *Reynolds v. People*, 1 Colo. 179; *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808.

[a] **The territorial courts have jurisdiction over misdemeanors on land reserved for naval and military purposes.** *Territory v. Carter*, 19 Hawaii 198.

33. **U. S.**—*Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. ed. 699; *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264; *United States v. Penn*, 48 Fed. 669; *United States v. Stahl*, McCahon 206, 27 Fed. Cas. No. 16,373. **Kan.**

that the state shall have the right to serve civil and criminal process within the territory ceded, is limited to causes of action arising outside of the ceded territory.³⁴

C. OVER CAUSES OF ACTION AND PROPERTY WITHOUT THE STATE.

1. In General. — From the fact that each state has exclusive control over all persons and property within its boundaries it necessarily follows that no state can exercise direct jurisdiction and authority over persons or property without its territory.³⁵ It is a principle universally recognized that laws have no extraterritorial force,³⁶ except so far

Clay v. State, 4 Kan. 49. **N. Y.**—People v. Godfrey, 17 Johns. 225; People v. Lent, 2 Wheeler Crim. Cas. 548. **Tenn.**—Divine v. Unaka Nat. Bank, 125 Tenn. 98, 106, 140 S. W. 747, 39 L. R. A. (N. S.) 586; Wills v. State, 3 Heisk. 141.

34. Divine v. Unaka Nat. Bank, 125 Tenn. 98, 107, 140 S. W. 747, 39 L. R. A. (N. S.) 586.

35. **U. S.**—Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Galpin v. Page, 18 Wall. 350, 367, 21 L. ed. 959. **Ala.**—Woolf v. McGaugh, 175 Ala. 299, 57 So. 754; Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331. **Cal.**—North Alaska Salmon Co. v. Pillsbury, 162 Pac. 93; Watts v. White, 13 Cal. 321. **Ga.**—Dearing v. Bank of Charleston, 5 Ga. 497, 48 Am. Dec. 300. **Ill.**—Wileox v. Conklin, 255 Ill. 604, 99 N. E. 669; Proctor v. Proctor, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673; Munger v. Crowe, 115 Ill. App. 189, affirmed, 219 Ill. 12, 76 N. E. 50; Courtney v. Henry, 114 Ill. App. 635. **Ind.**—Burk v. Simonson, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304; Eaton & H. R. Co. v. Hunt, 20 Ind. 457; Sturgis v. Fay, 16 Ind. 429, 79 Am. Dec. 440. **Ia.**—Curtis v. Armagast, 158 Iowa 507, 516, 138 N. W. 873; Sullivan v. Kenney, 148 Iowa 361, 126 N. W. 349; Buck v. Ellenbolt, 84 Iowa 394, 51 N. W. 22, 15 L. R. A. 187. **Me.**—Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630. **Mass.**—Smith v. Mutual Life Ins. Co., 14 Allen 336; Ewer v. Coffin, 1 Cush. 23, 48 Am. Dec. 587. **Miss.**—Cocke v. Brewer, 68 Miss. 775, 9 So. 823. **Mo.**—Carr v. Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328. **N. J.**—Doherty v. Catskill Cement Co., 72 N. J. L. 315, 65 Atl. 508; Hill v. Nelson, 70 N. J. L. 376, 57 Atl. 411; Lindley v. O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L.

R. A. 79. **N. Y.**—Brisbane v. Pennsylvania R. Co., 205 N. Y. 431, 98 N. E. 752, 44 L. R. A. (N. S.) 274; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679; De Meli v. De Meli, 120 N. Y. 485, 24 N. E. 996, 17 Am. St. Rep. 652; Jones v. Jones, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447. **N. C.**—Hinton v. Penn Mutual L. Ins. Co., 126 N. C. 18, 35 S. E. 182, 78 Am. St. Rep. 636. **Ohio.**—Pittsburg, C. C. & St. L. R. Co. v. Jackson, 83 Ohio St. 13, 93 N. E. 260, 21 Ann. Cas. 1313. **Pa.**—Kelly v. Thomas, 234 Pa. 419, 83 Atl. 307, 51 L. R. A. (N. S.) 122. **S. C.**—McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 51 Am. St. Rep. 794, 28 L. R. A. 655. **Tex.**—Trinity & S. Ry. Co. v. Brown, 91 Tex. 673, 45 S. W. 793; Boggs v. Brown, 82 Tex. 41, 17 S. W. 830; Simpson v. Knox, 1 Posey Unrep. Cas. 569, 576. **Va.**—Wimer v. Wimer, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126. **W. Va.**—Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178; Stevens v. Brown, 20 W. Va. 450. **Wis.**—Pries v. Ashland Light, etc. R. Co., 143 Wis. 606, 128 N. W. 281; Renier v. Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562. **Eng.**—Matthaei v. Galitzin, L. R., 18 Eq. 340.

[a] The determination of the status of citizens of other states is beyond the jurisdiction of a court. Frame v. Thormann, 102 Wis. 653, 79 N. W. 39 (legitimizing adult children of non-residents); St. Sure v. Lindsfelt, 82 Wis. 346, 52 N. W. 308, 33 Am. St. Rep. 50, 19 L. R. A. 515, marriage status of nonresidents.

36. **U. S.**—Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. **Ala.**—Louisville & N. R. Co. v. Nash, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A.

as is allowed by comity,³⁷ and, between the states of this Union, the same rule applies, except as governed by the "full faith and credit" clause of the constitution of the United States and the acts of congress.³⁸ It is upon this principle that courts refuse to exercise jurisdiction to inquire into or regulate the internal affairs of a foreign corporation doing business within the state.³⁹

2. Causes of Action Arising Beyond State.—a. *In General.* Unless provided otherwise by statute,⁴⁰ if an action is transitory, as distinguished from a local action, any court having jurisdiction of the

331. *Colo.*—*Interstate Sav. & Trust Co. v. Wyatt*, 27 *Colo. App.* 217, 147 *Pac.* 444. *W. Va.*—*Pennsylvania R. Co. v. Rogers*, 52 *W. Va.* 450, 44 *S. E.* 300, 62 *L. R. A.* 178; *Stevens v. Brown*, 20 *W. Va.* 450.

[a] It matters not whether it be a kingdom, a state, a county, or a city, or other local district. If it be the former, it is necessarily bounded and limited by the sovereignty of the government itself, which cannot be extraterritorial; if the latter, then the judicial interpretation is that the sovereign has chosen to assign this special limit short of his general authority. *Galpin v. Page*, 18 *Wall. (U. S.)* 350, 21 *L. ed.* 959.

[b] Although the terms of a statute may be broad enough to include lands without the state, the court will not be deemed to have been granted extraterritorial jurisdiction. *Condon v. Mutual Reserve Fund L. Assn.*, 89 *Md.* 99, 42 *Atl.* 944, 73 *Am. St. Rep.* 169, 44 *L. R. A.* 149.

37. *U. S.*—*Pennoyer v. Neff*, 95 *U. S.* 714, 24 *L. ed.* 565. *Ala.*—*Louisville & N. R. Co. v. Nash*, 118 *Ala.* 477, 23 *So.* 825, 72 *Am. St. Rep.* 181, 41 *L. R. A.* 331. *Colo.*—*Interstate Sav. & Trust Co. v. Wyatt*, 27 *Colo. App.* 217, 147 *Pac.* 444.

See *infra*, X, C, 2, b.

[a] Comity is not a rule of law, but a rule of practice, convenience and expediency. While, however, it is not a matter of absolute obligation, it is something more than mere courtesy and good will. *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 224 *Fed.* 188, 192.

38. *Interstate Sav. & Trust Co. v. Wyatt*, 27 *Colo. App.* 217, 147 *Pac.* 444.

As to full faith and credit clause, see 15 *STANDARD PROC.* 645.

39. *Condon v. Mutual Reserve Fund L. Assn.*, 89 *Md.* 99, 42 *Atl.* 944, 73

Am. St. Rep. 169, 44 *L. R. A.* 149; *North State Copper & G. Min. Co. v. Field*, 64 *Md.* 151, 26 *Atl.* 1039; *Wilkins v. Thorne*, 60 *Md.* 253; *Madden v. Penn El. L. Co.*, 181 *Pa.* 617, 37 *Atl.* 817, 38 *L. R. A.* 638.

[a] Reason.—There are obvious difficulties that would be encountered if the courts of one state undertook to adjust the internal affairs of a foreign corporation formed under the laws of a different state and having its habitat within the borders of another sovereignty. The absence of a visitatorial power over such a corporation and the absolute inability to enforce a forfeiture of its charter for a violation of the law, or to remove its officers for misconduct, or to punish them for malversations committed in the place of its domicile, are open and apparent obstacles in the court's pathway, should it assume to exert an extraterritorial jurisdiction. Besides all this, its lack of the means to do full justice, and its want of the machinery to enforce against the corporation in the place of its existence, any decree it might render in such a proceeding indicate, if they do not demonstrate that the legislature never designed to confer a power, the existence of which would or might be utterly fruitless and vain. *Condon v. Mutual Reserve Fund L. Assn.*, 89 *Md.* 99, 42 *Atl.* 944, 73 *Am. St. Rep.* 169, 44 *L. R. A.* 149.

[b] A statute providing that every foreign insurance company doing business in this state shall appoint an agent upon whom process can be served, does not confer upon the courts of this state jurisdiction to regulate the internal government of such corporation. *Condon v. Mutual Reserve Fund L. Assn.*, 89 *Md.* 99, 42 *Atl.* 944, 73 *Am. St. Rep.* 169, 44 *L. R. A.* 149.

40. *Chambers v. Baltimore & O. R. Co.*, 207 *U. S.* 142, 28 *Sup. Ct.* 34, 52 *L. ed.* 143; *Anglo-American Prov. Co.*

subject matter may assume jurisdiction,⁴¹ irrespective of whether the

- v. Davis Prov. Co. No. 1*, 191 U. S. 373, 24 Sup. Ct. 92, 48 L. ed. 225; *Klunck v. Pennsylvania R. Co.*, 148 App. Div. 786, 133 N. Y. Supp. 207.
41. **U. S.**—*Barrow S. S. Co. v. Kane*, 170 U. S. 100, 18 Sup. Ct. 526, 42 L. ed. 964; *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. ed. 439; *Keane Wonder Min. Co. v. Cunningham*, 222 Fed. 821, 138 C. C. A. 247; *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122; *Healey v. Humphrey*, 81 Fed. 990, 27 C. C. A. 39; *Evey v. Mexican Cent. R. Co.*, 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 224 Fed. 188; *Potomac Mill. & Ice Co. v. Baltimore & O. R. Co.*, 217 Fed. 665; *St. Bernard v. Shane*, 201 Fed. 453; *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017; *Delilah v. Jacobs*, 4 Cranch C. C. 238, 7 Fed. Cas. No. 3,773. **Ala.**—*Southern R. Co. v. Jordan*, 192 Ala. 528, 68 So. 418 (by statute); *Watford v. Alabama & Florida Lumb. Co.*, 152 Ala. 178, 44 So. 567; *Richmond & D. R. Co. v. Trousdale & Sons*, 99 Ala. 389, 13 So. 23, 42 Am. St. Rep. 69; *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276; *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119, *distinguishing* *Central R. & Banking Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339. **Ark.**—*Western Union Tel. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168; *St. Louis & S. F. Ry. Co. v. Brown*, 62 Ark. 254, 35 S. W. 225. **Cal.** *Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, 95 Pac. 862; *Roberts v. Duns-muir*, 75 Cal. 203, 16 Pac. 782. **Conn.** *Cristilly v. Warner*, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415; *Vanbuskirk v. Hartford F. Ins. Co.*, 14 Conn. 583, 591. **Ga.**—*Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513 (*reversing* *Baw-knight v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194); *Central Ry. Co. v. Swint*, 73 Ga. 651, 26 Am. & Eng. R. R. Cas. 482; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461. **Ill.**—*Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619, Ann. Cas. 1913D, 568, L. R. A. 1915F, 955; *Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302; *Chicago & E. I. R. Co. v. Rouse*, 178 Ill. 132, 52 N. E. 951, 44 L. R. A. 410; *O'Donnell v. Lewis*, 104 Ill. App. 198. **Ind.**—*Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230. **Ia.**—*Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337; *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 128 N. W. 1, 40 L. R. A. (N. S.) 684; *Morris v. Chicago, R. I. & P. R. Co.*, 65 Iowa 727, 23 N. W. 143, 54 Am. Rep. 39; *Boyce v. Wabash Ry. Co.*, 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730, 23 Am. & Eng. R. R. Cas. 172. **Kan.**—*Hollinger v. Missouri, K. & T. R. Co.*, 94 Kan. 316, 146 Pac. 1034, Ann. Cas. 1916D, 802. **Ky.**—*Louisville & N. R. Co. v. Melton*, 127 Ky. 276, 105 S. W. 366, 110 S. W. 233, 112 S. W. 618. **La.**—*Cohen v. Otis*, 127 La. 6, 53 So. 364. **Mass.**—*Hanlon v. Leyland & Co.*, 223 Mass. 438, 111 N. E. 907, L. R. A. 1917A, 34 (*overruling* *Richardson v. New York Cent. R. Co.*, 98 Mass. 85); *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Sargent v. Sargent*, 168 Mass. 420, 47 N. E. 121; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, 44 N. E. 349, 55 Am. St. Rep. 414; *s. c.*, 172 Mass. 39, 51 N. E. 207, 70 Am. St. Rep. 232, 42 L. R. A. 396; *Walsh v. New York & N. E. R. Co.*, 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 180, 29 N. E. 534, 31 Am. St. Rep. 544; *Peabody v. Hamilton*, 106 Mass. 217. **Mich.**—*Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574; *Thompson v. Michigan Mut. Ben. Assn.*, 52 Mich. 522, 18 N. W. 247; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Miller v. Great Western Ry. Co.*, 1 Mich. N. P. 177. **Minn.**—*Herrick v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, 17 Cent. L. J. 81. **Miss.**—*Louisville & N. R. Co. v. McCaskell*, 98 Miss. 20, 53 So. 348; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977. **Mo.**—*State ex rel. Pacific Mut. Life Ins. Co. v. Grimm*, 239 Mo. 135, 143 S. W. 483; *Johnston v. Chicago G. W. R. Co. (Mo. App.)*, 164 S. W. 260. **Mont.**—*State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622.

cause of action arises by virtue of the common law or statute,⁴² or whether it be of a contractual nature or based on a tort of a personal nature,⁴³ provided the parties are before them,⁴⁴ and the court has juris-

- Neb.**—*Delahaye v. Heitkemper*, 16 Neb. 475, 20 N. W. 385. **Nev.**—*Christensen v. Floriston Pulp & Paper Co.*, 29 Nev. 552, 92 Pac. 210. **N. H.**—*Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467; *Laird v. Connecticut & P. R. R. Co.*, 62 N. H. 254, 13 Am. St. Rep. 564; *Holyoke v. Clark*, 54 N. H. 578. **N. J.**—*Ackerson v. Erie R. Co.*, 31 N. J. L. 309; *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190. **N. Y.**—*Hutchinson v. Ward*, 192 N. Y. 375, 85 N. E. 890, 127 Am. St. Rep. 909; *Flynn v. Central R. Co.*, 142 N. Y. 439, 37 N. E. 514; *Reed v. Chilson*, 142 N. Y. 152, 36 N. E. 884; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Robin v. Long*, 60 How. Pr. 200; *Waisikoski v. Philadelphia & R. C. & I. Co.*, 173 App. Div. 538, 159 N. Y. Supp. 906; *Payne v. New York, etc. R. Co.*, 157 App. Div. 302, 142 N. Y. Supp. 241; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Wertheim v. Clergue*, 53 App. Div. 122, 65 N. Y. Supp. 750; *McFadden v. Innes*, 60 Misc. 543, 112 N. Y. Supp. 912; *Morris v. Altstedter*, 156 N. Y. Supp. 1103. **N. C.**—*Brady v. Brady*, 161 N. C. 324, 77 S. E. 235, 44 L. R. A. (N. S.) 279; *Jackson v. Hanna*, 53 N. C. 188. **Ohio.**—*Thayer v. Brooks*, 17 Ohio 489, 49 Am. Dec. 474. **Okla.**—*Hays v. King*, 44 Okla. 180, 143 Pac. 1142. **Pa.**—*Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200. **R. I.**—*O'Reilly v. New York & N. E. R. Co.*, 16 R. I. 383, 17 Atl. 171, 19 Atl. 244, 5 L. R. A. 364, 6 L. R. A. 719. **Tenn.**—*Whitlow v. Nashville, C. & St. L. R. Co.*, 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 503; *Ducktown Sulphur, C. & I. Co. v. Barnes*, 60 S. W. 593; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. 341, 35 Am. Rep. 705. **Tex.**—*Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711; *El Paso & S. W. Co. v. Chisholm* (Tex. Civ. App.), 180 S. W. 156; *Southern Pac. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 106 S. W. 766; *Southern Pac. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441; *Missouri, K. & T. R. Co. v. Godair Comm. Co.*, 39 Tex. Civ. App. 298, 87 S. W. 871, *affirmed*, 101 Tex. 648; *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401; *St. Louis & S. F. R. Co. v. Smith*, 34 Tex. Civ. App. 612, 79 S. W. 340, *affirmed*, 98 Tex. 630; *Atchison, T. & S. F. R. Co. v. Keller*, 33 Tex. Civ. App. 358, 76 S. W. 801, *affirmed*, 97 Tex. 625; *Mayer v. Brown*, 4 Wills. Civ. Cas., §128, 16 S. W. 788. **Vt.**—*Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102; *McLeod v. Connecticut & P. R. Co.*, 58 Vt. 727, 6 Atl. 648. **Va.**—*Norfolk & W. R. Co. v. Denny's Admr.*, 106 Va. 383, 56 S. E. 321; *Chesapeake & O. Ry. Co. v. American Exch. Bank*, 92 Va. 495, 23 S. E. 935, 44 L. R. A. 449; *Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583; *Shaver v. White*, 6 Munf. (20 Va.) 110, 8 Am. Dec. 730. **Wash.**—*Reynolds v. Day*, 79 Wash. 449, 140 Pac. 681; *Olympia Min. & Mill. Co.*, 64 Wash. 545, 117 Pac. 260. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503; *Curtis v. Bradford*, 33 Wis. 190. **Wyo.**—*Studebaker Bros. Co. v. Mau*, 14 Wyo. 68, 82 Pac. 2.
42. **U. S.**—*Tennessee Coal, Iron & R. Co. v. George*, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. ed. 997; *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. ed. 439. **Ind.**—*Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67; *Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230. **Mass.**—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. **Pa.**—*Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200.
43. *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219.
44. See cases cited in preceding note and following cases: **Ga.**—*Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, *reversing* *Baw-knight v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194. **Mich.**—*Thompson v. Michigan Mut. Ben. Assn.*, 52 Mich. 522, 18 N. W. 247. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68

diction of the subject matter.⁴⁵ This jurisdiction of a transitory action exists even where the cause of action arose in a foreign country,⁴⁶ or on the high seas.⁴⁷ The court will entertain jurisdiction whether the parties are resident or nonresident,⁴⁸ natural or artificial persons.⁴⁹ But if the action is a local one it cannot be brought in another state.⁵⁰

What Are Transitory Actions.—In determining whether the action be local or transitory in its nature, the principal question involved in the

N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

[a] The true test of jurisdiction is not residence or nonresidence of the plaintiff, or the place where the cause of action originated, but whether the defendant can be found and served in the jurisdiction where the cause of action is asserted. *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, reversing *Bawknigh v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194.

45. *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

46. **U. S.**—*Evey v. Mexican Cent. R. Co.*, 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387. **Cal.**—*Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782. **Ia.**—*Bradbury v. Chicago, R. I. & P. R. Co.*, 149 Iowa 51, 59, 128 N. W. 1, 40 L. R. A. (N. S.) 684. **Mich.**—*Great Western R. Co. v. Miller*, 19 Mich. 305. **N. Y.**—*Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564; *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219. **Tex.**—*Mendiola v. Gonzales* (Tex. Civ. App.), 185 S. W. 389; *Banco Minero v. Ross* (Tex. Civ. App.), 138 S. W. 224; *s. c.*, 106 Tex. 522, 172 S. W. 711; *Mexican Cent. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282. **Vt.**—*Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102, Canada. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

[a] That the cause of action arose in a foreign country does not of itself preclude jurisdiction in the courts of one of the United States. *Mexico Cent. Ry. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282, affirmed, 93 Tex. 714.

[b] Under a statute authorizing a suit against a foreign corporation only where the cause of action arose in the state, where it arises in a foreign country its courts have no jurisdiction.

Wester v. Casein Co., 140 App. Div. 442, 125 N. Y. Supp. 335.

47. **U. S.**—*La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. ed. 973; *The Hamilton*, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264. **Mass.**—*Souden v. Fore River Ship Bldg. Co.*, 223 Mass. 509, 112 N. E. 82. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

[a] In case of a death occurring upon the high seas, an action may be maintained to enforce a remedy given by the state where the vessel is owned. *Souden v. Fore River Ship Bldg. Co.*, 223 Mass. 509, 112 N. E. 82.

48. **Cal.**—*Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782. **Ga.**—*Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513. **Mass.**—*Barrell v. Benjamin*, 15 Mass. 354. **Miss.**—*Louisville & N. R. Co. v. McCaskell*, 98 Miss. 20, 53 So. 348; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. **Mont.**—*State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. **Tex.**—*Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 21, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349; *Southern Pac. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441.

See *infra*, X, B, 2, c.

49. *Louisville & N. R. Co. v. McCaskell*, 98 Miss. 20, 53 So. 348; *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

Where defendant is a foreign corporation, see 5 STANDARD PROC. 734.

50. **Ala.**—*Howard v. Ingersoll*, 23 Ala. 673. **Ill.**—*Eachus v. Illinois & M. Canal*, 17 Ill. 534. **Mass.**—*Sumner v. Finegan*, 15 Mass. 280. **N. Y.**—*American Tel. Co. v. Middleton*, 80 N. Y. 408; *Dodge v. Colby*, 37 Hun 515, 2 How. Pr. (N. S.) 475; *Day v. Sun Ins. Office*, 40 App. Div. 305, 57 N. Y. Supp. 1033; *Genet v. Delaware, etc. Canal Co.*, 56 Hun 640, 8 N. Y. Supp. 822, 29 N. Y. St. 954. **Tex.**—*Morris*

case must be considered.⁵¹ The distinction between local and transitory actions exists in the nature of the subject of the injury, and not in the means used or the places at which the cause of action arises.⁵² A true statement of the test between a local and a transitory action is whether the injury is done to a subject-matter which, in its nature, could not arise beyond the locality of its situation, in contradistinction to the subject causing the injury.⁵³ If the principal fact carry with it the idea of some certain place, for example, relates to land, it is local, and the action must be maintained in the place where it is situated.⁵⁴ Actions are deemed transitory where the transactions on which they are founded might have taken place anywhere.⁵⁵ Thus actions upon contract,⁵⁶ ac-

v. Missouri Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349 (trespasses on land); *Southern Pac. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 106 S. W. 766. **Vt.** *Niles v. Howe*, 57 Vt. 388. **Wis.**—*Bettys v. Milwaukee & St. P. Ry. Co.*, 37 Wis. 323.

[a] If a part of the railroad company's wing dam was built in Texas, so as to give the court jurisdiction to try the cause as any part of the damage to the real estate, the court could hear the entire cause, and the jury could consider the entire producing or approximate cause of the damage. *Armendiaz v. Stillman*, 54 Tex. 623; *Southwestern Portland Cement Co. v. Kezer* (Tex. Civ. App.), 174 S. W. 661.

51. *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. ed. 127; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; *Columbia Nat. S. D. Co. v. Morton*, 28 App. Cas. 288, 8 Ann. Cas. 511, 7 L. R. A. (N. S.) 114.

52. **Mo.**—*Mason v. Warner*, 31 Mo. 508. **N. C.**—*Brady v. Brady*, 161 N. C. 324, 77 S. E. 235, 44 L. R. A. (N. S.) 279; *Perry v. Seaboard Air Line R. Co.*, 153 N. C. 117, 68 S. E. 1060. **Vt.**—*McLeod v. Connecticut & P. R. R. Co.*, 58 Vt. 727, 732, 6 Atl. 648.

53. *Mattix v. Swepston*, 127 Tenn. 693, 155 S. W. 928.

[a] The unerring test by which it may be determined, whether a particular cause of action sounding in damages is local or transitory—"inheres in the nature of the subject of the injury as differing from the means whereby and the mere place at which the injury was inflicted. If the subject of the injury be real estate or an easement, . . . obviously the action

must be local, for the reason that the injury to the particular real estate or easement could not possibly have arisen anywhere else than where the thing injured was actually situated. But if the subject of the injury be an individual, then an injury to that individual's person, no matter by what means occasioned or where afflicted, is essentially an injury to a subject not having a fixed, . . . immovable location; and an action to recover damages therefor would necessarily be transitory." *Potomac Milling & Ice Co. v. Baltimore & O. R. Co.*, 217 Fed. 665.

54. *Columbia Nat. S. Co. v. Morton*, 28 App. Cas. 288, 8 Ann. Cas. 511, 7 L. R. A. (N. S.) 114.

55. *Livingston v. Jefferson*, 1 Brock. 203, 15 Fed. Cas. No. 8,411.

[a] The fundamental question is whether there is substantive right originating in one state and a corresponding liability which follows the person against whom it is sought to be enforced into another state. *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

56. **U. S.**—*Selover B. & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. ed. 146, *affirming* 109 Minn. 136, 123 N. W. 291. **Ky.**—*Campbell v. Ritter Lumb. Co.*, 140 Ky. 312, 131 S. W. 20, 140 Am. St. Rep. 385. **Mich.**—*Millar v. Hilton*, 189 Mich. 635, 155 N. W. 574.

[a] An action against a surety upon a contractor's bond is transitory and may be brought in a state where the surety did business, though the house was constructed upon property situated beyond the state. *American Surety Co. v. Huey*, etc. Co. (Tex. Civ. App.), 191 S. W. 617.

tions to enforce the statutory liability of a stockholder in a corporation,⁵⁷ and actions for injury to the person,⁵⁸ or for injury to,⁵⁹ or con-

57. *Whitman v. Citizens' Bank*, 110 Fed. 503, 49 C. C. A. 122.

58. **U. S.**—*Achison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. ed. 695; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. ed. 829; *Keane Wonder Min. Co. v. Cunningham*, 222 Fed. 821, 138 Fed. 247; *Olson v. Buffalo Hump Min. Co.*, 130 Fed. 1017; *Hills v. Richmond & D. R. Co.*, 37 Fed. 660. **Ala.** *Southern R. Co. v. Jordan*, 192 Ala. 528, 68 So. 418; *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276; *Alabama G. S. R. Co. v. Thomas*, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119. **Ga.**—*Watson v. Richmond & D. R. Co.*, 91 Ga. 222, 18 S. E. 306. **Ind.** *Cincinnati, H. & D. R. Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, 10 Am. St. Rep. 67. **Ia.**—*Boyce v. Wabash Ry. Co.*, 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730. **Kan.**—*McGonigle v. Achison*, 33 Kan. 726, 7 Pac. 550. **Mass.**—*Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400. **Miss.**—*Louisville & N. R. Co. v. McCaskell*, 98 Miss. 20, 53 So. 348. **Mo.**—*Burdiet v. Missouri Pac. Ry. Co.*, 123 Mo. 221, 27 S. W. 453, 45 Am. St. Rep. 528, 26 L. R. A. 384; *Johnston v. Chicago Great W. R. Co.* (Mo. App.), 164 S. W. 260. **N. J.**—*Ackerson v. Erie R. Co.*, 31 N. J. L. 309; *Hale v. Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190. **N. Y.**—*Flynn v. New Jersey Cent. R. Co.*, 142 N. Y. 439, 37 N. E. 514; *Beach v. Bay State Co.*, 16 How. Pr. 1, 6 Abb. Pr. 415; *Burdiek v. Freeman*, 46 Hun 138, 10 N. Y. St. 756, 27 N. Y. Wkly. Dig. 313; *Newman v. Goddard*, 3 Hun 70, 48 How. Pr. 363, 5 Thomp. & C. 299. **Ore.**—*Shmit v. Day*, 27 Ore. 110, 39 Pac. 870. **S. C.**—*Crosby v. Seaboard Air Line Ry.*, 81 S. C. 24, 61 S. E. 1064. **Tenn.**—*Mattix v. Swepston*, 127 Tenn. 693, 155 S. W. 928; *Ducktown Sulphur, C. & I. Co. v. Barnes*, 60 S. W. 593. **Tex.**—*Willis v. Missouri Pac. R. Co.*, 61 Tex. 432, 48 Am. Rep. 301; *Mendiola v. Gonzales* (Tex. Civ. App.), 185 S. W. 389; *El Paso & S. W. Co. v. Chisholm* (Tex. Civ. App.), 180 S. W. 156; *Southern Pac. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441; *Gulf, C. & S. F. R. Co. v. Gibson*, 42 Tex. Civ. App. 306, 93 S. W. 469; *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401.

Wis.—*McCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503; *Curtis v. Bradford*, 33 Wis. 190.

[a] **Action for negligence** arising from failure to make repairs on road is not local under Vermont statutes. *Hunt v. Pownall*, 9 Vt. 411.

[b] **Illustrations.**—(1) Transitory actions include actions of false imprisonment (**Kan.**—*McGonigle v. Achison*, 33 Kan. 726, 7 Pac. 550. **N. H.**—*Henry v. Sargeant*, 13 N. H. 321, 40 Am. Dec. 146. **N. Y.**—*Tupper v. Morin*, 25 Abb. N. C. 398, 12 N. Y. Supp. 310), (2) malicious prosecution (*Missouri, K. & T. Ry. Co. v. Craddock* [Tex. Civ. App.], 174 S. W. 965), (3) slander (*Hull v. Vreeland*, 42 Barb. [N. Y.] 543, 18 Abb. Pr. 182; *Lister v. Wright*, 2 Hill [N. Y.] 320), (4) assault and battery (*Watts v. Thomas*, 2 Bibb [Ky.] 458; *Armstrong v. Foote*, 11 Abb. Pr. [N. Y.] 384), (5) unfair competition in trade founded upon fraud (*Morris v. Altstedter*, 156 N. Y. Supp. 1103), (6) and actions for damage caused by an unreasonable discrimination practiced in another state in violation of the law of that state on the subject. *McDuffee v. Portland & R. R. R.*, 52 N. H. 430, 13 Am. Rep. 72.

59. **U. S.**—*Potomac Mill. & Ice Co. v. Baltimore & O. R. Co.*, 217 Fed. 665. **Ark.**—*Moore v. Winter*, 67 Ark. 189, 53 S. W. 1057. **Ia.**—*Boyce v. Wabash Ry. Co.*, 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730. **Mo.**—*Mason v. Warner*, 31 Mo. 508; *Gregg v. Union Pac. R. Co.*, 48 Mo. App. 494. **N. H.** *Laird v. Connecticut & P. R. R. Co.*, 62 N. H. 254, 13 Am. St. Rep. 564. **N. Y.**—*Goodwin v. Young*, 34 Hun 252; *Barney v. Burnstenbinder*, 7 Lans. 210, 64 Barb. 212. **Tex.**—*Silberberg v. Trilling*, 82 Tex. 523, 18 S. W. 591; *Missouri Pac. Ry. Co. v. Cullers*, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542; *Southwestern Port C. Co. v. Kezer* (Tex. Civ. App.), 174 S. W. 661; *St. Louis, A. & T. Ry. Co. v. Holden*, 3 Wills. Civ. Cas., §323. **Utah.**—*Allen v. Allen*, 47 Utah 145, 151 Pac. 982, wheat severed from realty.

version of,⁶⁰ personal property, or for wrongful death⁶¹ are transitory and may be instituted in the courts of a state other than that where the injury occurred, while actions for injury to real property are local.⁶²

b. *Rule Rests Upon Comity.*—The right to enforce a cause of action in another jurisdiction does not exist because the laws of the state have extraterritorial effect,⁶³ but it rests upon comity,⁶⁴ because it is a right which the plaintiff legitimately acquired, and which still belongs

[a] Trover for the conversion of soil, minerals, or timber from land irrespective of its location. **U. S.** *Phelps v. Church of O. L. H. of Christians*, 99 Fed. 683, 40 C. C. A. 72. **Cal.**—*Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340. **Me.**—*Whidden v. Seelye*, 40 Me. 247, 255, 63 Am. Dec. 661. **Mont.** *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. **N. C.**—*Brady v. Brady*, 161 N. C. 324, 77 S. E. 235, 44 L. R. A. (N. S.) 279; *Williams v. Elm City Lumb. Co.*, 154 N. C. 306, 309, 70 S. E. 631, Ann. Cas. 1912A, 917. **Wis.**—*Tyson v. McGuineas*, 25 Wis. 656.

60. *Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711.

61. See 6 STANDARD PROC. 378.

[a] That the contract of hiring was made in a state where no statute existed giving an action for death by wrongful act, does not deprive the decedent's relatives of an action where the death occurred in a state where such a remedy was given and the contract was partly performed within the latter state. *American Radiator Co. v. Rogge*, 86 N. J. L. 436, 94 Atl. 85.

62. *Mattix v. Swepston*, 127 Tenn. 693, 155 S. W. 928. See *infra*, X, B, 3.

63. *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200.

64. **U. S.**—*The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. ed. 152; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 224 Fed. 188, 192; *The Bee*, 1 Ware 336, 3 Fed. Cas. No. 1,219. **Ind.**—*Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230. **Mass.**—*National Tel. Mfg. Co. v. Du Bois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503, 30 L. R. A. 628; *Smith v. Mutual Life Ins. Co.*, 14 Allen 336. **Mich.**—*Cofrode v. Circ. Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R.

A. 511; *Great Western R. Co. v. Miller*, 19 Mich. 305; *Miller v. Great Western Ry. Co.*, 1 Mich. N. P. 177. **Miss.** *Mitchell v. Wells*, 37 Miss. 235. **N. Y.** *Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949; *Ferguson v. Neilson*, 58 Hun 604, 11 N. Y. Supp. 524, 33 N. Y. St. 814; *Mandel Bros. v. Simpson*, 122 N. Y. Supp. 397. **S. D.**—*Knittle v. Ellenbuseh*, 159 N. W. 893. **Tex.** *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 21, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349; *El Paso & S. W. Co. v. Chisholm* (Tex. Civ. App.), 180 S. W. 156. **Wash.**—*Olympia Min. & Mill. Co. v. Kerns*, 64 Wash. 545, 117 Pac. 260. **Wis.**—*Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 106 N. W. 821, 115 Am. St. Rep. 1063, 15 L. R. A. (N. S.) 1045; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

[a] The development of the rule is traced in *Christensen v. Floriston Pulp & Paper Co.*, 29 Nev. 552, 92 Pac. 210, the court concluding that: "The right to bring such an action in a foreign jurisdiction does not rest, as some of the decisions seem to put it, upon principles of comity, but rather because 'the action by which the remedy is to be enforced is a personal, and not a real action, and is of that character which the law recognizes as transitory and not local.'" See also *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337.

[b] The right to enforce an action in a federal court in one state in a cause of action arising under the laws of another state, depends entirely upon the statutes and the policy of such other state. *St. Bernard v. Shane*, 201 Fed. 453.

[c] A foreign corporation having filed its articles of incorporation and complied with the law of the forum is in no better position to demand the exercise of jurisdiction than any other party. *Olympia Min. & Mill. Co. v. Kerns*, 64 Wash. 545, 117 Pac. 260.

to him.⁶⁵ Each sovereignty has the right to finally determine for itself; not only the nature and extent of the duty to exercise jurisdiction but the occasions on which its exercise may be justly demanded,⁶⁶ subject only to the constitutional requirement that citizens of a sister state be not discriminated against.⁶⁷ The court accordingly, pursuant to the policy of the sovereignty, may dismiss an action⁶⁸ if for any reason

[d] It cannot be said that a citizen is not to be governed and bound by the laws of his own country; nor can he, in disregard of such laws, go into the courts of another country and ask them, as a matter of comity, to redress wrongs which the laws of his own domicile require him to seek redress for in the courts of his own country. The very principle upon which comity between foreign or sister states is based repels the idea that he has even the shadow of a claim to any such right. *Southern Pac. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 210, 106 S. W. 766.

[e] The doctrine of comity owes its origin and authority to the voluntary adoption and consent of nations. *Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467.

[f] The principle "loosely called comity" is not of courts but of nations. *Sto. Conf. Law*, §§ 37, 38; *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 10 L. ed. 274; *Crippen v. Loughton*, 69 N. H. 540, 550, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467.

65. *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301.

66. **U. S.**—*Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143, *affirming* 73 Ohio St. 16, 76 N. E. 91. **N. H.**—*Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467. **N. Y.**—*Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564; *Winchester v. Browne*, 59 Hun 626, 13 N. Y. Supp. 655, 37 N. Y. St. 542. **Tex.**—*Lanning v. Gregory*, 100 Tex. 310, 99 S. W. 542, 123 Am. St. Rep. 809, 10 L. R. A. (N. S.) 690; *Morris v. Missouri Pac. Ry. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349.

[a] A state may through its legislature say what transitory action arising in other jurisdictions shall be enforced in its courts and upon what con-

ditions they may be enforced. *St. Bernard v. Shane*, 201 Fed. 453.

[b] Under the Missouri statutes the right of a nonresident to sue another nonresident upon a cause of action arising in another state does not depend upon comity. *State ex rel. Pacific Mut. Life Ins. Co. v. Grimm*, 239 Mo. 135, 161, 143 S. W. 483.

67. *Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 148, 28 Sup. Ct. 34, 52 L. ed. 143, *affirming* 73 Ohio St. 16, 76 N. E. 91.

[a] **Privilege and Immunity Guaranteed by Constitution of United States.**—One of the "privileges and immunities" referred to in the constitutional provision is the right to bring and maintain an action in the courts of the state. Any citizen of this state may bring an action in the court of one state upon a transitory cause of action arising in another state, and against a citizen of another state, provided he can obtain jurisdiction of the person of the defendant in this state. This is one of the rights guaranteed him under our constitution and laws. If the words "privileges and immunities" in the constitutional clause in question refer to the right to maintain actions, then a resident of another state has the same right to bring an action in the courts of this state upon a cause of action arising in another state, and against a citizen of another state, that a citizen of this state has, because the constitution guarantees him the same right as a citizen of this state. *Eingartner v. The Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

68. *Disconto Gesellschaft v. Terlingen*, 127 Wis. 651, 106 N. W. 821, 115 Am. St. Rep. 1063, 15 L. R. A. (N. S.) 1045; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503. See also cases in preceding notes, and *infra*, X, B, 2, c.

it seems improper to take jurisdiction, or if it refers to property situated in the other state.⁶⁹

It has been held that the court will, in the exercise of a sound judicial discretion, decline jurisdiction of actions between foreigners or non-residents founded upon personal injuries or purely personal wrongs, committed in another jurisdiction unless special circumstances are shown to exist which require the retention of jurisdiction,⁷⁰ but this rule has not been applied in cases of a contractual nature,⁷¹ but according to some authorities, neither the crowded condition of the calendar of the court,⁷² nor the length of time required for the trial of a cause⁷³ nor the expense entailed upon the county,⁷⁴ are valid reasons for refusing to entertain such a case.

c. *Exceptions and Limitations to Rule.*—To the rule under discussion there are some exceptions in which actions must be brought within the country where they arose.⁷⁵ These exceptions exist where the foreign law governing the case is in direct contravention of the law and policy of the forum,⁷⁶ where the remedy prescribed by the *lex loci delicti* is

69. *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416; *Olympia Min. & Mill. Co. v. Kerns*, 64 Wash. 545, 117 Pac. 260.

70. *Pietrarola v. New Jersey & H. R. Ry. & F. Co.*, 197 N. Y. 434, 91 N. E. 120; *Hoes v. New York N. H. & H. R. Co.*, 173 N. Y. 435, 441, 66 N. E. 119; *English v. New York N. H. & H. R. Co.*, 161 App. Div. 831, 146 N. Y. Supp. 963; *Payne v. New York, S. & W. R. Co.*, 157 App. Div. 302, 142 N. Y. Supp. 241; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619.

[a] **Where Beneficiaries Are Non-resident and Nominal Plaintiff Is Resident.**—Although the plaintiff is a resident, if those to be solely benefited reside beyond the estate, the court will not entertain an action founded on a wrong occurring in another state. *Pietrarola v. New Jersey & H. R. Ry. & F. Co.*, 197 N. Y. 434, 91 N. E. 120.

[b] **If both parties intend to return to the country of which they are residents, the court will not take jurisdiction.** *Gardner v. Thomas*, 14 Johns. (N. Y.) 134, 7 Am. Dec. 445; *De Witt v. Buchanan*, 54 Barb. (N. Y.) 31.

[c] **Where the defendant has absconded and does not intend to return to the foreign state, jurisdiction will be entertained.** *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219. *Compare Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 106 N. W. 821, 15 L. R. A. (N. S.) 1045.

[d] **On its own motion, the court may refuse to entertain jurisdiction.**

Winchester v. Browne, 59 Hun 626, 13 N. Y. Supp. 655, 37 N. Y. St. 542.

71. *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219.

72. *Cofrode v. Cire. Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

73. *Cofrode v. Cire. Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

74. *Cofrode v. Cire. Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

75. *Southern Pac. Co. v. Dusablon*, 48 Tex. Civ. App. 203, 106 S. W. 766.

76. **U. S.**—*Chambers v. Baltimore & O. R. Co.*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143; *St. Bernard v. Shane*, 201 Fed. 453. **Conn.**—*Cristilly v. Warner*, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415. **Ga.**—*Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, reversing *Bawknigh v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194.

Ill.—*Schlee v. Guckenheimer*, 179 Ill. 593, 54 N. E. 302. **Ind.**—*Lake Shore & M. S. R. Co. v. Teeters*, 166 Ind. 335, 77 N. E. 599, 5 L. R. A. (N. S.) 425.

Ia.—*Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337. **La.**—*Petit's Succession*, 49 La. Ann. 625, 21 So. 717, 62 Am. St. Rep. 659.

Mass.—*Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544. **N. H.**—*Crippen v. Loughton*, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467. **N. Y.**—*In re Romero*, 58 Misc. 319, 107 N. Y. Supp. 621; *Mandel Bros. v. Simpson*, 122 N. Y. Supp. 397. **N. C.**—*Carpenter, Bag-*

penal in character," and where the statute in creating the liability at the same time created a mode of redress peculiar to that state by which

got & Co. *v.* Hanes, 167 N. C. 551, 83 S. E. 577. **Ohio.**—Wabash R. Co. *v.* Fox, 64 Ohio St. 133, 142, 59 N. E. 888, 83 Am. St. Rep. 739. **Tex.**—Southern Pac. Co. *v.* Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766. **Vt.**—Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102. **Wis.**—Anderson *v.* Milwaukee & St. P. Ry. Co., 37 Wis. 321. **Wyo.** Studebaker Bros. Co. *v.* Mau, 14 Wyo. 68, 82 Pac. 2.

[a] The policy of the state must be determined from its constitution, laws and judicial decisions, not by the varying opinions of lawyers or judges as to the demands or interest of the public. Southern Pac. Co. *v.* Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766.

[b] Primarily the legislature must be held to be the judge of questions of public policy, and, if it has spoken plainly either for or against the enforcement of a statute of its sister state in a given case, the courts must obey its mandate. Baltimore & O. R. Co. *v.* Chambers, 73 Ohio St. 16, 76 N. E. 91, 11 L. R. A. (N. S.) 1012, *affirmed*, 207 U. S. 142, 28 Sup. Ct. 34, 52 L. ed. 143.

[c] Character of Difference Necessary Within Rule.—(1) The fact that the law of the forum is in many respects materially different from that where the cause of action arose, where such difference does not amount to a fundamental difference of policy is not of itself sufficient to warrant the court in refusing to take jurisdiction. **U. S.** Dennick *v.* Central R. R. Co., 103 U. S. 11, 26 L. ed. 439. **Ill.**—Hanna *v.* Grand Trunk Ry. Co., 41 Ill. App. 116. **Ia.** Armbruster *v.* Chicago, R. I. & P. R. Co., 166 Iowa 155, 147 N. W. 337. **Mass.** Walsh *v.* New York & N. E. R. Co., 160 Mass. 571, 36 N. E. 584, 39 Am. St. Rep. 514; Carson *v.* Dunham, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202. **Minn.**—Herrick *v.* Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, 17 Cent. L. J. 81. **Mo.**—St. Joseph F. & M. Ins. Co. *v.* Leland, 90 Mo. 177, 2 S. W. 431, 59 Am. Rep. 9. **N. H.**—Hile *v.* Boston & M. R. R. Co., 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714; Rice *v.* Merrimaek Hosiery Co., 56 N. H. 114. **Vt.**—Morrisette *v.* Canadian Pac. R. Co., 76 Vt. 267, 56 Atl. 1102. **Wis.**—Eingartner *v.* Illinois Steel Co., 94 Wis.

70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503. (2) To justify a court in refusing to enforce a right of action which accrued under the law of another state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens. Keane Wonder Min. Co. *v.* Cunningham, 222 Fed. 821, 138 C. C. A. 247.

77. **U. S.**—Huntington *v.* Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265, 8 Sup. Ct. 1370, 32 L. ed. 239; *Ex parte* Dos Santos, 2 Brock. 493, 7 Fed. Cas. No. 4,016. **Conn.**—Cristilly *v.* Warner, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415. **D. C.**—Hansel *v.* Chapman, 2 App. Cas. 361. **Ill.** Raisor *v.* Chicago & A. R. Co., 117 Ill. App. 488, *approved*, 215 Ill. 47, 74 N. E. 69, 106 Am. St. Rep. 153, providing for fixed amount for death by wrongful act. **Ia.**—Armbruster *v.* Chicago, R. I. & P. R. Co., 166 Iowa 155, 147 N. W. 337. **Kan.**—Matheson *v.* Kansas City, Ft. S. & M. R. Co., 61 Kan. 667, 60 Pac. 747; Dale *v.* Atchison, T. & S. F. R. Co., 57 Kan. 601, 47 Pac. 521. **Md.** Ordway *v.* Baltimore Cent. N. Bank, 47 Md. 217, 28 Am. Rep. 455; First Nat. Bank of Plymouth *v.* Price, 33 Md. 487, 3 Am. Rep. 211. **Mass.**—Howarth *v.* Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Higgins *v.* Central N. E. & W. R. Co., 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; Com. *v.* Green, 17 Mass. 515. **Minn.**—Gulledge Bros. Lumb. Co. *v.* Wenatchee Land Co., 122 Minn. 266, 142 N. W. 305, 46 L. R. A. (N. S.) 697. **Miss.**—Louisville & N. R. Co. *v.* McCaskell, 98 Miss. 20, 53 So. 348. **Mo.**—Cary *v.* Schmeltz, 141 Mo. App. 570, 125 S. W. 532. **N. H.** Hill *v.* Boston & M. R. R. Co., 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714. **N. Y.**—Peterson *v.* Walsh, 1 Daly 182; Loueks *v.* Standard Oil Co., 92 Misc. 475, 156 N. Y. Supp. 7; Wollman *v.* National Fire Ins. Co., 72 Misc. 477, 131 N. Y. Supp. 335; Venner *v.* New York Cent. R. Co., 158 N. Y. Supp. 602 (statute forbidding consolidation of parallel or competing lines of railway); Mandel Bros. *v.* Simpson, 122 N. Y.

alone the wrong is to be remedied,⁷⁸ although it has been held that a transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that the action must be brought in local domestic courts.⁷⁹ A court will not enforce the laws of another jurisdiction or the rights arising thereunder which it conceives to be injurious to the public rights of the forum,⁸⁰ or will work injustice to its citizens,⁸¹ or which offends against the canons of

Supp. 397. **Ohio.**—United States v. Campbell, Tapp. 61. **Okla.**—Mohr v. Sands, 44 Okla. 330, 133 Pac. 238, 144 Pac. 381, statute providing for treble damages against attorney guilty of fraud or deceit toward client. **Pa.** Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 Atl. 1085, 128 Am. St. Rep. 823. **Tenn.**—Whitlow v. Nashville, C. & St. L. R. Co., 114 Tenn. 344, 84 S. W. 618, 68 L. R. A. 503. **Tex.**—Southern Pac. Co. v. Dusablon, 48 Tex. Civ. App. 203, 106 S. W. 766.

[a] Whether a law is a penal law, (1) in the international sense, so that it cannot be enforced in the courts of another state, depends upon whether its purpose is to punish offenses against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. **U. S.** Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; Evey v. Mexican Cent. R. Co., 81 Fed. 294, 26 C. C. A. 407, 38 L. R. A. 387. **Colo.** Interstate Sav. & Trust Co. v. Wyatt, 27 Colo. App. 217, 147 Pac. 444. **Ia.** Boyce v. Wabash Ry. Co., 63 Iowa 70, 18 N. W. 673, 50 Am. Rep. 730. **Miss.** Louisville & N. R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348. **N. H.**—Hill v. Boston & M. R. Co., 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714. **Va.** Chesapeake & O. Ry. Co. v. American Exch. Bank, 92 Va. 495, 503, 23 S. E. 935, 44 L. R. A. 449. (2) The question as to whether a statute is penal or not must be determined by the courts of the state where it is sought to enforce same. **U. S.**—Huntington v. Attrill, 146 U. S. 657, 685, 13 Sup. Ct. 224, 36 L. ed. 1123. **N. H.**—Hill v. Boston & M. R. Co., 77 N. H. 151, 89 Atl. 482, Ann. Cas. 1914C, 714. **N. Y.** Loucks v. Standard Oil Co., 92 Misc. 475, 156 N. Y. Supp. 7.

78. Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301; Richardson v. New York Cent. R. Co., 98 Mass. 85; Southern Pac. Co. v. Dusa-

blon, 48 Tex. Civ. App. 203, 106 S. W. 766.

79. Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. 354, 360, 34 Sup. Ct. 587, 58 L. ed. 997; Atchison, T. & S. F. R. Co. v. Sowers, 213 U. S. 55, 59, 70, 29 Sup. Ct. 397, 53 L. ed. 695.

[a] The reason of the rule is that venue is no part of the right to sue. That jurisdiction is to be determined by the law of the court's creation and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action. Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. 354, 360, 34 Sup. Ct. 587, 58 L. ed. 997.

[b] Between common law and a new and statutory cause of action there is no distinction in this respect. Tennessee Coal, Iron & R. R. Co. v. George, 233 U. S. 354, 34 Sup. Ct. 587, 58 L. ed. 997.

80. Cristilly v. Warner, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415.

81. Conn.—Cristilly v. Warner, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415. Mass.—Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. **N. H.**—Crippen v. Loughton, 69 N. H. 540, 44 Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467. **N. Y.**—In re Romero, 56 Misc. 319, 107 N. Y. Supp. 621. **N. C.**—Carpenter, Baggot & Co. v. Hanes, 167 N. C. 551, 83 S. E. 577. **S. D.** Knittle v. Ellenbusch, 159 N. W. 893. **Vt.**—Morrisette v. Canadian Pac. R. Co., 76 Vt. 267, 272, 56 Atl. 1102. **Wyo.** Studebaker Bros. Co. v. Mau, 14 Wyo. 68, 82 Pac. 2.

[a] Illustrations.—(1) Courts will not enforce a foreign mortgage lien against those citizens of the state of the forum who are not parties to the mortgage, where the mortgage has not been recorded in the state of the forum (Miles v. Oden, 8 Mart. N. S. [La.] 214, 19 Am. Dec. 177), (2) or a claim based upon the sale of intoxicating liquors sold in a foreign state in contem-

morality,⁸² or is contrary to abstract justice.⁸³ A court will not take jurisdiction where it will be impossible to do full and complete justice to all the parties in interest,⁸⁴ or if the adjudication which is sought would depend for its enforcement upon the courts of the other state,⁸⁵ or the provisions of the foreign statute are so dissimilar to the laws of the forum that the local court could not enforce same.⁸⁶ But the mere

plation that such liquors should thereafter be sold in violation of the laws of the forum. *Smith v. Godfrey*, 28 N. H. 379, 61 Am. Dec. 617. (3) Nor will they enforce a contract made in a foreign state by a citizen of the state of the forum, even though the contract be valid in the foreign state if, under the laws of the state of the forum, her citizens had not legal capacity to enter into such a contract. *Armstrong v. Best*, 112 N. C. 59, 17 S. E. 14, 34 Am. St. Rep. 473, 25 L. R. A. 188; *Knittle v. Ellenbusch* (S. D.), 159 N. W. 893.

[b] A statute imposing upon the wife a liability for purchases made by her husband without her knowledge, on proof that they constituted a part of "the expenses of the family," is founded on the power of a state to regulate the duty of supporting the families of its citizens. For that reason it may be doubted whether it was intended to apply to citizens of other states "temporarily" within that state. If it was intended to apply to such citizens, it is not a liability which will be enforced by the courts of other states. *Mandell Bros. v. Fogg*, 182 Mass. 582, 66 N. E. 198, 94 Am. St. Rep. 667, 17 L. R. A. (N. S.) 426.

82. *Conn.*—*Cristilly v. Warner*, 87 Conn. 461, 88 Atl. 711, 51 L. R. A. (N. S.) 415. *Mass.*—*Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544. *N. C.* *Carpenter, Baggot & Co. v. Hanes*, 167 N. C. 551, 557, 83 S. E. 577. *Vt.*—*Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102.

83. *Higgins v. Central N. E. & W. R. Co.*, 155 Mass. 176, 29 N. E. 534, 31 Am. St. Rep. 544; *Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102.

84. *Mass.*—*National Tel. Mfg. Co. v. Du Bois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503, 30 L. R. A. 628; *New Haven Horseshoe N. Co. v. Linden Spring Co.*, 142 Mass. 349, 353, 7 N. E. 773. *N. H.* *Crippen v. Loughton*, 69 N. H. 540, 44

Atl. 538, 76 Am. St. Rep. 192, 46 L. R. A. 467. *S. D.*—*Knittle v. Ellenbusch*, 159 N. W. 893.

[a] Where the cause of action arose abroad, where it affected only the internal government of a foreign corporation, and where the judgment, if rendered, could not be in any way enforced against the corporation, except by injunction against individual members of it, and the party had an ample remedy in the state where the corporation had a legal existence, the courts of a state other than the domicile of the corporation might well decline to exercise an equitable jurisdiction. *Gregory v. New York, L. E. & W. R. Co.*, 40 N. J. Eq. 38, 45; *Howell v. Chicago & N. W. Ry. Co.*, 51 Barb. (N. Y.) 378, 385.

[b] Where defendant will be subjected to great and unnecessary expense which will be avoided by a suit brought in the state of his residence. *National Tel. Mfg. Co. v. Du Bois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503, 30 L. R. A. 628.

85. *Kimball v. St. Louis & S. F. Ry. Co.*, 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250.

[a] **Punitive Damages.**—Jurisdiction of such causes carries with it power to impose punitive damages, if allowable by the *lex loci delicti*. *Louisville & N. R. Co. v. McCaskell*, 98 Miss. 20, 53 So. 348.

86. *Slater v. Mexican Nat. R. Co.*, 194 U. S. 120, 24 Sup. Ct. 581, 48 L. ed. 900; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276, reversing 32 S. W. 230.

[a] That the defendant is entitled to have the court order a view in its discretion under the law where the cause of action arose does not preclude the court of another state from assuming jurisdiction. *Missouri, K. & T. R. Co. v. Kellerman*, 39 Tex. Civ. App. 274, 87 S. W. 401.

[b] In Texas it would seem advisable not to prove the laws of Mexico

fact that the remedy, available in the forum may not be as full or complete as the foreign law would afford will not alone justify the court in refusing to entertain jurisdiction.⁸⁷

3. As to Real Property Beyond State.—*a. In General.*—The law is well settled that the jurisdiction of the courts of a state does not extend to real property situated beyond its territorial limits.⁸⁸ Accordingly the courts of one state cannot entertain suits relating to title or possession of realty situated without the state,⁸⁹ and therefore, they

but to rely upon the presumption that the Mexican law is the same as the Texas statute. *Mendiola v. Gonzales* (Tex. Civ. App.), 185 S. W. 391, *explaining* Mexican Nat. R. Co. *v. Jackson*, 89 Tex. 107, 33 S. W. 857, 59 Am. St. Rep. 28, 31 L. R. A. 276, and Mexican Cent. Ry. Co. *v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282.

87. *Armbruster v. Chicago, R. I. & P. R. Co.*, 166 Iowa 155, 147 N. W. 337.

88. U. S.—*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. ed. 464; *Rose v. Himely*, 4 Cranch 241, 2 L. ed. 608; *Boyce v. Grundy*, 9 Pet. 275, 9 L. ed. 127; *Pennoyer v. Neff*, 95 U. S. 714, 722, 24 L. ed. 565; *Kentucky Co. Lands Co. v. Mineral Dev. Co.*, 219 Fed. 45, 122 C. C. A. 151, *reversed*, 191 Fed. 899. **Ark.**—*Williams v. Nichol*, 47 Ark. 254, 262, 1 S. W. 243; *Clopton v. Booker*, 27 Ark. 482. **Fla.** *Hodges v. Hunter Co.*, 61 Fla. 280, 54 So. 811, 34 L. R. A. (N. S.) 994. **Kan.** *McGonigle v. Atchison*, 33 Kan. 726, 7 Pac. 550. **Md.**—*Gunther v. Dranbauer*, 86 Md. 1, 38 Atl. 33. **Miss.**—*Cocke v. Brewer*, 68 Miss. 775, 9 So. 823. **Mo.** *Carr v. Lewis Coal Co.*, 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328. **Neb.** *Kroll v. Chicago, B. & Q. R. Co.*, 98 Neb. 322, 152 N. W. 548. **N. J.**—*Doherty v. Catskill Cement Co.*, 72 N. J. L. 315, 65 Atl. 508; *Hill v. Nelson*, 70 N. J. L. 376, 57 Atl. 411; *New Jersey Central R. Co. v. Jersey City*, 70 N. J. L. 81, 56 Atl. 239; *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213; *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79; *Davis v. Headley*, 22 N. J. Eq. 115; *Servis v. Nelson*, 14 N. J. Eq. 94. **N. C.** *Brady v. Brady*, 161 N. C. 324, 77 S. E. 235, 44 L. R. A. (N. S.) 279; *Williams v. Elm City Lumb. Co.*, 154 N. C. 306, 309, 70 S. E. 631, Ann. Cas. 1912A, 917;

Davenport v. Gannon, 123 N. C. 362, 31 S. E. 858, 68 Am. St. Rep. 827. **Ohio.** *Pittsburg, C. C. & St. L. R. Co. v. Jackson*, 83 Ohio St. 13, 93 N. E. 260, 21 Ann. Cas. 1313. **S. D.**—*Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476. **Tex.**—*Texas & P. R. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; *Moseby v. Burrow*, 52 Tex. 396; *Paschal v. Acklin*, 27 Tex. 173. **Va.**—*Roller v. Murray*, 107 Va. 527, 59 S. E. 421; *Poindexter v. Burwell*, 82 Va. 507; *Wimer v. Wimer*, 82 Va. 890, 901, 5 S. E. 536, 3 Am. St. Rep. 126. **Wash.** *Lindsley v. Union S. S. Min. Co.*, 26 Wash. 301, 66 Pac. 382.

[a] **Assignments by order of a bankrupt court in one state, of land situate in another, are within the rule.** *Moseby v. Burrow*, 52 Tex. 396.

89. U. S.—*Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. ed. 55; *Carpenter v. Strange*, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. ed. 640; *Kentucky Coal Lands Co. v. Mineral Dev. Co.*, 219 Fed. 45, 133 C. C. A. 151, *reversed*, 191 Fed. 899; *Tardy v. Morgan*, 3 McLean 358, 23 Fed. Cas. No. 13,752; *Lyman v. Lyman*, 2 Paine 11, 15 Fed. Cas. No. 8,628. **Ark.**—*Williams v. Nichol*, 47 Ark. 254, 1 S. W. 243; *Clopton v. Booker*, 27 Ark. 482. **Cal.**—*Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340. **D. C.**—*Contee v. Lyons*, 8 Mackey 207; *Columbia Nat. S. D. Co. v. Morton*, 28 App. Cas. 288, 8 Ann. Cas. 511, 7 L. R. A. (N. S.) 114; *Philadelphia Co. v. Dickinson*, 33 App. Cas. 338; *Hansel v. Chapman*, 2 App. Cas. 361. **Fla.** *Winn v. Strickland*, 34 Fla. 610, 16 So. 606. **Ill.**—*Smith v. Smith*, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403. **Ia.** *Curtis v. Armagast*, 158 Iowa 507, 138 N. W. 873; *Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349. **Kan.**—*Cooper v. Ives*, 62 Kan. 395, 63 Pac. 434; *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac.

cannot partition land situated beyond the state,⁹⁰ direct or authorize an executor or guardian to sell lands situated in another state,⁹¹ appoint a receiver for property situated in another state,⁹² cancel deed⁹³ to land

779. **Ky.**—Short *v.* Galway, 83 Ky. 501, 4 Am. St. Rep. 168; Page *v.* McKee, 3 Bush. 135, 96 Am. Dec. 201; McLawrin *v.* Salmons, 11 B. Mon. 96, 52 Am. Dec. 563. **La.**—Mussina *v.* Alling, 11 La. Ann. 568. **Md.**—White *v.* White, 7 Gill & J. 208. **Miss.**—Sutton *v.* Archer, 93 Miss. 603, 46 So. 705; Cocke *v.* Brewer, 68 Miss. 775, 9 So. 823. **Mo.**—Richardson *v.* Allen (Mo. App.), 185 S. W. 252. **Neb.**—O'Connor *v.* Petty, 95 Neb. 727, 146 N. W. 947; Higgins *v.* Vandever, 85 Neb. 89, 122 N. W. 843. **N. J.**—Lindley *v.* O'Reilly, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79; Cook *v.* Weigley, 68 N. J. Eq. 480, 59 Atl. 1029; Davis *v.* Headley, 22 N. J. Eq. 115. **N. M.**—Burton-Lingo Co. *v.* Patton, 107 Pac. 679, 27 L. R. A. (N. S.) 420. **N. Y.**—Glen *v.* Gibson, 9 Barb. 634; Hawley *v.* James, 7 Paige 213, 32 Am. Dec. 623; Smith *v.* Tozer, 11 Civ. Proc. 349, 3 N. Y. St. 164. **N. C.**—Davenport *v.* Gannon, 123 N. C. 362, 31 S. E. 858, 68 Am. St. Rep. 827. **Ohio.**—Daniels *v.* Stevens' Lessee, 19 Ohio 222; Nowler *v.* Coit, 1 Ohio 519, 13 Am. Dec. 640. **Pa.**—Thomas *v.* Hukill, 131 Pa. 298, 18 Atl. 875; Bucks' Estate, 25 Pa. Co. Ct. 264. **Tenn.**—Miller *v.* Birdsong, 7 Baxt. 531; Johnson *v.* Kimbro, 3 Head 557, 75 Am. Dec. 781. **Tex.**—Holt *v.* Guerguin, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136; Moseby *v.* Burrow, 52 Tex. 396; Paschal *v.* Acklin, 27 Tex. 173. **Va.**—Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Gibson *v.* Burgess, 82 Va. 650; Poindexter *v.* Burwell, 82 Va. 507. **Wash.**—Olympia Min. & Mill. Co. *v.* Kerns, 64 Wash. 545, 117 Pac. 260; Lindsley *v.* Union S. S. Min. Co., 26 Wash. 301, 66 Pac. 382. **Can.**—Ross *v.* Ross, 23 Ont. 43.

[a] A foreign court cannot quiet title to lands within another state, or establish or extinguish liens thereon, or restore possession or cancel records, or afford many other forms of relief which affect primarily the res. Curtis *v.* Armagast, 158 Iowa 507, 138 N. W. 873.

[b] Cannot decree allotment of a widow's dower as to lands lying in another state. Blunt *v.* Gee, 5 Call (9 Va.) 481.

[c] Widow's allowance cannot be decreed in land in another state. Smith *v.* Smith, 174 Ill. 52, 50 N. E. 1083, 43 L. R. A. 403.

[d] Action of Ejectment or To Try Title.—Northern Indiana R. Co. *v.* Michigan C. R. Co., 15 How. (U. S.) 233, 14 L. ed. 674; Davis *v.* Headley, 22 N. J. Eq. 115.

[e] This rule is not changed by a statute providing that suits relating to realty must be tried in the county where the land is situated. Such provision does not define the jurisdiction of the courts but only the venue of cases over which it has jurisdiction. Cragin *v.* Lovell, 88 N. Y. 258, 2 N. Y. Civ. Proc. 128.

90. **Cal.**—Ophir Silver Min. Co. *v.* Superior Court, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340. **Ill.**—Parsons *v.* Millar, 189 Ill. 107, 59 N. E. 606. **Ia.**—Sullivan *v.* Kenney, 148 Iowa 361, 126 N. W. 349. **Ky.**—Page *v.* McKee, 3 Bush 135, 96 Am. Dec. 201. **Md.**—Binney's Case, 2 Bland 99. **Neb.**—Schick *v.* Whitecomb, 68 Neb. 784, 94 N. W. 1023. **N. Y.**—Bowers *v.* Durant, 43 Hun 348, 6 N. Y. St. 535. **Tenn.**—Johnson *v.* Kimbro, 3 Head 557, 75 Am. Dec. 781. **Tex.**—Holt *v.* Guerguin, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136; Morris *v.* Missouri Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349. **Vt.**—Niles *v.* Howe, 57 Vt. 388. **Va.**—Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. 32, 53 Am. St. Rep. 804; Poindexter *v.* Burwell, 82 Va. 507; Wimer *v.* Wimer, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126. **Eng.**—Kennedy *v.* Casillis, 2 Swanst. 312, 323, 36 Eng. Reprint 635; Cartwright *v.* Pettus, 2 Ch. Cas. 214, 22 Eng. Reprint 916.

91. Richardson *v.* Allen (Mo. App.), 185 S. W. 252.

92. Trinity & S. Ry. Co. *v.* Brown, 91 Tex. 673, 45 S. W. 793; Texas & P. R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Pool *v.* Farmers' Loan & Tr. Co., 7 Tex. Civ. App. 334, 27 S. W. 744.

93. **U. S.**—Carpenter *v.* Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. ed. 640; Hart *v.* Sansom, 110 U. S. 151, 155, 3 Sup. Ct. 586, 28 L. ed. 101. **Ala.**—West Point Min. & Mfg. Co. *v.* Allen,

in another state, declare such deed null and void,⁹⁴ or set it aside as a fraud upon creditors;⁹⁵ though a United States court in bankruptcy in one state acquires full jurisdiction over land situated in another state upon the filing of the petition in bankruptcy.⁹⁶

Actions for injuries to real property are local, and cannot be entertained by a court of another state,⁹⁷ though a few states hold action for

143 Ala. 547, 39 So. 351, 111 Am. St. Rep. 60, 5 Ann. Cas. 532. **Tex.**—Paul v. Chenault (Tex. Civ. App.), 44 S. W. 682.

94. **U. S.**—Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. ed. 640. **Ill.**—Cooley v. Scarlett, 38 Ill. 316, 87 Am. Dec. 298. **Tex.**—Fryer v. Meyers, 13 S. W. 1025.

95. **N. J.**—Gray v. Folwell, 57 N. J. Eq. 446, 41 Atl. 869. **N. Y.**—Nicholson v. Leavitt, 4 Sandf. 252. **Can.**—Burns v. Davidson, 21 Ont. 547.

[a] A judgment that a deed to lands was void is a judgment as to the title of land within the above rule. Davis v. Headley, 22 N. J. Eq. 115.

96. Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. ed. 1174.

97. **U. S.**—Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 14 L. ed. 674; Potomac Mill. & Ice Co. v. Baltimore, etc. R. Co., 217 Fed. 665; Livingston v. Jefferson, 1 Brock. 203, 15 Fed. Cas. No. 8,411. **Ala.**—Howard v. Ingersoll, 23 Ala. 673, 17 Ala. 780. **Cal.**—Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340. **D. C.**—Columbia Nat. S. D. Co. v. Morton, 28 App. Cas. 288, 8 Ann. Cas. 511, 7 L. R. A. (N. S.) 114. **Ill.**—Eachus v. Illinois & M. Canal, 17 Ill. 534. **Ind.**—Dubreuil v. Pennsylvania R. Co., 130 Ind. 137, 29 N. E. 909. **Kan.**—Brown v. Irwin, 47 Kan. 50, 27 Pac. 184; Holderman v. Pond, 45 Kan. 410, 25 Pac. 872, 23 Am. St. Rep. 734, 11 L. R. A. 542. **Ky.**—Smith v. Southern R. Co., 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927. **Me.**—Eaton v. McCall, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **Md.**—Baltimore v. Meredith's Ford, etc. Co., 104 Md. 351, 65 Atl. 35, 10 Ann. Cas. 35. **Mass.**—Allin v. Connecticut River Lumb. Co., 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416. **Mo.**—Carr v. Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328. **N. J.**—Karr v. New York J. F. Co., 78 N. J. L. 198, 73 Atl. 132; Do-

herty v. Catskill Cement Co., 72 N. J. L. 315, 65 Atl. 508; Hill v. Nelson, 70 N. J. L. 376, 57 Atl. 411. **N. Y.**—Brisbane v. Pennsylvania R. Co., 205 N. Y. 431, 98 N. E. 752, 44 L. R. A. (N. S.) 274, reversing 141 App. Div. 366, 125 N. Y. Supp. 1042; Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703; Plimpton v. Bigelow, 93 N. Y. 592, 13 Abb. N. C. 173, 4 Civ. Proc. 189, 66 How. Pr. 131; Cragin v. Lovell, 88 N. Y. 258, 2 Civ. Proc. 128; American Union Tel. Co. v. Middleton, 80 N. Y. 468; Watts' Admrs. v. Kinney, 6 Hill 82; Genet v. Delaware, etc. Co., 56 Hun 640, 8 N. Y. Supp. 822, 29 N. Y. St. 954. **Ohio.**—Pittsburg, C. C. & St. L. R. Co. v. Jackson, 83 Ohio St. 13, 93 N. E. 260, 21 Ann. Cas. 1313; Youngstown v. Moore, 30 Ohio St. 133; Ohio Rev. St., §5064; Weidner v. Rankin, 26 Ohio St. 522; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474. **Ore.**—Montesano Lumb. Co. v. Portland Iron Works, 78 Ore. 53, 152 Pac. 244. **R. I.**—Cross v. Brown, 19 R. I. 220, 226, 33 Atl. 147. **Tex.**—Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 282, 17 S. W. 19, 13 L. R. A. 542; Morris v. Missouri Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349. **Vt.**—Niles v. Howe, 57 Vt. 288. **Wis.**—Bettys v. Milwaukee & St. P. Ry. Co., 37 Wis. 323; Tyson v. McGuineas, 25 Wis. 656. **Eng.**—British So. Africa Co. v. Companhia de Mocambique, (1893) App. Cas. 602; Douglson v. Matthews, 4 T. R. 503, 100 Eng. Reprint 1143. **Can.**—Brereton v. Canadian Pac. R. Co., 29 Ont. 57.

See the title "Venue."

[a] Action for slander of title to real property is transitory and may be brought in a state other than where the property is situated. Dodge v. Colby, 108 N. Y. 445, 15 N. E. 703.

[b] Waiver of Objection.—If the court, however, acquires jurisdiction in an action for injuries to real property over the persons of the parties by due personal service of process, or by their voluntary appearance and submission to its jurisdiction and the defendant

trespass to real property to be transitory merely.⁹⁸ But if timber, sand and the like have been severed from the realty, the owner of the land may waive all claim for damages to the freehold and maintain a personal action for the value of the property removed, wherever he can obtain jurisdiction over the defendant's person,⁹⁹ notwithstanding he may be compelled to allege and prove ownership of the premises.¹ If the gravamen of the action is trespass to the land, however, this qualification of the rule does not apply.² But if the injury to the real estate results from a cause or act arising or occurring in a county or state other than the one in which it is situated, the action may be brought in either jurisdiction.³

makes no objection to the authority of the court to hear the cause, the judgment would be valid and binding. **U. S.** Phelps v. McDonald, 99 U. S. 298, 25 L. ed. 473. **N. Y.**—Sentenis v. Ladew, 140 N. Y. 463, 35 N. E. 650, 37 Am. St. Rep. 569. **Pa.**—Magee v. Pennsylvania S. V. R. Co., 13 Pa. Super. 187. But see Niles v. Howe, 57 Vt. 388, holding the objection is available at any time by motion to dismiss.

98. Holmes v. Barclay, 4 La. Ann. 63; Little v. Chicago, St. P., M. & O. Ry. Co., 65 Minn. 48, 67 N. W. 846, 60 Am. St. Rep. 421, 33 L. R. A. 423. See Ducktown Sulphur, C. & I. Co. v. Barnes (Tenn.), 60 S. W. 593, distinguishing between actions of trespass and actions of trespass on the case.

99. **U. S.**—Ellenwood v. Marietta Chair Co., 158 U. S. 105, 15 Sup. Ct. 771, 39 L. ed. 913; Phelps v. Church of Our Lady, etc., 99 Fed. 683, 40 C. C. A. 72. **Cal.**—Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340. **D. C.**—Columbia Nat. S. D. Co. v. Morton, 28 App. Cas. 288, 8 Ann. Cas. 511, 7 L. R. A. (N. S.) 114. **Kan.**—Holderman v. Pond, 45 Kan. 410, 25 Pac. 872, 23 Am. St. Rep. 734, 11 L. R. A. 542; McGonigle v. Atchison, 33 Kan. 726, 7 Pac. 560. **Me.** Whidden v. Seelye, 40 Me. 247, 63 Am. Dec. 661. **Miss.**—West v. McClure, 85 Miss. 296, 37 So. 752. **Mont.**—State ex rel. Mackey v. District Court, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. **N. Y.**—Glen v. Hodges, 9 Johns. 67. **N. C.**—Brady v. Brady, 161 N. C. 324, 77 S. E. 325, 44 L. R. A. (N. S.) 279; Williams v. Elm City Lumb. Co., 154 N. C. 309, 70 S. E. 631. **Tex.**—Missouri Pac. Ry. Co. v. Cullers, 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542. **Wis.** Tyson v. McGuineas, 25 Wis. 656. **Can.** Stuart v. Baldwin, 41 U. C. Q. B. 446.

1. Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340.

2. Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 82 Pac. 70, 3 Ann. Cas. 340.

[a] An action for cutting down telegraph poles along the highway is local and not transitory where the complaint merely charges the cutting down and removing them from the place where cut, to ditches and side fences by the roadside, there being no assumption of possession thereof. American Union Tel. Co. v. Middleton, 80 N. Y. 408.

3. **U. S.**—Rundle v. Delaware & R. Canal, 1 Wall. Jr. 275, 21 Fed. Cas. No. 12,139, affirmed, 14 How. 80, 14 L. ed. 335; Livingston v. Jefferson, 1 Brock. 203, 15 Fed. Cas. No. 8,411. **Idaho.** Taylor v. Hulett, 15 Idaho 265, 97 Pac. 37, 19 L. R. A. (N. S.) 535. **Ill.** Ohio & M. Ry. Co. v. Combs, 43 Ill. App. 119; Pilgrim v. Mellor, 1 Ill. App. 448. **Ky.**—Smith v. Southern R. Co., 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927. **Mass.**—Mannville Co. v. Worcester, 138 Mass. 89, 52 Am. Rep. 261; Barden v. Crocker, 10 Pick. 383. **N. Y.** Brisbane v. Pennsylvania R. Co., 205 N. Y. 431, 98 N. E. 752, 44 L. R. A. (N. S.) 274; Watts' Admrs. v. Kinney, 23 Wend. 484; Ruckman v. Green, 9 Hun 225. **Ohio.**—Pittsburg, C. C. & St. L. R. Co. v. Jackson, 83 Ohio St. 13, 93 N. E. 260, 21 Ann. Cas. 1313; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474. **Tenn.**—Ducktown Sulphur C. & I. Co. v. Barnes, 60 S. W. 593. **Tex.** Morris v. Missouri Pac. Ry. Co., 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349; Armendiaz v. Stillman, 54 Tex. 623; St. Louis & S. F. Ry. Co. v. Craig, 10 Tex. Civ. App. 233, 238, 31 S. W. 207. **Eng.**—Doulson v. Matt-

Actions based upon contracts, however, respecting realty situated in another state than the forum are transitory and not local⁴ so that actions for rent,⁵ for waste,⁶ for an accounting as to the rents and profits of realty,⁷ for breach of covenant, when brought by the original convenantee⁸ need not be brought in the state where the land lies.

Liens.—Under the statutes of most states actions to enforce liens upon real property are local and are restricted to the courts of the county or city wherein the land is situated.⁹

b. *Exceptions and Limitations to Rule.*—The territorial limitation of the jurisdiction of courts of a state over property in another estate has a limited and well-defined exception in courts of equity, which, having jurisdiction over the person, may indirectly act upon real estate in another state through the instrumentality of this authority over the person.¹⁰ In such case the power exists to compel the defendant to do all things necessary, which he could do voluntarily, to give full effect to

hews, 4 T. R. 503, 100 Eng. Reprint 1143.

[a] **The reason for the rule** is that the injury and wrongful act are to be regarded as having occurred together or in immediate connection, and in the same jurisdiction, or either of two jurisdictions. Consequently the venue may be had in either jurisdiction. *Smith v. Southern R. Co.*, 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927.

[b] **Where an obstruction had been wrongfully placed in the Rio Grande** in Cameron county, Texas, which caused the current of the river to flow against and upon land on the Mexican side of the river, thereby causing damage to the land in Mexico, a suit for the damages could be maintained in the Texas court. *Southwestern Portland Cem. Co. v. Kezer* (Tex. Civ. App.), 174 S. W. 661.

4. **U. S.**—*Selover B. & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. ed. 146, affirming 109 Minn. 136, 123 N. W. 291. **Ky.**—*Campbell v. Ritter Lumb. Co.*, 140 Ky. 312, 131 S. W. 20, 140 Am. St. Rep. 385, waste by tenant in violation of contract. **Mass.**—*Rogers v. Barnes*, 169 Mass. 179, 47 N. E. 602, 38 L. R. A. 145. **Tenn.**—*Mattix v. Swepston*, 127 Tenn. 693, 155 S. W. 928. **Wash.**—*Sheppard v. Coeur D'Alene Lumb. Co.*, 62 Wash. 12, 112 Pac. 932, Ann. Cas. 1912C, 909, 44 L. R. A. (N. S.) 267.

5. *Sheppard v. Coeur D'Alene Lumb. Co.*, 62 Wash. 12, 112 Pac. 932, Ann. Cas. 1912C, 909, 44 L. R. A. (N. S.) 267.

[a] **Action to recover reasonable rental value of realty** does not affect the title to realty, though defendant sets up title in himself. *Sheppard v. Coeur D'Alene Lumb. Co.*, 62 Wash. 12, 112 Pac. 932, Ann. Cas. 1912C, 909, 44 L. R. A. (N. S.) 267.

6. *Campbell v. Ritter Lumb. Co.*, 140 Ky. 312, 131 S. W. 20, 140 Am. St. Rep. 385.

7. *Clark v. Shoemith*, 91 Kan. 797, 139 Pac. 426.

8. **Mass.**—*Phelps v. Decker*, 10 Mass. 267. **N. C.**—*Jackson v. Hanna*, 53 N. C. 188. **Vt.**—*Tillotson v. Prichard*, 60 Vt. 94, 14 Atl. 302, 6 Am. St. Rep. 95.

[a] **Action by assignee of covenantee** is local because based wholly on privity of estate. *Lienow v. Ellis*, 6 Mass. 331; *White v. Sanborn*, 6 N. H. 220. But see *Oliver v. Loyal*, 59 Miss. 320.

9. **Conn.**—*Farmers' Loan & Tr. Co. v. Postal Tel. Co.*, 55 Conn. 334, 11 Atl. 184, 3 Am. St. Rep. 53. **Me.**—*Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **Ohio.**—*Fisher v. Murdock*, 1 Handy 544, 12 Ohio Dec. (Reprint) 280, mechanic's lien.

10. *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; *Watkins v. Holman's Lessee*, 16 Pet. 25, 10 L. ed. 873; *Columbia River Packers' Assn. v. M'Gowan*, 219 Fed. 365, 377, 134 C. C. A. 461.

[a] **The defendant cannot be bound, unless he has been reached by the process of the court.** *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416.

the decree against him.¹¹ The decree in such case does not operate upon the res, but is in personam, and operates only upon the person of the defendant,¹² and can be made effective only by process operating upon the party, such as sequestration of property within jurisdiction,

11. **U. S.**—*Carpenter v. Strange*, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. ed. 640; *Corbett v. Nutt*, 10 Wall. 464, 19 L. ed. 976; *Watkins v. Holman's Lessee*, 16 Pet. 25, 10 L. ed. 873; *Massie v. Watts*, 6 Cranch 148, 3 L. ed. 181; *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed. 1, 6, 124 C. C. A. 573. **Ark.**—*Pillow v. King*, 55 Ark. 633, 18 S. W. 764. **D. C.**—*Columbia Nat. S. D. Co. v. Morton*, 28 App. Cas. 288, 8 Ann. Cas. 511, 7 L. R. A. (N. S.) 114. **Ga.**—*Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573. **Ill.**—*Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416. **Ia.**—*Gilliland v. Inabnit*, 92 Iowa 46, 60 N. W. 211. **La.**—See *Seixas v. King*, 39 La. Ann. 510, 2 So. 416. **Me.**—*Reed v. Reed*, 75 Me. 264; *Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **Mass.**—*Brown v. Desmond*, 100 Mass. 267. **Neb.**—*Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767. **Pa.**—*Kane & Elk R. Co. v. Pittsburgh & W. Ry. Co.*, 241 Pa. 608, 88 Atl. 793; *Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907; *Given's Appeal*, 121 Pa. 260, 15 Atl. 468, 6 Am. St. Rep. 795; *Vaughan v. Barclay*, 6 Whart. 392; *Com. v. Froelich*, 56 Pa. Super. 604. **S. D.**—*Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476. **Va.**—*Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126. **Eng.** *Penn v. Lord Baltimore*, 1 Ves. Sr., 444, 27 Eng. Reprint 1132, in which the chancellor of England decreed a specific performance of a contract respecting lands lying in North America.

[a] In *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79, it is said: "The principle upon which this jurisdiction rests is, that chancery, acting in personam and not in rem, holds the conscience of the parties bound without regard to the situs of the property. It is a jurisdiction which arises when a special equity can be shown which forms a ground for compelling a party to convey or release, or for restraining him from asserting a title or right in lands so situated, and is strictly limited to those cases in which the relief decreed

can be obtained through the party's personal obedience." *Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175.

[b] The ground of this jurisdiction is that courts of equity have authority to act upon the person: "*Aequitas agit in personam.*" **U. S.**—*Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473. **Ill.** *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416. **Me.**—*Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **Neb.**—*Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767.

[c] The rule is applicable to personal property, as well as real property, situated beyond the state where the parties are before the court. *Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561.

12. **U. S.**—*Philadelphia Co. v. Stimson*, 223 U. S. 605, 622, 32 Sup. Ct. 340, 56 L. ed. 570; *Fall v. Eastin*, 215 U. S. 1, 8, 30 Sup. Ct. 3, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. ed. 640; *Langdon v. Sherwood*, 124 U. S. 74, 8 Sup. Ct. 429, 31 L. ed. 344; *Phelps v. McDonald*, 99 U. S. 298, 308, 25 L. ed. 473; *Muller v. Dows*, 94 U. S. 444, 449, 24 L. ed. 207; *Northern Indiana R. Co. v. Michigan C. R. Co.*, 15 How. 233, 14 L. ed. 674; *Massie v. Watts*, 6 Cranch 148, 3 L. ed. 181; *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed. 1, 6, 124 C. C. A. 573. **Ala.**—*Allen v. Buchanan*, 97 Ala. 399, 11 So. 777, 38 Am. St. Rep. 187. **Conn.**—*Clark's Appeal*, 70 Conn. 195, 39 Atl. 155, *affirmed*, *Clarke v. Clarke*, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. ed. 1028. **Ga.**—*Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573. **Ill.** *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673. **Ky.**—*Short v. Galway*, 83 Ky. 501, 4 Am. St. Rep. 168. **La.**—*Hayden v. Yale*, 45 La. Ann. 362, 12 So. 633, 40 Am. St. Rep. 232. **Neb.**—*Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767. **N. J.**—*Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213; *Davis v. Headley*, 22 N. J. Eq.

attachment for contempt and the like.¹³ The courts of the situs of lands cannot be compelled to issue their decrees to enforce the process of courts of another state, or the performance of acts required by the decree of such courts, ancillary to the relief thereby granted, affecting such lands.¹⁴ And when enforced as by the conveyance, it is the conveyance, not the decree, that affects the lands in the foreign jurisdiction.¹⁵ This is not in conflict with the full faith and credit clause,¹⁶ and

115. **N. Y.**—*Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192. **Tenn.**—*Miller v. Birdsong*, 7 Baxt. 331. **Va.**—*Wimer v. Wimer*, 82 Va. 390, 5 S. E. 536, 3 Am. St. Rep. 126.

[a] The court may compel the defendant to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him. *Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561.

[b] If the defendant dies or leaves the state wherein the decree was rendered without having complied with the terms thereof, the prevailing party has in effect, achieved nothing—he cannot record his decree in the state wherein the land is situate; he cannot sue upon it in the courts of such state; in fact he stands where he did before suit brought. *Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476.

[c] Deed of committee of insane person who had been directed to make deed of property situated in another state, the ward having failed to comply with order made prior to his being declared insane is invalid. Decree is not effectual unless owner of land in person executes the conveyance. *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210.

13. **U. S.**—*Watts v. Waddle*, 6 Pet. 389, 8 L. ed. 437. **N. J.**—*Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213. **Ohio.**—*Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621.

[a] The decree in a suit of this aspect imposes a mere personal obligation, enforceable by injunction, attachment or like process, against the person, and cannot operate *ex proprio vigore* upon lands in another jurisdiction to create, transfer or vest a title. *Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767.

14. *Carpenter v. Strange*, 141 U. S. 87, 106, 11 Sup. Ct. 960, 35 L. ed. 640; *Bullock v. Bullock*, 52 N. J. Eq. 561, 30

Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213.

[a] In *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528; the complainant's husband had been adjudged by the supreme court of the state of New York, in a divorce proceeding of which it had jurisdiction, to execute a mortgage upon lands in New Jersey to secure the payment of a certain sum per month to the complainant as alimony. He refused to do so, and made other mortgages and conveyances of the lands, which the wife alleged were fraudulently made for the purpose of defeating her rights. She charged that she had acquired an equitable lien in the lands by virtue of the New York decree, and prayed the court to set aside the several mortgages and conveyances, and that he be decreed to execute and deliver the mortgage required by the New York court. The majority of the court held that, while the New York court might have enforced the execution of the mortgage by the defendant while he was within its jurisdiction, this not having been done, the New York decree could not operate as a cause of action affecting the title to land in New Jersey, and pointed out that "the doctrine that jurisdiction respecting lands in a foreign state is not in rem but only in personam is bereft of all practical force if the decree in personam is conclusive and must be enforced by the courts of the situs." *Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767.

15. **Neb.**—*Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767. **N. J.**—*Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213; *Davis v. Headley*, 22 N. J. Eq. 115. **Va.**—*Wimer v. Wimer*, 82 Va. 890, 5 S. E. 536, 3 Am. St. Rep. 126.

16. *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853. See

full faith and credit will be given to such decrees and judgments, by according to them a force merely personal upon the parties and enforceable alone by their process.¹⁷

Such actions are limited almost or quite exclusively to those equitable actions wherein the relief sought can be effectually enforced through a degree in personam, being cases based upon fraud, trust, or upon some privity of contract or estate.¹⁸ Some courts will refuse jurisdiction if both parties are non-residents of the forum, unless the action is based upon a contract entered into by such parties within such state.¹⁹ And equity will not grant relief to compel an act of doubtful legality affecting lands in another jurisdiction.²⁰

Illustrations. — Applying this rule equity may compel the party to do, or refrain from doing, beyond its territorial jurisdiction, anything which it has power to require him to do or omit within the limits of its territory.²¹ And therefore with respect to lands situated in a foreign state, equity may compel the conveyance of such property, or the specific performance of contracts to convey such lands;²² compel an ac-

Lindley v. O'Reilly, 50 N. J. L. 636, 642, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79; *Davis v. Headley*, 22 N. J. Eq. 115. But see *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067; *Roblin v. Long*, 60 How. Pr. (N. Y.) 200.

17. *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213. But see *Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621.

18. **U. S.**—*Massie v. Watts*, 6 Cranch 148, 160, 3 L. ed. 181. **D. C.**—*Columbia Nat. S. D. Co. v. Morton*, 28 App. Cas. 288, 8 Ann. Cas. 511. **Miss.**—*Sutton v. Archer*, 93 Miss. 603, 46 So. 705. **Neb.** *Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767. **N. J.**—*Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79; *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213. **N. Y.** *Deklyn v. Watkins*, 3 Sandf. Ch. 185. **S. D.**—*Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476.

But see *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed. 1, 6, 124 C. C. A. 573.

19. *Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476.

20. *Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213; *Blount v. Blount*, 8 N. C. 365.

21. *Louisville & N. R. Co. v. Western Union Tel. Co.*, 207 Fed. 1, 124 C. C. A. 573; *State v. Fredlock*, 52 W. Va.

232, 43 S. E. 153, 94 Am. St. Rep. 932.

[a] **Action for rescission or to compel the setting aside of a contract relating to land in another state.** *Campbell v. W. M. Ritter Lumber Co.*, 140 Ky. 312, 315, 131 S. W. 20; *Dicken v. King*, 3 J. J. Marsh. (Ky.) 591; *Williams v. Carter*, 3 Dana (Ky.) 198; *Bedrick v. Wheatley*, 3 Dana (Ky.) 34.

[b] **May relieve against forfeiture of mining lease of property in another jurisdiction.** *Sunday Lake M. Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136.

[c] **May compel release and discharge of apparent cloud upon the title to land situated in another state.** *Vaught v. Meador*, 99 Va. 569, 39 S. E. 225, 86 Am. St. Rep. 908.

[d] **The execution of a deed in lieu of one the party had executed and fraudulently destroyed may be compelled.** *Pillow v. King*, 55 Ark. 633, 18 S. W. 764.

22. **U. S.**—*Robertson v. Howard*, 229 U. S. 254, 261, 33 Sup. Ct. 854, 57 L. ed. 1174; *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 833; *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. ed. 640; *Phelps v. McDonald*, 99 U. S. 298, 25 L. ed. 473; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Corbett v. Nutt*, 10 Wall. 464, 475, 19 L. ed. 976; *Salton Sea Cases*, 172 Fed. 792, 97 C. C. A. 214; *Wilhite v. Skelton*, 149 Fed. 67, 78 C. C. A. 635. **Cal.**—*Smith v. Davis*, 90 Cal. 25, 27 Pac. 26, 25 Am. St. Rep.

counting,²³ remove a cloud,²⁴ foreclose a mortgage,²⁵ enforce a trust

92; *McGee v. Sweeney*, 84 Cal. 100, 23 Pac. 1117. **Fla.**—*Winn v. Strickland*, 34 Fla. 610, 16 So. 606. **Ill.**—*McDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209; *White Star M. Co. v. Hultberg*, 220 Ill. 578, 77 N. E. 327; *Garden City Sand Co. v. Miller*, 157 Ill. 225, 41 N. E. 753; *Cloud v. Greasley*, 125 Ill. 313, 17 N. E. 826; *Enos v. Hunter*, 9 Ill. 211. **Ind.**—*Monnett v. Turpie*, 132 Ind. 482, 133 Ind. 424, 32 N. E. 328; *Bethell v. Bethell*, 92 Ind. 318; *Fort Wayne Tr. Co. v. Sihler*, 34 Ind. App. 140, 72 N. E. 494. **Ia.**—*Sullivan v. Kenney*, 148 Iowa 361, 126 N. W. 349; *Rea v. Ferguson*, 126 Iowa 704, 102 N. W. 778; *Gilliland v. Inabnit*, 92 Iowa 46, 60 N. W. 211. **Ky.**—*McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. 454; *Dicken v. King*, 3 J. J. Marsh. 591; *Williams v. Carter*, 3 Dana 198; *Kendrick v. Wheatley*, 3 Dana 34. **La.**—*Kinder v. Scharff*, 125 La. 594, 51 So. 654; *Robinson Mineral Spring Co. v. De Bautte*, 50 La. Ann. 1281, 23 So. 865; *Seixas v. King*, 39 La. Ann. 510, 2 So. 416. **Me.**—*Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **Mass.**—*Brown v. Desmond*, 100 Mass. 267. **Mo.**—*Olney v. Eaton*, 66 Mo. 563. **Neb.**—*Fall v. Fall*, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175, 121 Am. St. Rep. 767, *affirmed* in *Fall v. Eastin*, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853. **N. J.**—*Bullock v. Bullock*, 52 N. J. Eq. 561, 30 Atl. 676, 46 Am. St. Rep. 528, 27 L. R. A. 213; *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79; *Vreeland v. Vreeland*, 49 N. J. Eq. 322, 24 Atl. 551; *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. 204; *Davis v. Headley*, 22 N. J. Eq. 115. **N. M.**—*Burton-Lingo Co. v. Patton*, 107 Pac. 679, 27 L. R. A. (N. S.) 420. **N. Y.**—*Mead v. Merritt*, 2 Paige 402; *Mitchell v. Bunch*, 2 Paige 606, 22 Am. Dec. 669; *Sutphen v. Fowler*, 9 Paige 280; *Chase v. Knickerbocker Phosphate Co.*, 32 App. Div. 400, 53 N. Y. Supp. 220; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89. **N. C.**—*Oer's Heirs v. Irwin's Heirs*, 4 N. C. 351. **Ohio.**—*Burnley v. Stevenson*, 24 Ohio St. 474, 15 Am. Rep. 621. **Ore.**—*Eagle Cliff F. Co. v. McGowan*, 70 Ore. 1, 137 Pac. 766. **Pa.**—*McElrath v. Pittsburgh & S. R. Co.*, 55 Pa. 189; *Conover v. Wright*, 9 Pa. Dist. 688. **Tenn.**

Kirklin v. Atlas Sav. & L. Asso. (Tenn. Ch. App.), 60 S. W. 149; *Johnson v. Kimbro*, 3 Head 557, 75 Am. Dec. 781. **Tex.**—*Texas & P. R. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; *Morris v. Hand*, 70 Tex. 481, 8 S. W. 210; *Moseby v. Burrow*, 52 Tex. 396. **Va.**—*Aldridge v. Giles*, 3 Hen. & M. (13 Va.) 136; *Farley v. Shippen*, Wythe 135. **Wash.**—*Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. **Wis.**—*Gates v. Paul*, 117 Wis. 170, 94 N. W. 55. **Can.**—*Montgomery v. Ruppensburg*, 31 Ont. 433.

See generally the title "Specific Performance."

[a] Trustees may be compelled to sell and transfer property situated in another state when within the jurisdiction of the court making the order. *McElrath v. Pittsburgh & S. R. Co.*, 55 Pa. 189. See also *Vaughan v. Barclay*, 6 Whart. (Pa.) 392.

23. **U. S.**—*Lyman v. Lyman*, 2 Paine 11, 15 Fed. Cas. No. 8,628. **Cal.**—*Peninsular Trading, etc. Co. v. Pacific Steam W. Co.*, 123 Cal. 689, 56 Pac. 604. **D. C.**—*Stone v. Fowlkes*, 29 App. Cas. 379. **Ill.**—*MacDonald v. Dexter*, 234 Ill. 517, 85 N. E. 209. **La.**—*Hayden v. Yale*, 45 La. Ann. 362, 12 So. 633, 40 Am. St. Rep. 232. **N. J.**—*Wood v. Warner*, 15 N. J. Eq. 81. **N. Y.**—*Grant v. Cobre Grande Copper Co.*, 193 N. Y. 306, 86 N. E. 34; *Reading v. Haggin*, 58 Hun 450, 12 N. Y. Supp. 368, 35 N. Y. St. 585; *Buel v. Baltimore & O. S. W. Ry. Co.*, 24 Misc. 646, 53 N. Y. Supp. 749. **N. C.**—*Henderson v. McBee*, 79 N. C. 219. **Va.**—*Dickinson v. Homes*, 8 Gratt. (49 Va.) 353, 410. **Wis.**—*Gates v. Paul*, 117 Wis. 170, 94 N. W. 55. **Eng.**—*Mercantile Inv. & G. Tr. Co. v. River Plate Tr. Co.*, (1892), 2 Ch. 363; *Cartwright v. Pettus*, 2 Ch. Cas. 214, 22 Eng. Reprint 916, 1 Eq. Cas. Abr. 133, 21 Eng. Reprint 937.

[a] Court should not take jurisdiction where it has personal jurisdiction of only part of the necessary defendants. *Harris v. Pullman*, 84 Ill. 20, 25 Am. Rep. 416.

24. *Remer v. Mackay*, 35 Fed. 86. See also *Hart v. Sanson*, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. ed. 101.

25. See the title "Mortgages."

[a] Declare a Deed To Be a Mortgage.—*Me.*—*Reed v. Reed*, 75 Me. 264. **Mass.**—*Clark v. Seagraves*, 186 Mass.

thereon.²⁶ or enjoin a trespass²⁷ or other wrong with respect thereto.²⁸ Or equity may grant relief on the ground of fraud, actual or constructive.²⁹

4. Over Crimes.—*a. In General.*—The law is well settled that crimes are local and only the courts of the state wherein the crime was committed have jurisdiction thereof.³⁰ Courts of a state have no juris-

430, 71 N. E. 813. **N. J.**—See *Lindley v. O'Reilly*, 50 N. J. L. 636, 15 Atl. 379, 7 Am. St. Rep. 802, 1 L. R. A. 79.

26. U. S.—*Massie v. Watts*, 6 Cranch 148, 3 L. ed. 181. **Ark.**—*Clopton v. Booker*, 27 Ark. 482. **D. C.**—*Whitney v. Frisbie*, 6 D. C. 202. **Ind.**—*Sturdevant v. Pike*, 1 Ind. 277. **Ia.**—*MacGregor v. MacGregor*, 9 Iowa 65. **Kan.** *Meadow v. Manlove*, 97 Kan. 706, 156 Pac. 731; *Manley v. Carter*, 7 Kan. App. 86, 52 Pac. 915. **Ky.**—*McQuerry v. Gilliland*, 89 Ky. 434, 12 S. W. 1037, 7 L. R. A. 454. **Me.**—*Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **N. Y.**—*Hawley & King v. James*, 7 Paige 213, 32 Am. Dec. 623. **Tenn.**—*Miller v. Birdsong*, 7 Baxt. 531. But see *Pickett v. Ferguson*, 86 Tenn. 642, 8 S. W. 386.

27. Ill.—*Alexander v. Tolleston Club*, 110 Ill. 65. **N. H.**—*Great Falls Mfg. Co. v. Worster*, 23 N. H. 462. **Ore.** *Eagle Cliff Fishing Co. v. McGowan*, 70 Ore. 1, 137 Pac. 766. **Pa.**—*Schmaltz v. York Mfg. Co.*, 204 Pa. 1, 53 Atl. 522, 93 Am. St. Rep. 782, 59 L. R. A. 907. **Tenn.**—*Kirklin v. Atlas Sav. & Loan Assn. (Tenn. Ch. App.)*, 60 S. W. 149.

28. Frank v. Peyton, 82 Ky. 150, 6 Ky. L. Rep. 8, conveyance.

[a] **Diversion of water.**—*Miller v. Rickey*, 127 Fed. 573; *Willey v. Decker*, 11 Wyo. 496, 73 Pac. 210, 100 Am. St. Rep. 939.

[b] **Enjoining suit in another state or country respecting land therein.** *Gibson v. American Loan & Tr. Co.*, 58 Hun 443, 12 N. Y. Supp. 444; *Bowers v. Durant*, 43 Hun 348, 6 N. Y. St. 535; *Bunbury v. Bunbury*, 1 Beav. 318, 8 L. J. Ch. N. S. 297, 3 Jur. 644, 48 Eng. Reprint 963.

29. La.—*Edwards v. Ballard*, 14 La. Ann. 362. **Me.**—*Eaton v. McCall*, 86 Me. 346, 29 Atl. 1103, 41 Am. St. Rep. 561. **Tex.**—*Texas & P. R. Co. v. Gay*, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

30. U. S.—*Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. ed. 1123; *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Houston v. Moore*, 5 Wheat. 1,

5 L. ed. 19. **Ark.**—*Beattie v. State*, 73 Ark. 428, 84 S. W. 477. **Conn.**—*State v. Grady*, 34 Conn. 118, 129; *Gilbert v. Steadman*, 1 Root 403. **D. C.**—*Brown v. United States*, 35 App. Cas. 548, Ann. Cas. 1912A, 388. **Ga.**—*Jemmer-son v. State*, 80 Ga. 111, 5 S. E. 131. **Ill.**—*Missouri River T. Co. v. First Nat. Bank*, 74 Ill. 217. **Ind.**—*Stewart v. Jessup*, 51 Ind. 413, 19 Am. Rep. 739; *Johns v. State*, 19 Ind. 421, 81 Am. Dec. 408. **Kan.**—*Ex parte Carr*, 28 Kan. 1. **Ky.**—*Tutt v. Greenville*, 142 Ky. 536, 134 S. W. 890, 33 L. R. A. (N. S.) 331; *Earle v. Latonia Agr. Assn.*, 127 Ky. 578, 106 S. W. 312. **La.** *State v. Reonnals*, 14 La. Ann. 278. **Mich.**—*Tyler v. People*, 8 Mich. 320. **Mo.**—*State v. Johnson*, 115 Mo. 480, 22 S. W. 463; *State v. Shaeffer*, 89 Mo. 271, 1 S. W. 293. **N. J.**—*State v. Stow*, 85 N. J. L. 14, 84 Atl. 1063. **N. Y.** *People v. International Nickel Co.*, 218 N. Y. 644, 112 N. E. 1068 (*affirming* 168 App. Div. 245, 153 N. Y. Supp. 295, 155 N. Y. Supp. 156); *Manley v. People*, 7 N. Y. 295; *People v. Merrill*, 2 Park. Crim. 590. **N. C.**—*State v. Toney*, 162 N. C. 635, 78 S. E. 156; *State v. Hall*, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59; *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130; *State v. Mitchell*, 83 N. C. 674; *State v. Knight*, 1 N. C. 143. **Pa.**—*Com. v. Kunzmann*, 41 Pa. 429. **P. I.**—*United States v. Arceo*, 6 Phil. Isl. 29. **S. C.**—*Hartsville v. McCall*, 101 S. C. 277, 85 S. E. 599. **Tenn.**—*Low v. State*, 111 Tenn. 81, 78 S. W. 110; *State v. Dubose*, 88 Tenn. 753, 13 S. W. 1088; *State v. Evans*, 1 Overt. 211. **Va.**—*Com. v. Gaines*, 2 Va. Cas. (4 Va.) 172. **Eng.**—*Rex v. Hooker*, 7 Mad. 193, 87 Eng. Reprint 1184; *Musgrave v. Medex*, 19 Ves. Jr. 652, 34 Eng. Reprint 657; *Warrender v. Warrender*, 9 Bligh (N. S.) 89, 119, 5 Eng. Reprint 1227; *Reg. v. Garrett*, 2 C. L. R. 106, 6 Cox. C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607.

[a] A crime not committed within any state of the union may be tried at

diction of offenses committed elsewhere even though the legislature of the state tries to confer such jurisdiction.³¹

b. *Offense Partly Committed in Several States.*—Where a person beyond the state there puts in operation a force which causes the commission of an offense within the state, its courts have jurisdiction to punish such person for the offense:³² if they can procure jurisdiction over his person.³³ Where, however, one is merely an accessory or accomplice acting through guilty agents in another state, he cannot in the absence of statute, be prosecuted for a felony in the state where the crime was consummated.³⁴

such place as congress may by law have directed. *Jones v. United States*, 137 U. S. 202, 211, 11 Sup. Ct. 80, 34 L. ed. 691.

[b] *Acquiescence in the exercise of jurisdiction* by one state for a number of years of territory belonging to another state does not give the first state jurisdiction over offenses committed there. *Hearne v. State*, 121 Ark. 460, 181 S. W. 291.

[c] *Unoccupied Territory.*—By the law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession and conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired. *Jones v. United States*, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. ed. 691.

31. *Ky.*—*Earle v. Latonia Agr. Assn.*, 127 Ky. 578, 106 S. W. 312. *La.* *State v. Burton*, 105 La. 516, 29 So. 970. *N. C.*—*State v. Cutshall*, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130, wherein statute sought to punish bigamy committed in another state.

32. *U. S.*—*United States v. Nord Deutscher Lloyd*, 223 U. S. 512, 32 Sup. Ct. 244, 56 L. ed. 531; *Strassheim v. Daily*, 221 U. S. 280, 31 Sup. Ct. 558, 55 L. ed. 735; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. ed. 417; *United States v. Davis*, 2 Sumn. 482, 25 Fed. Cas. No. 14,932. *Ark.*—*State v. Chapin*, 17 Ark. 561,

565, 65 Am. Dec. 452. *Cal.*—*People v. Botkin*, 132 Cal. 231, 64 Pac. 286, 84 Am. St. Rep. 39, s. c., 9 Cal. App. 244, 98 Pac. 861; *People v. Black*, 122 Cal. 73, 54 Pac. 385; *Ex parte Hedley*, 31 Cal. 108. *Conn.*—*State v. Grady*, 34 Conn. 118. *Ga.*—*Simpson v. State*, 92 Ga. 41, 17 S. E. 984, 44 Am. St. Rep. 75, 22 L. R. A. 248. *Ind.*—*Johns v. State*, 19 Ind. 421, 81 Am. Dec. 408. *Kan.*—*In re Fowles*, 89 Kan. 430, 131 Pac. 598, 47 L. R. A. (N. S.) 227. *Mass.* *Com. v. White*, 123 Mass. 430, 25 Am. Rep. 116; *Com. v. Smith*, 11 Allen 243; *Com. v. Blanding*, 3 Pick. 304, 15 Am. Dec. 214. *Mich.*—*Tyler v. People*, 8 Mich. 320. *N. J.*—*Noyes v. State*, 41 N. J. L. 418. *N. Y.*—*People v. Zayas*, 217 N. Y. 78, 111 N. E. 465; *People v. Arnstein*, 211 N. Y. 585, 105 N. E. 814; *People v. Adams*, 3 Denio 190, 45 Am. Dec. 468, *affirming* 1 N. Y. 173, 4 How. Pr. 295. *N. C.*—*State v. Hall*, 114 N. C. 909, 19 S. E. 602, 41 Am. St. Rep. 822, 28 L. R. A. 59. *Ohio.*—*State v. Sanner*, 81 Ohio St. 393, 90 N. E. 1007, 26 L. R. A. (N. S.) 1093; *Lindsey v. State*, 38 Ohio St. 507; *Robbins v. State*, 8 Ohio St. 131. *S. C.*—*State v. Morrow*, 40 S. C. 221, 18 S. E. 853. *Tex.*—*Rogers v. State*, 11 Tex. App. 608. *W. Va.* *Weil v. Black*, 86 S. E. 666.

[a] Where one while in another state or county does a criminal act which takes effect in a second state, the latter state may assume jurisdiction of the offense. *Smith v. Southern R. Co.*, 136 Ky. 162, 123 S. W. 678, 26 L. R. A. (N. S.) 927; *State v. Cutshall*, 110 N. C. 538, 15 S. E. 261, 16 L. R. A. 130.

33. See cases in preceding note.

As to extradition, see generally the title "Extradition."

For application of this rule see particular titles, such as "Larceny."

34. See 1 STANDARD PROC. 135.

c. *On the Seas and Navigable Waters.* — (I.) **Within Three Mile Limit.** Though it has been said that as between nations the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league, or three geographical miles from its coast, measured from low water mark;³⁵ other authorities hold that the courts of a nation or state have no jurisdiction over an offense committed within the three mile limit unless statute expressly so provides.³⁶ State statutes providing for the exercise of jurisdiction over all offenses committed within the three mile limit, are constitutional.³⁷

(II.) **Offenses on High Seas.** — Except in the case of piracy,³⁸ in the absence of statute, federal courts have no jurisdiction of an offense committed on the high seas,³⁹ unless committed upon an American vessel,⁴⁰ and if it does take place upon the high seas upon such a vessel, United States courts have exclusive jurisdiction.⁴¹

d. *Offenses on Vessels.* — Vessels are a part of the territory of the country to which they belong, and hence offences committed upon vessels belonging to the United States or any of its citizens, within the admiralty jurisdiction, though out of the territorial limits of the United States are cognizable by its courts,⁴² notwithstanding the offense was

35. *Manchester v. Massachusetts*, 139 U. S. 240, 258, 11 Sup. Ct. 559, 35 L. ed. 159; *Com. v. Manchester*, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236, *affirmed*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. ed. 159.

36. *Queen v. Keyn*, 2 Ex. Div. (Eng.) 63, *explained* in *Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. ed. 159, as only deciding the admiralty jurisdiction in England.

37. **U. S.**—*United States v. Newark Meadows Imp. Co.*, 173 Fed. 426. **Mass.** *Com. v. Manchester*, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236, *affirmed*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. ed. 159. **P. I.** *United States v. Castro*, 23 Phil. Isl. 67.

38. *United States v. Holmes*, 5 Wheat. (U. S.) 412, 416, 5 L. ed. 122; *United States v. Klintock*, 5 Wheat. (U. S.) 144, 5 L. ed. 55. See generally the title "**Piracy**."

39. *United States v. Lewis*, 36 Fed. 449.

[a] **The waters of the Great Lakes and of the rivers which connect them are to be considered "high seas" in the same sense as oceans are.** *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. ed. 1071; *Ex parte O'Hare*, 179 Fed. 662, 103 C. C. A. 220.

40. **U. S. Crim. Code**, §272; **U. S.**

Rev. St., §5339; *United States v. Lewis*, 36 Fed. 449.

[a] **Assault by British subject on board a British vessel is not cognizable by the federal court.** *United States v. Lewis*, 36 Fed. 449.

41. *In re Ross*, 140 U. S. 453, 476, 11 Sup. Ct. 897, 35 L. ed. 581; *United States v. Holmes*, 5 Wheat. (U. S.) 412, 5 L. ed. 122; *United States v. Pirates*, 5 Wheat. (U. S.) 184, 5 L. ed. 64; *United States v. Palmer*, 3 Wheat. (U. S.) 610, 632, 4 L. ed. 471.

42. **U. S.**—*United States v. Rodgers*, 150 U. S. 249, 264, 14 Sup. Ct. 109, 37 L. ed. 1071; *United States v. Holmes*, 5 Wheat. 412, 5 L. ed. 122; *United States v. Pirates*, 5 Wheat. 184, 5 L. ed. 64; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *United States v. Kessler*, *Baldw.* 15, 26 Fed. Cas. No. 15,528; *United States v. Bevans*, 24 Fed. Cas. No. 14,589. **Haw.** *King v. Parish*, 1 Hawaii 58. **Mich.** *Tyler v. People*, 8 Mich. 320; *People v. Tyler*, 7 Mich. 161, 74 Am. Dec. 703. **Eng.**—*Reg. v. Carr*, 10 Q. B. D. 76, 4 Asp. 604, 15 Cox C. C. 129, 47 J. P. 38, 52 L. J. M. C. 12, 47 L. T. N. S. 451, 31 Wkly. Rep. 121; *Reg. v. Anderson*, L. R. 1 C. C. 161, 11 Cox C. C. 198, 38 L. J. M. C. 12, 19 L. T. N. S. 400, 17 Wkly. Rep. 208; *Reg. v. Lesley*, *Bell C. C.* 220, 8 Cox C. C. 269, 6 Jur. N. S. 202, 29 L. J. M. C. 97, 1 L. T. N. S. 452, 8 Wkly. Rep. 220.

committed in the waters of a foreign country,⁴³ though its jurisdiction in such case is not necessarily exclusive,⁴⁴ as where the offence involves the peace, dignity or tranquility of the other jurisdictions, in which case it may assert its authority,⁴⁵ unless otherwise provided by treaty.⁴⁶

c. *Arm of the Sea, River, Haven, Basin or Bay.*—All creeks, havens, coves and inlets lying within projecting headlands and islands, and all bays and arms of the seas lying within and between lands not so wide but that persons and objects on the opposite side are discernible to the naked eye by persons on the opposite side, are taken within the common-law jurisdiction of a state or county,⁴⁷ but this limitation as to being visible to the naked eye is not applicable as between the states and the United States, the territorial jurisdiction of the states being that of an independent nation,⁴⁸ and except in so far as control over its territory has been granted to the United States

Can.—Reg. v. Kinsman, 2 Nova Scotia 62.

As to admiralty jurisdiction see the title "Admiralty."

[a] A vessel loses her national character, by assuming a piratical character; and a piracy committed by a foreigner from on board such a vessel, upon any other vessel whatever, is punishable. *United States v. Pirates*, 5 Wheat. (U. S.) 184, 5 L. ed. 64.

[b] Cuba was a foreign country while under military governor appointed by United States, and the federal courts had no jurisdiction of offenses committed upon a Cuban vessel at Hayti. *United States v. Assia*, 118 Fed. 915.

[c] But when such vessel is destroyed and goes to the bottom the jurisdiction of the United States ends, and accordingly the federal courts have no jurisdiction over an offense committed upon a foreign coast where the vessel was entirely destroyed. *United States v. Smiley*, 6 Sawy. 640, 27 Fed. Cas. No. 16,317.

43. *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565; *United States v. Beyer*, 31 Fed. 35; *United States v. Roberts*, 27 Fed. Cas. No. 16,173; *United States v. Gordon*, 5 Blatchf. 18, 25 Fed. Cas. No. 15,231 (River Congo in Africa); *United States v. Carr*, 3 Sawy. 302, 25 Fed. Cas. No. 14,730; *United States v. Bennett*, 3 Hughes, 466, 24 Fed. Cas. No. 14,574.

[a] The early statutes of the United States did not give the federal courts jurisdiction of offenses committed in foreign waters on board an American ship. *United States v. Morel*, 26 Fed.

Cas. No. 15,807; *United States v. Hamilton*, 1 Mason 152, 26 Fed. Cas. No. 15,290.

44. *United States v. Rodgers*, 150 U. S. 249, 265, 14 Sup. Ct. 109, 37 L. ed. 1071; *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565.

45. *United States v. Rodgers*, 150 U. S. 249, 260, 14 Sup. Ct. 109, 37 L. ed. 1071; *Wildenhus' Case*, 120 U. S. 1, 12, 7 Sup. Ct. 385, 30 L. ed. 565.

46. *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565; *Com. v. Luckness*, 14 Phila. (Pa.) 363.

47. U. S.—*Manchester v. Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. ed. 159; *United States v. Bevans*, 3 Wheat. 336, 4 L. ed. 404; *United States v. Grush*, 5 Mason 290, 26 Fed. Cas. No. 15,268; *United States v. Davis*, 2 N. Y. Leg. Obs. 35, 25 Fed. Cas. No. 14,931. Mass.—*Com. v. Manchester*, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236; *Com. v. Peters*, 12 Metc. 387. N. Y.—*Manley v. People*, 7 N. Y. 295. Ohio.—*State v. Savors*, 15 Ohio Cir. Ct. (N. S.) 65. P. I.—*United States v. Bull*, 15 Phil. Isl. 7; *United States v. Dasal*, 3 Phil. Isl. 6. Eng.—*Direct United States Cable Co. v. Anglo-American T. Co.*, 2 App. Cas. 394.

[a] Waters enclosed by breakwaters and forming a continuation of the interior harbor, southeasterly along the shore of a city line, constitute a "haven" within the ordinary meaning of that word. *Ex parte O'Hare*, 179 Fed. 662, 103 C. C. A. 220.

48. *Manchester v. Massachusetts*, 139 U. S. 240, 264, 11 Sup. Ct. 559, 35 L. ed. 159.

this control remains with the state.⁴⁹ The federal courts have merely assumed jurisdiction over offenses committed upon one of these bodies of water where such water is out of the jurisdiction of any state.⁵⁰ Bays wholly within the territory of a nation, the headlands of which are not more than six geographical miles apart, have always been regarded as a part of the territory of such state or nation.⁵¹

f. *On Boundary Rivers*.—Where a navigable stream is the boundary between two states and neither state was the original proprietor, the jurisdiction of a state over offenses committed upon such stream is determined by whether the offense was committed beyond the center of such navigable channel as distinguished from the center of the river from bank to bank;⁵² that is, where neither state was the original proprietor, then the territory of each runs to the middle line of the main channel, in the absence of a contrary agreement.⁵³ When, however, one state is the original proprietor and grants the territory on one side only, it retains jurisdiction over the whole river.⁵⁴ By reason of treaties and statutory provisions, in some states the jurisdiction of the particular states extends to the middle of the river,⁵⁵ while in others exclusive jurisdiction is given to one state over the whole river,⁵⁶ or the states have concurrent jurisdiction.⁵⁷

g. *Offenses Committed Upon Lands Acquired for Exclusive Use of United States*.—The federal courts have jurisdiction over offenses

49. *Manchester v. Massachusetts*, 139 U. S. 240, 264, 11 Sup. Ct. 559, 35 L. ed. 159.

50. *Wynne v. United States*, 217 U. S. 234, 30 Sup. Ct. 447, 54 L. ed. 748; *Manchester v. Massachusetts*, 139 U. S. 240, 263, 11 Sup. Ct. 559, 35 L. ed. 159; *United States v. Bevans*, 3 Wheat. (U. S.) 336, 4 L. ed. 404; *Ex parte O'Hare*, 179 Fed. 662, 103 C. C. A. 220; *Com. v. Peters*, 12 Mete. (Mass.) 387.

[a] *Murder committed in Honolulu harbor* is cognizable by federal court. *Wynne v. United States*, 217 U. S. 234, 30 Sup. Ct. 447, 54 L. ed. 748.

[b] *To bring the offense within the jurisdiction of the federal courts*, it must have been committed on a river, etc., and out of the jurisdiction of any state. It is not the offense committed, but the bay in which it is committed, which must be out of the jurisdiction of the state. *Wynne v. United States*, 217 U. S. 234, 242, 30 Sup. Ct. 447, 54 L. ed. 748.

51. *Com. v. Manchester*, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236, *affirmed*, 139 U. S. 240, 11 Sup. Ct. 559, 35 L. ed. 159.

52. *State v. Keane*, 84 Mo. App. 127.

53. **U. S.**—*Howard v. Ingersoll*, 13 How. 381, 14 L. ed. 189; *Handly's Lessee v. Anthony*, 5 Wheat. 374, 5 L. ed. 113. **Ky.**—*Nicoulin v. O'Brien*, 172 Ky. 473, 189 S. W. 724; *Fleming v. Kenney*, 4 J. J. Marsh. 155, 158. **N. J.**—*State v. Babcock*, 30 N. J. L. 29.

[a] *Effect of sudden change in river*, see *State v. Keane*, 84 Mo. App. 127.

54. **U. S.**—*Howard v. Ingersoll*, 13 How. 381, 14 L. ed. 189; *Handly's Lessee v. Anthony*, 5 Wheat. 374, 5 L. ed. 113. **Ky.**—*Nicoulin v. O'Brien*, 172 Ky. 473, 189 S. W. 724; *Fleming v. Kenney*, 4 J. J. Marsh. 155, 158. **N. J.**—*State v. Babcock*, 30 N. J. L. 29.

55. *State v. Burton*, 105 La. 516, 29 So. 970.

56. **Ky.**—*Nicoulin v. O'Brien*, 172 Ky. 473, 189 S. W. 724. **N. J.**—*State v. Babcock*, 30 N. J. L. 29, New York has exclusive jurisdiction on Hudson River. **N. Y.**—*People v. Central R. Co.*, 42 N. Y. 283. **Pa.**—*Com. v. Frazee*, 2 Phila. 191, 5 Am. L. Reg. (O. S.) 167.

57. **Ind.**—*Carlisle v. State*, 32 Ind. 55; *McFadin v. State*, 1 Ind. 557. **Ia.**—*State v. Mullen*, 35 Iowa 199. **Minn.**—*State v. George*, 60 Minn. 503, 63 N.

committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof.⁵⁸ The jurisdiction of the courts of a state is exclusive over all the land within the state, except as to such land as may by cession of particular states and the acceptance of congress, become the seat of government of the United States,⁵⁹ or land purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same is located, for the erection of forts, arsenals, magazines, dockyards and other needful buildings,⁶⁰ such as post-offices.⁶¹ Where, therefore, lands are acquired in any other way by

W. 100. N. J.—*State v. Babcock*, 30 N. J. L. 29, Delaware River.

58. U. S.—Crim. Code, §272; *In re Gon-Shay-ee*, 130 U. S. 343, 352, 9 Sup. Ct. 542, 32 L. ed. 976; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264; *United States v. Tucker*, 122 Fed. 518; *In re Kelly*, 71 Fed. 545. Ohio.—*Sinks v. Reese*, 19 Ohio St. 306, 2 Am. Rep. 397. Wash.—*Watts v. Territory*, 1 Wash. Ter. 409; *Watts v. United States*, 1 Wash. Ter. 288.

See 6 STANDARD PROC. 105.

[a] When a mortal blow or wound is inflicted in a fort, and the person struck or wounded, dies out of the fort, the crime is not regarded as committed where the person dies so as to exclude federal jurisdiction. *State v. Kelly*, 76 Me. 331, 335, 49 Am. Rep. 620.

[b] This phrase, "within the exclusive jurisdiction of the United States," is well understood as applying to the crimes which are committed within the premises, grounds, forts, arsenals, navy-yards, and other places within the boundaries of a state, or even within a territory, over which the federal government has by cession, by agreement, or by reservation exclusive jurisdiction. Those cases are tried by circuit or district courts of the United States, administering the laws of the United States, and not by the courts of the state or those of the territory. *In re Gon-Shay-ee*, 130 U. S. 343, 352, 9 Sup. Ct. 542, 32 L. ed. 976.

59. U. S. Const., art. 1, §18, ch. 17; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 528, 5 Sup. Ct. 995, 29 L. ed. 264; *United States v. Bateman*, 34 Fed. 86; *United State v. Guiteau*, 1 Mackey 498, 47 Am. Rep. 247.

60. U. S.—*Battle v. United States*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L.

ed. 670; *Benson v. United States*, 146 U. S. 325, 13 Sup. Ct. 60, 36 L. ed. 991; *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264; *United States v. Bevans*, 3 Wheat. 336, 389, 4 L. ed. 404; *United States v. Tully*, 140 Fed. 899; *United State v. Tucker*, 122 Fed. 518; *In re Kelly*, 71 Fed. 545; *United States v. Penn*, 48 Fed. 699; *Kelly v. United States*, 27 Fed. 616; *Sharon v. Hill*, 24 Fed. 726 (custom house); *United States v. Travers*, 28 Fed. Cas. No. 16,537. Kan.—*Clay v. State*, 4 Kan. 49. Me. *State v. Kelly*, 76 Me. 331, 49 Am. Rep. 620. Mass.—*Mitchell v. Tibbetts*, 17 Pick. 298; *Com. v. Clary*, 8 Mass. 72. Tex.—*Baker v. State*, 47 Tex. Crim. 482, 83 S. W. 1122, 122 Am. St. Rep. 703; *Lasher v. State*, 30 Tex. App. 387, 17 S. W. 1064, 28 Am. St. Rep. 922.

[a] The broadest construction has been wisely put upon the language of the constitution—one which makes it cover all structures and places necessary for carrying on the business of the national government. *United States v. Tucker*, 122 Fed. 518, 522.

[b] Both a purchase with the consent of the state and an express cession of jurisdiction are not necessary to the powers and rights of the government. Either will be sufficient if the place is owned by the United States and is actually used for governmental purposes. *United States v. Tucker*, 122 Fed. 518.

[c] That the legislative consent was granted after the purchase is immaterial so far as relates to offenses committed thereafter. *United States v. Tucker*, 122 Fed. 518.

61. *Battle v. United States*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. ed. 670.

[a] A crime committed upon land bought by the United States in a city

the United States within the limits of a state than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the use of the federal government, such buildings with their appurtenances, as instrumentalities for the execution of its powers, will be free from such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed.⁶² But when not used as such instrumentalities, the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits.⁶³

h. Offenses on Great Lakes.—United States has jurisdiction over offenses committed upon the Great Lakes⁶⁴ on board any vessel registered, licensed or enrolled under the laws of the United States where

and on which it was building a post-office and courthouse is within the jurisdiction of the United States. *Battle v. United States*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. ed. 670.

62. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 539, 5 Sup. Ct. 995, 29 L. ed. 264. See *United States v. Tucker*, 122 Fed. 518.

[a] **Fence Enclosing Part of Land Only.**—The extent of the "possessory right" of the United States is not fixed by a fence or wall which it has placed around the land. By so enclosing a part of the land the United States does not abandon possession of the land outside the enclosure. *Baker v. State*, 47 Tex. Crim. 482, 83 S. W. 1122, 122 Am. St. Rep. 703.

63. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 539, 5 Sup. Ct. 995, 29 L. ed. 264. See *People v. Godfrey*, 17 Johns. (N. Y.) 225.

[a] "If there has been no cession by the state of the place, although it has been constantly occupied and used under purchase, or otherwise, by the United States for a fort or arsenal, or other constitutional purpose, the state jurisdiction still remains complete and perfect." *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 538, 5 Sup. Ct. 995, 29 L. ed. 264.

[b] *Ft. Leavenworth, Kansas (Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. ed. 264), and *The Presidio in San Francisco county, California (United States v. Bateman*, 34 Fed. 86), being a part of the public domain before the admission of the state into the union and there being no reservation of governmental authority or jurisdiction are not

subject to the exclusive jurisdiction of the federal courts.

[c] **Land purchased in state for national home for disabled soldiers**, by federal government, is not subject to exclusive jurisdiction of United States where act of congress created a corporation to take and hold the land. *In re Kelly*, 71 Fed. 545; *In re O'Connor*, 37 Wis. 379, 19 Am. Rep. 765. But see *Sinks v. Reese*, 19 Ohio St. 206, 2 Am. Rep. 397; *Foley v. Shriver*, 81 Va. 568.

[d] **Since Arlington cemetery was purchased during war at a tax sale**, and jurisdiction of it was never ceded by the state of Virginia, the federal courts have no jurisdiction of offenses committed there. *United States v. Penn*, 48 Fed. 669.

[e] **Fort Niagara.**—The land on which Fort Niagara was erected, in New York, never was ceded by the state to the United States, and therefore the courts of the state had jurisdiction of crimes or offenses against the laws of the state committed within the fort or its precincts. *People v. Godfrey*, 17 Johns. (N. Y.) 225.

64. U. S. Crim. Code, §272; *Rev. St.*, §5339; *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. ed. 1071 (*overruling In re Miller*, 17 Fed. Cas. No. 9,558, and *Ex parte Byers*, 32 Fed. 404); *Ex parte O'Hare*, 179 Fed. 662, 103 C. C. A. 220 (*reversing 171 Fed. 290*); *United States v. Rogers*, 46 Fed. 1.

[a] **A ship towed upon the Great Lakes to anchorage for the purpose of being fitted out for service**, no crew being employed and no fires lighted, is not upon a voyage and crimes com-

upon a voyage upon the lakes, or committed upon any of the waters connecting them.⁶⁵

i. *Upon Guano Islands*.—The federal courts have jurisdiction over offenses committed upon any island, rock or key containing deposits of guano, which may be considered by the president as appertaining to the United States.⁶⁶

D. OVER NONRESIDENTS.—1. **Actions by Nonresidents**.—As a general rule neither citizenship nor residence is required to entitle a person to bring suit.⁶⁷ Indeed, unless restricted by statute,⁶⁸ the mere fact that the plaintiff is a non-resident does not deprive the court of jurisdiction,⁶⁹ especially where the cause of action arose in the jurisdiction where suit is brought.⁷⁰

2. **Actions Against Nonresidents**.—The mere fact that the defendant is a nonresident of the state will not deprive the court of jurisdiction.⁷¹ While the courts of a state acquire jurisdiction of a

mitted thereon are not within the jurisdiction of the United States. *Ex parte O'Hare*, 179 Fed. 662, 103 C. C. A. 220, reversing 171 Fed. 290.

65. *United States v. Rogers*, 46 Fed. 1, affirmed, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. ed. 1071.

66. *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. ed. 691.

67. *Knight v. West Jersey R. Co.*, 108 Pa. 250, 56 Am. Rep. 200.

68. *South Bay Co. v. Merrill*, 77 N. H. 1, 86 Atl. 351; *South Bay Co. v. Howey*, 190 N. Y. 240, 83 N. E. 26; *Robinson v. Oceanic S. Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636.

[a] A code provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states makes no discrimination between citizens, but between residents and nonresidents. *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636.

69. *Ind.*—*Burk v. Simonson*, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304. *Ky.*—*Barnes v. Union Cent. L. Ins. Co.*, 168 Ky. 253, 182 S. W. 169; *Turner v. O'Bannon*, 2 J. J. Marsh. 186; *Lexington Mfg. Co. v. Dorr*, 2 Litt. 256. *La.*—*Amato v. Ermann*, 47 La. Ann. 967, 17 So. 505. *Mo.*—*King of Prussia v. Kuepper's Admr.*, 22 Mo. 550, 66 Am. Dec. 639. *N. Y.*—*McCormick v. Pennsylvania Cent. R. Co.*, 49 N. Y. 303; *Jackson v. Wheedon*, 3 Code Rep. 186, 1 E. D. Smith 141; *Wertheim v. Clergue*, 53 App. Div. 122, 65 N. Y. Supp. 750;

Gibson v. American L. & T. Co., 58 Hun 443, 12 N. Y. Supp. 444, 35 N. Y. St. 192; *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219; *Atkins v. Fitzpatrick*, 57 Misc. 341, 109 N. Y. Supp. 619. *N. C.*—*McDonald v. MacArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832. *Tenn.*—*Lisenbee v. Holt*, 1 Sneed 42. *Tex.*—*Western Union Tel. Co. v. Clark*, 14 Tex. Civ. App. 563, 38 S. W. 225; *Western Union Tel. Co. v. Phillips* (Tex. Civ. App.), 30 S. W. 494.

[a] The motive of the plaintiff in acquiring residence to sue a nonresident corporation is immaterial where such residence was acquired bona fide. *Andriuszis v. Philadelphia & R. Coal & Iron Co.*, 172 App. Div. 350, 156 N. Y. Supp. 260.

70. *Burk v. Simonson*, 104 Ind. 173, 2 N. E. 309, 3 N. E. 826, 54 Am. Rep. 304.

71. See cases cited *infra*, this section.

[a] **Where Defendant Is a Non-resident Corporation**.—See the following cases: *U. S.*—*Barrow S. S. Co. v. Kane*, 170 U. S. 100, 109, 18 Sup. Ct. 526, 42 L. ed. 964; *St. Clair v. Cox*, 106 U. S. 350, 354, 1 Sup. Ct. 354, 27 L. ed. 222, 224; *Dennick v. Central R. Co.*, 103 U. S. 11, 18, 26 L. ed. 439, 441. *Ala.*—*Contra*, *Central R. & Bkg. Co. v. Carr*, 76 Ala. 388, 52 Am. Rep. 339. *Ga.*—*Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, reversing *Bawknight v. Liverpool*, etc. Ins. Co., 55 Ga. 194. *Ind.*—*Burns v. Grand Rapids & I. R. Co.*, 113 Ind. 169, 15 N. E. 230. *Ky.*—*Barnes*

nonresident by service of process within the jurisdiction of the court,⁷² or by a voluntary appearance in the action,⁷³ the tribunals of one state have no extra territorial jurisdiction and cannot make a citizen of another state or country amenable to their process and bind them by a judgment in personam without their consent, unless he is served

v. Union Cent. L. Ins. Co., 168 Ky. 253, 182 S. W. 169. **Miss.**—*Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *New Orleans, etc. R. Co. v. Wallace*, 50 Miss. 244. **Pa.**—*Knight v. West Jersey R. Co.*, 108 Pa. 250, 58 Am. Rep. 200. **Va.**—*Nelson v. Chesapeake & O. R. Co.*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 583. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503. **Eng.** *Lhoneux v. Hong Kong & S. Bkg. Corp.*, L. R. 33 Ch. Div. 446; *Haggins v. Comptoir d' Escompte*, L. R. 23 Q. B. Div. 519.

See the title "**Corporations.**"

[b] The weight of modern authority seems to support the proposition that a foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and that the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, *reversing* *Bawknight v. Liverpool, etc. Ins. Co.*, 55 Ga. 194.

[c] **Where Defendants Are Aliens.** *Faras v. Lower California Dev. Co.*, 27 Cal. App. 688, 151 Pac. 35; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

[d] **Nonresident Taxpayers.**—The jurisdiction of equity to enjoin local officers from collecting taxes levied for the payment of bonds is not affected by the nonresidence of the owners of the bonds. *Welch v. Post*, 99 Ill. 471.

72. **Colo.**—*Weiner v. Rumble*, 11 Colo. 607, 19 Pac. 760. **Ga.**—*Adams v. Lamar*, 8 Ga. 83. **Ill.**—*Brewster v. Scarborough*, 3 Ill. 280. **Ia.**—*Darrah v. Watson*, 36 Iowa 116; *Swan v. Smith*,

26 Iowa 87. **La.**—*Gibson v. Huie*, 14 La. 129. **Me.**—*Alley v. Caspari*, 80 Me. 234, 14 Atl. 12, 6 Am. St. Rep. 178; *Badger v. Towle*, 48 Me. 20. **Mass.** *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Barrell v. Benjamin*, 15 Mass. 354; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **Miss.**—*Pullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. **Mont.**—*State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. **N. Y.**—*Routenberg v. Schweitzer*, 165 N. Y. 175, 58 N. E. 880; *Clarkson v. Millnacht*, 56 How. Pr. 323; *Johnson v. Ackerson*, 40 How. Pr. 222; *Gardner v. Thomas*, 14 Johns. 134, 7 Am. Dec. 445; *Johnson v. Dalton*, 1 Cow. 543, 13 Am. Dec. 564. **N. C.**—*McDonald v. MacArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832. **Ohio.**—*Handy v. Ins. Co.*, 37 Ohio St. 266, 369. **Tex.**—*York v. State*, 73 Tex. 651, 11 S. W. 869; *Cowan v. Nixon*, 28 Tex. 230; *Green v. Rugely*, 23 Tex. 539; *Southern Pac. Co. v. Allen*, 48 Tex. Civ. App. 66, 106 S. W. 441; *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S. W. 1049. **Wis.**—*Fond du Lac C. & B. Co. v. Henningsen P. Co.*, 141 Wis. 70, 123 N. W. 640; *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651, 106 N. W. 821, 115 Am. St. Rep. 1063, 15 L. R. A. (N. S.) 1045; *Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503; *Curtis v. Bradford*, 33 Wis. 190. **Eng.**—*Logan v. Bank of Scotland* (1906), 1 K. B. 141, 3 Ann. Cas. 1148.

[a] Presence within the territorial limits of the state gives jurisdiction to its courts, and a nonresident may be brought into court by service of process in the same manner that a resident would be brought in. *Reeves v. Southern Ry. Co.*, 121 Ga. 561, 49 S. E. 674, 70 L. R. A. 513, *reversing* *Bawknight v. Liverpool & L. & G. Ins. Co.*, 55 Ga. 194. See generally the title "**Process.**"

73. **Cal.**—*Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; *Roberts v. Dunsuir*, 75 Cal. 203, 16 Pac. 782. **Ga.**—*Lightfoot v. Brower*,

with process within the state in which the cause is being prosecuted, or voluntarily appears.⁷⁴ Consequently, if the nonresident has no property within the state, and there has been no personal service on him within the state, or voluntary appearance by him, there is nothing upon which the tribunals can adjudicate; and any judgment rendered under such circumstances, whether affecting the person only, or the property also, would be void for want of jurisdiction of the person and of the subject-matter.⁷⁵ If jurisdiction over the person of a nonresident has once attached, however, the court will retain such cause

123 Ga. 766, 66 S. E. 1094; *Varner v. Radeliff*, 59 Ga. 448; *Georgia Central Bank v. Gibson*, 11 Ga. 453; *Adams v. Lamar*, 8 Ga. 83; *Dearing v. Bank of Charleston*, 5 Ga. 497, 48 Am. Dec. 300. **Ill.**—*Darst v. Kirk*, 230 Ill. 521, 82 N. E. 862; *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673; *Welch v. Post*, 99 Ill. 471. **Md.**—*McSherry v. McSherry*, 113 Md. 395, 77 Atl. 653, 140 Am. St. Rep. 428. **Mich.**—*Drake v. Lake Shore & M. S. Ry. Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382. **Ore.**—*Starkey v. Lunz*, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783. **Tex.**—*Wilson v. Zeigler*, 44 Tex. 657; *Piedmont, etc. L. Ins. Co. v. Fitzgerald*, 1 White & W. Civ. Cas., §1345.

As to what constitutes an appearance, see the title "Appearances."

74. U. S.—*Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. ed. 338; *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. ed. 918; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931. **Cal.**—*Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314. **Conn.**—*Coyne v. Plume*, 90 Conn. 293, 97 Atl. 336. **Ga.**—*Adams v. Lamar*, 8 Ga. 83; *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300. **Ill.**—*Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673; *Welch v. Post*, 99 Ill. 471. **Ind.**—*Sturgis v. Fay*, 16 Ind. 429, 79 Am. Dec. 440. **Md.**—*McSherry v. McSherry*, 113 Md. 395, 77 Atl. 653, 140 Am. St. Rep. 428. **Ore.**—*Starkey v. Lunz*, 57 Ore. 147, 110 Pac. 702, Ann. Cas. 1912D, 783. **Tex.**—*Milburn v. Smith*, 11 Tex. Civ. App. 678, 33 S. W. 910.

[a] Cannot decree alimony or counsel fees where no personal service with-

in state or voluntary appearance. *Proctor v. Proctor*, 215 Ill. 275, 74 N. E. 145, 106 Am. St. Rep. 168, 69 L. R. A. 673. See generally the title "Divorce."

75. U. S.—*Wilson v. Graham*, 4 Wash. C. C. 53, 30 Fed. Cas. No. 17,804. **Ala.**—*Sessoms Grocery Co. v. International S. Feed Co.*, 188 Ala. 232, 66 So. 479; *Louisville & Nashville R. R. Co. v. Nash*, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758; *Glover v. Glover*, 16 Ala. 440. **Ga.**—*Howell v. Gordon*, 40 Ga. 302; *Adams v. Lamar*, 8 Ga. 83; *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300. **Ill.**—*Waverly v. Auditor of Public Accounts*, 100 Ill. 354. **Ind.**—*Beard v. Beard*, 21 Ind. 321; *Brown-Ketcham Iron Wks. v. Swift Co.*, 53 Ind. App. 630, 100 N. E. 584, 860. **Ky.**—*Meres v. Chrisman*, 7 B. Mon. 422. **La.**—*Lemann v. Truxillo*, 32 La. Ann. 65; *Dejona v. The Osceola*, 17 La. Ann. 277; *Fell v. Darden*, 17 La. Ann. 236. **Me.**—*Smith v. Eaton*, 36 Me. 298, 58 Am. Dec. 746; *Lovejoy v. Albee*, 33 Me. 414, 54 Am. Dec. 630. **Mass.**—*Richards v. New York Cent. Ry. Co.*, 98 Mass. 85; *Ewer v. Coffin*, 1 Cush. 23, 48 Am. Dec. 587. **Miss.**—*Cooke v. Brewer*, 68 Miss. 775, 9 So. 823. **Mo.**—*Hiles v. Rule*, 121 Mo. 248, 25 S. W. 959. **N. Y.**—*Pietraroia v. New Jersey & H. R. Co.*, 197 N. Y. 434, 91 N. E. 120; *Mahr v. Norwich Union F. Ins. Co.*, 127 N. Y. 452, 28 N. E. 391; *Schwinger v. Hickok*, 53 N. Y. 280; *McLaughlin v. McLaughlin R. E. Co.*, 162 App. Div. 644, 147 N. Y. Supp. 959; *Tierney v. Helvetia S. F. Ins. Co.*, 138 App. Div. 469, 122 N. Y. Supp. 869; *Guffey v. Grand Trunk R. Co.*, 67 Misc. 553, 122 N. Y. Supp. 947; *Matter of Romero*, 56 Misc. 319, 107 N. Y. Supp. 621. **N. C.**—*Warlick Reynolds & Co.*, 151 N. C. 606, 66

for final adjudication⁷⁶ despite his subsequent removal from the state.⁷⁷

3. Jurisdiction Over Property of Nonresident.—Notwithstanding the rule that the courts of a state cannot render a personal judgment against a nonresident unless he is served with process within the state or voluntarily appears,⁷⁸ the property of a nonresident within the state may be subjected to the payment of his debts⁷⁹ by the

S. E. 657. **Ohio.**—*Pennywit v. Foote*, 27 Ohio St. 600, 22 Am. Rep. 340. **Pa.** *Martin v. Martin*, 214 Pa. 389, 63 Atl. 1026; *Com. v. Parker*, 59 Pa. Super. 74. **S. C.**—*McKinne v. Augusta*, 5 Rich. Eq. 55. **Tex.**—*Louisville & N. R. Co. v. Missouri, K. & T. R. Co.*, 40 Tex. Civ. App. 296, 88 S. W. 413, 89 S. W. 276. **Vt.**—*Skinner v. McDaniel*, 4 Vt. 418. **Va.**—*Miller v. Sharp*, 3 Rand. (24 Va.) 41; *Hopkirk v. Bridges*, 4 Hen. & M. (14 Va.) 413.

As to necessity for jurisdiction to render judgment, see the title "Judgments."

76. *Callaway v. Jones*, 19 Ga. 277.

77. *People's, etc. Assn. v. Mayfield*, 42 S. C. 424, 20 S. E. 290.

78. See *supra*, X, E, 2.

79. **U. S.**—*Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565. **Cal.**—*First Nat. Bank of Riverside v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; *Loaiza v. Superior Court*, 85 Cal. 11, 24 Pac. 707, 20 Am. St. Rep. 197, 9 L. R. A. 376. **Ga.** *Molyneux v. Seymour*, 30 Ga. 440, 76 Am. Dec. 662; *Adams v. Lamar*, 8 Ga. 83. **Mont.**—*Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497. **S. D.**—*Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476. **Wis.**—*Moyer v. Koontz*, 103 Wis. 22, 79 N. W. 50, 74 Am. St. Rep. 837.

[a] **Character of Proceeding.**—A proceeding to enforce the payment of a debt or demand, by attachment against the defendant's personal property within the jurisdiction of the court partakes in its nature and character of a proceeding in rem and also of an action in personam. If the defendant is served within the jurisdiction, or appears generally, the proceeding is in the nature of a personal action. He is liable in such case to a personal judgment, if the indebtedness is established, irrespective of the property seized, with the added incident that the property attached remains liable

under the control of the court to answer to the demand established against the defendant by the final judgment of the court. If there be no such service or appearance of the defendant, then the proceeding is in its nature in rem, or, more accurately speaking, quasi in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. *Griffin Co. v. Howell*, 38 Utah 357, 113 Pac. 326. To same effect, *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 318, 19 L. ed. 931.

[b] The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted. No suit can be maintained on such a judgment in the same court or in any other, nor can it be used as evidence in any other proceeding not affecting the attached property; nor could the costs in that proceeding be collected of defendant out of any other property than that attached in the suit. Second, the court, in such a suit, cannot proceed unless the officer finds some property of defendant on which to levy the writ of attachment. A return, that none can be found, is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made and proven in court. But if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 318, 19 L. ed. 931. And see generally the titles "Judgments;" "Judgments and Decrees, Enforcement of."

process of attachment,⁸⁰ by virtue of the fact that each state has exclusive control and jurisdiction over the property situated within its territorial limits,⁸¹ the power of the court to render judgment being restricted to rendering a judgment affecting the property before the court only.⁸² It is for these reasons that the statutes providing for service by publication are passed.⁸³ The right to exercise jurisdiction with reference to the property of a nonresident depends upon whether it has been subjected to the control of the court by some appropriate method.⁸⁴

4. All Parties Nonresident.— Unless a statute provides otherwise, neither alienage⁸⁵ nor nonresidence⁸⁶ of all the parties deprives the court of jurisdiction of a cause of action, whether the cause arose

80. *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565; *Cooper v. Reynolds*, 10 Wall. (U. S.) 308, 19 L. ed. 931; *First Nat. Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95.

81. *Louisville & Nashville R. R. Co. v. Nash*, 118 Ala. 477, 23 So. 825, 72 Am. St. Rep. 181, 41 L. R. A. 331.

82. *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. ed. 372; *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565; *Fond du Lac Cheese & Butter Co. v. Henningsen Produce Co.*, 141 Wis. 70, 123 N. W. 640.

83. *Froelich v. Swafford*, 35 S. D. 35, 150 N. W. 476. See the titles "Process;" "Service of Process and Papers."

84. **U. S.**—*The Rio Grande*, 23 Wall. 458, 463, 23 L. ed. 158. **Conn.**—*Coyne v. Plume*, 90 Conn. 293, 97 Atl. 336. **Mich.**—*Gould v. Jacobson*, 58 Mich. 288, 25 N. W. 194. **Miss.**—*New Orleans, etc. Co. v. Hemphill*, 35 Miss. 17. **Tex.**—*Merriell v. State Bank*, 5 Tex. Civ. App. 483, 24 S. W. 564.

[a] Where nonresidents have property within the state, it is material whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the

subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment, if void when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found, and void if there be none. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

85. **Cal.**—*Roberts v. Dunsmuir*, 75 Cal. 203, 16 Pac. 782. **Mass.**—*Peabody v. Hamilton*, 106 Mass. 217; *Roberts v. Knights*, 7 Allen 449. **Pa.**—*Caignett v. Rouge*, 1 Yeates 546, 2 Dall. 234.

See generally the title "Aliens."

86. **Ala.**—*Lee v. Baird*, 139 Ala. 526, 36 So. 720. **D. C.**—*Smith v. Smith*, 4 Mackey 255. **Fla.**—*La Trobe v. Hayward*, 13 Fla. 190. **Ill.**—*Simpson Fruit Co. v. Atchison, etc. R. Co.*, 245 Ill. 596, 92 N. E. 524. **Ind.**—*Levi v. Kaufman*, 12 Ind. App. 347, 39 N. E. 1045. **Ky.**—*Barnes v. Union Cent. Life Ins. Co.*, 168 Ky. 253, 182 S. W. 169; *Clarey v. Union Cent. L. Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881. **Mass.**—*Watkins v. Watkins*, 135 Mass. 83; *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Peabody v. Hamilton*, 106 Mass. 217; *Hall v. Williams*, 6 Pick. 232, 17 Am. Dec. 356. **Miss.**—*Fullman P. C. Co. v. Lawrence*, 74 Miss. 782, 22 So. 53. **Mont.**—*State ex rel. Mackey v. Dist. Court*, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. **Nev.**—*Tiedemann v. Tiedemann*, 36 Nev. 494, 499, 137 Pac. 824. **N. J.**—*Tomson v. Tomson*, 31 N. J. Eq. 464. **N. Y.**—*Burdick v. Freeman*, 120 N. Y. 420, 24 N. E. 949 (*reversing* *Molony v. Dows*, 8 Abb. Pr. 316, and *La Tourette v. Clark*, 30 How. Pr. 242, 45 Barb. 327); *Dewitt v. Buchanan*, 54 Barb. 31; *McIvor v. McCabe*, 26 How. Pr. 257; *Gardner v. Thomas*, 14 Johns. 134, 7

within⁸⁷ or without⁸⁸ the state, unless the nonresident defendant cannot be served within the state, and there is none of his property within the state.⁸⁹

XI. CONFLICTING AND CONCURRENT JURISDICTION.

A. CONCURRENT AND EXCLUSIVE JURISDICTION.—1. In General. Jurisdiction may be either concurrent or exclusive.⁹⁰ When the constitution, in express terms, confers jurisdiction over a *particular subject-matter* upon one court, and not upon another, it must be presumed that it was intended the jurisdiction conferred should be exclusive,⁹¹ unless in the clause conferring it or elsewhere in the constitution the same jurisdiction, or jurisdiction of the same character, is conferred also on another court.⁹² And if the constitution gives a court general jurisdiction of certain cases with certain exceptions, a statute conferring upon a court jurisdiction of a case not within the named exceptions creates a general jurisdiction.⁹³

2. Where Jurisdiction of Law and Equity Is Concurrent.—Courts of law and courts of equity have in some cases concurrent jurisdiction.⁹⁴ In such case the court first taking jurisdiction will retain

Am. Dec. 445; *Rubel v. Central R. Co.*, 171 App. Div. 456, 156 N. Y. Supp. 1094; *Bennett v. Austro-Am. C. C. Co.*, 161 App. Div. 753, 147 N. Y. Supp. 193; *Wrightsville Hdw. Co. v. Assets Realization Co.*, 159 App. Div. 849, 144 N. Y. Supp. 991; *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219; *Rosenblatt v. Jersey Novelty Co.*, 45 Misc. 59, 90 N. Y. Supp. 816; *Waisikoski v. Philadelphia & R. C. & L. Co.*, 159 N. Y. Supp. 906; *Fairclough v. Southern Pac. Co.*, 155 N. Y. Supp. 899. **N. C.**—*McDonald v. MacArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832; *Walters v. Breder*, 48 N. C. 64; *Miller v. Black*, 47 N. C. 341. **Tenn.**—*Lisenbee v. Holt*, 1 Sneed 42. **Tex.**—*Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. Rep. 17, 9 L. R. A. 349; *Wilson v. Zeigler*, 44 Tex. 657, 661; *Ward v. Lathrop*, 11 Tex. 287; *St. Louis & S. F. R. Co. v. Arms* (Tex. Civ. App.), 136 S. W. 1164; *Bowman v. Flint*, 37 Tex. Civ. App. 28, 82 S. W. 1049. **Vt.**—*Morrisette v. Canadian Pac. R. Co.*, 76 Vt. 267, 56 Atl. 1102; *Whitmore v. Orcutt*, *Brayt*. 22. **Wis.**—*Eingartner v. Illinois Steel Co.*, 94 Wis. 70, 68 N. W. 664, 59 Am. St. Rep. 859, 34 L. R. A. 503.

87. *Cofrode v. Circ. Judge*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511.

88. As to jurisdiction of causes of action arising without the state, see *supra*, X, B, 2.

89. *Osborn v. Lloyd*, 1 Root (Conn.)

301; *Ward v. Lathrop*, 4 Tex. 180. See *supra*, X, E, 2, 3.

90. *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

91. **Colo.**—*People v. District Court*, 37 Colo. 443, 450, 86 Pac. 87, 92 Pac. 958, 13 L. R. A. (N. S.) 768; *People v. Richmond*, 16 Colo. 274, 26 Pac. 929. **Neb.**—*Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Hendreschke v. Harvard*, etc. Dist., 35 Neb. 400, 53 N. W. 204. **Tex.**—*Messner v. Giddings*, 65 Tex. 301; *Waters-Pierce Oil Co. v. State*, 47 Tex. Civ. App. 162, 103 S. W. 836.

92. *State ex rel. Dunham v. Nixon*, 232 Mo. 98, 133 S. W. 336.

93. *Tritt v. Bize*, 51 Ga. 494.

[a] But creating a new forum with concurrent jurisdiction may have the effect of withdrawing from the courts which before existed, a portion of the causes which would otherwise have been brought before them, but it cannot affect the power of the old courts to administer justice when it is demanded at their hands. *Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653.

94. **U. S.**—*United States v. Spalding*, 2 Mason 478, 27 Fed. Cas. No. 16,365. **Ga.**—*Mordecai v. Stewart*, 37 Ga. 364; *Justices Inferior Court v. Hemphill*, 9 Ga. 65. **Ill.**—*Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746. **Ia.**—*Covert v. Sebern*, 73 Iowa 564, 35 N. W. 636. **Md.**—*Gott v. Carr*, 6 Gill

it,⁹⁵ unless there be some good reason for the interference of equity.⁹⁶

3. Statute Subsequently Conferring Jurisdiction Upon Other Court.—If a court has jurisdiction of a cause the subsequent enactment of a statute conferring concurrent jurisdiction upon other courts will not deprive the court having first obtained jurisdiction, of its control over a cause of this class.⁹⁷ Thus the original jurisdiction of a court of equity to grant relief in a certain class of cases is not divested by a statute conferring the same or a like power on a court of law. The jurisdiction of the two courts is afterwards concurrent,⁹⁸ although equity may decline to exercise jurisdiction because of the existence of the legal remedy.⁹⁹

4. Statute Creating Cause of Action Providing for Particular Forum.—When the statute creating a new right and prescribing a particular remedy for violation thereof, provides that the remedy must be pursued in a particular court, this excludes all other jurisdictions.¹

& J. 309. *Miss.*—*Tooley v. Kane*, Smed. & M. Ch. 518. *Tenn.*—*Fleming v. Taliafer*, 4 Heisk. 352. *Wis.*—*Mangan v. Shea*, 158 Wis. 619, 149 N. W. 378.

See the title "Equity Jurisdiction and Procedure."

95. *Ga.*—*Park v. Park*, 65 *Ga.* 746; *Markham v. Angier*, 57 *Ga.* 43; *Mordecai v. Stewart*, 37 *Ga.* 364; *Smith v. Gettinger*, 3 *Ga.* 140. *Ill.*—*Mason v. Piggott*, 11 *Ill.* 85. *Mass.*—*Stearns v. Stearns*, 16 *Mass.* 167. *Vt.*—*Bank of Bellows Falls v. Rutland & B. R. Co.*, 23 *Vt.* 470. *W. Va.*—*Prewett v. Citizens' Nat. Bank*, 66 *W. Va.* 184, 66 S. E. 231, 135 *Am. St. Rep.* 1019.

96. *U. S.*—*Taylor v. Carryl*, 20 *How.* 583, 15 *L. ed.* 1028. *Ga.*—*Young v. Brown*, 75 *Ga.* 1 (under statute); *McDonald v. Davis*, 43 *Ga.* 356. *Ill.*—*Mason v. Piggott*, 11 *Ill.* 85. *Vt.*—*Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 *Vt.* 470. *W. Va.*—*Prewett v. Citizens' Nat. Bank*, 66 *W. Va.* 184, 66 S. E. 231, 135 *Am. St. Rep.* 1019.

[a] If remedy at law is not as adequate and efficient as remedy in equity, a court of equity will interfere though a court of law first obtained jurisdiction. *Young v. Brown*, 75 *Ga.* 1; *Gunn v. Woolfolk*, 66 *Ga.* 682.

97. *U. S.*—*Fidelity Trust Co. v. Gill Car Co.*, 25 *Fed.* 737. *Cal.*—*Courtwright v. Bear River & A. W. & M. Co.*, 30 *Cal.* 573; *Fitzgerald v. Urton*, 4 *Cal.* 235. *Conn.*—*Loomis v. Bourn*, 63 *Conn.* 445, 28 *Atl.* 569. *D. C.*—*Dawson v. Woodward*, 6 *D. C.* 301. *Fla.*—*Hay's Admx. v. McNealy*, 16 *Fla.* 409. *Ga.*—*Fulgham v. Pate*, 77 *Ga.* 454; *Dean v.*

Central Cotton Press Co., 64 *Ga.* 670; *Hardeman v. Battersby*, 53 *Ga.* 36; *Tritt v. Bize*, 51 *Ga.* 494. *Ill.*—*People v. Young*, 72 *Ill.* 411. *Ind.*—*Browning v. Smith*, 139 *Ind.* 280, 37 *N. E.* 540; *Brookville v. Gagle*, 73 *Ind.* 117; *Redden v. Covington*, 29 *Ind.* 118. *Miss.*—*Walker v. State*, 53 *Miss.* 532. *Mo.*—*Cole County v. Dallmeyer*, 101 *Mo.* 57, 13 *S. W.* 687; *Tackert v. Vogler*, 85 *Mo.* 480; *Purdy v. Gault*, 19 *Mo. App.* 191. *N. Y.*—*Pollock v. Morris*, 105 *N. Y.* 676, 12 *N. E.* 179; *Cooke v. State Nat. Bank*, 52 *N. Y.* 96, 11 *Am. Rep.* 667; *Delafield v. Illinois*, 2 *Hill* 159. *Pa.*—*McGeorge v. Hancock Steel, etc. Co.*, 11 *Phila.* 602. *Tenn.*—*Taylor v. Pope*, 5 *Coldw.* 413. *Tex.*—*Gulf C. & S. F. Ry. Co. v. Blankenbeckler*, 13 *Tex. Civ. App.* 249, 35 *S. W.* 331. *Wis.*—*Gould v. Dodge*, 30 *Wis.* 621.

98. *McGowan v. Lufburrow*, 82 *Ga.* 523, 9 *S. E.* 427, 14 *Am. St. Rep.* 178; *Fulgham v. Pate*, 77 *Ga.* 454; *Hardeman v. Battersby*, 53 *Ga.* 36; *Mordecai v. Stewart*, 37 *Ga.* 364.

99. See the title "Legal Remedy."

[a] If a party avails himself of the remedy at law, equity will not interpose until he has pursued his legal remedy to every available extent. *McGough v. Insurance Bank*, 2 *Ga.* 151, 46 *Am. Dec.* 382.

1. *Cal.*—*Smith v. Omnibus R. Co.*, 36 *Cal.* 281; *Reed v. Omnibus R. Co.*, 33 *Cal.* 212. *Ind.*—*Great Western Life, etc. Co. v. State*, 181 *Ind.* 28, 33, 102 *N. E.* 849, 103 *N. E.* 843; *Gougar v. Timberlake*, 148 *Ind.* 38, 46 *N. E.* 339, 62 *Am. St. Rep.* 487, 37 *L. R. A.* 644;

B. AS BETWEEN STATE COURTS OF THE SAME STATE. — 1. In General. — It is a principle of universal application, essential to the orderly administration of justice, in order to avoid conflict between tribunals of coequal authority,² that where suits have been instituted involving a controversy between substantially the same parties or their privies, and no actual seizure of the res has by lawful process been made by either, the one in which suit was first brought, if its power is adequate to the administration of complete justice, retains its jurisdiction notwithstanding the institution of the second suit, and it may dispose³ of

Buck v. Miller, 147 Ind. 586, 45 N. E. 647, 47 N. E. 8, 62 Am. St. Rep. 436, 37 L. R. A. 384; *Silver, Burdett & Co. v. Indiana State Board, etc.*, 35 Ind. App. 438, 459, 72 N. E. 829; *Board, etc. v. Fort Wayne Water, etc. Co.*, 17 Ind. App. 36, 46 N. E. 36; *State v. Souder*, 14 Ind. App. 472, 41 N. E. 468; *Aldrich v. Hawkins*, 6 Blackf. 125. **Ky.** *Howard v. Kentucky & L. Mut. Ins. Co.*, 13 B. Mon. 282. **Mo.** — *Carlisle v. Missouri Pac. Ry. Co.*, 168 Mo. 652, 68 S. W. 898. **N. Y.** — *Dudley v. Mayhew*, 3 N. Y. 9; *Cunningham v. New York*, 141 N. Y. Supp. 1000. **Pa.** — *Battin v. Kear*, 2 Phila. 301. **Wis.** — *State ex rel. Owen v. Reisen*, 164 Wis. 123, 159 N. W. 747. **Eng.** — *Dundalk W. Ry. Co. v. Tapster*, 1 Ad. & El. N. S. 667; *Berkeley v. Elderkin*, 1 El. & Bl. 805, 118 Eng. Reprint 638.

See generally the title "Death by Wrongful Act."

2. U. S. — *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435, 22 L. R. A. (N. S.) 316; *Farmers Loan & Tr. Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667; *Peck v. Jennes*, 7 How. 612, 624, 12 L. ed. 841; *Colston v. Southern Home Bldg. & Loan Assn.*, 99 Fed. 305, 310. **Kan.** — *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299. **Md.** *Brooks v. Delaplaine*, 1 Md. Ch. 351. **Mich.** — *Wells v. Montcalm Circ. Judge*, 141 Mich. 58, 104 N. W. 318, 113 Am. St. Rep. 520; *McLean v. Wayne Circ. Judge*, 52 Mich. 257, 18 N. W. 396. **Va.** — *Spiller v. Wells*, 96 Va. 598, 601, 32 S. E. 46, 70 Am. St. Rep. 878.

3. U. S. — *Buck v. Cobbath*, 3 Wall. 334, 18 L. ed. 257; *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Cummins v. United States*, 232 Fed. 844, 147 C. C. A. 38; *Gooding v. Reid*, 177 Fed. 684, 101 C. C. A. 310; *Jackson v. Parkersburg & O. V. Elect. Ry. Co.*, 233 Fed. 784, 790; *Owens v.*

Ohio Cent. R. Co., 20 Fed. 10; *Mallett v. Dexter*, 1 Curt. 178, 16 Fed. Cas. No. 8,988; *Haines v. Carpenter*, 1 Woods 262, 11 Fed. Cas. No. 5,905 (*affirming* 91 U. S. 254, 23 L. ed. 345); *Gaylord v. Fort Wayne, M. & C. R. Co.*, 6 Biss 286, 10 Fed. Cas. No. 5,284. **Ala.** *Eastburn v. Canizas*, 193 Ala. 574, 69 So. 459; *Swope v. Swope*, 173 Ala. 157, 55 So. 418, Ann. Cas. 1914A, 937; *Southern Hardware & Supply Co. v. Lester*, 166 Ala. 86, 97, 52 So. 328; *Gray v. South & N. A. R. Co.*, 151 Ala. 215, 43 So. 859, 11 L. R. A. (N. S.) 581; *Finch v. Smith*, 146 Ala. 644, 41 So. 819; *Gay v. Brierfield Coal & I. Co.*, 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564; *Gould v. Hayes*, 19 Ala. 438; *Eaton v. Patterson*, 2 Stew. & P. 9. **Ark.** — *Home Fire Ins. Co. v. Benton*, 106 Ark. 552, 153 S. W. 830; *Kastor v. Elliott*, 77 Ark. 148, 91 S. W. 8; *State v. Devers*, 34 Ark. 188; *Ellis v. McHenry*, 1 Ark. 205. **Colo.** — *Consolidated Home Supply Ditch & R. Co. v. New Loveland & G. Irr. & L. Co.*, 27 Colo. 521, 62 Pac. 564; *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535. **Del.** — *Thomas v. Adams Express Co.*, 1 Penne. 142, 39 Atl. 1014; *Waples v. Waples*, 1 Harr. 392; *Beeson v. Elliott*, 1 Del. Ch. 368. **D. C.** — *Mason v. Jones*, 7 D. C. 247, 1 Hayw. & H. 323, 16 Fed. Cas. No. 9,239; *Brown v. Slater*, 23 App. Cas. 51. **Fla.** — *Ray v. Williams Phosphate Co.*, 59 Fla. 598, 52 So. 589; *Byrne v. Brown*, 40 Fla. 109, 23 So. 877; *Beatty v. Ross*, 1 Fla. 198. **Ga.** *Hardeman v. Battersby*, 53 Ga. 36; *Mordecai v. Stewart*, 37 Ga. 364; *Pope v. Solomons*, 36 Ga. 541. **Ill.** — *Nolan v. Barnes*, 268 Ill. 515, 109 N. E. 316; *St. Louis M. Bridge Co. v. Eisele*, 263 Ill. 50, 104 N. E. 1013; *Lingle v. Adams*, 259 Ill. 522, 102 N. E. 1010; *Sangamon & D. Drain Dist. v. Eminger*, 257 Ill. 281, 100 N. E. 906; *Ames v.*

Ames, 148 Ill. 321, 36 N. E. 110; Freydenhall v. Baldwin, 103 Ill. 325; Ross v. Buchanan, 13 Ill. 55; Mason v. Piggett, 11 Ill. 85; People *ex rel.* Hayne v. Northrup, 184 Ill. App. 638; Cobleigh v. Matheny, 181 Ill. App. 170; Hillis v. Asay, 105 Ill. App. 667; Lancashire Ins. Co. v. Corbett, 62 Ill. App. 236; Mount v. Scholes, 21 Ill. App. 192. **Ind.** Coleman v. Callon, 184 Ind. 204, 110 N. E. 979; Lake Shore, etc. R. Co. v. Clough, 182 Ind. 178, 104 N. E. 975, 105 N. E. 905; Taylor v. Ft. Wayne, 47 Ind. 274; Hughes v. Lake Erie & P. R. Co., 21 Ind. 175. **Ia.**—Gregory v. Howell, 118 Iowa 26, 91 N. W. 778. **Kan.**—Juhlin v. Hutchings, 90 Kan. 618, 135 Pac. 598; Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299; State v. Chinault, 55 Kan. 326, 40 Pac. 662; Chicago, K. & W. R. Co. v. Chase County, 42 Kan. 223, 21 Pac. 1071. **Ky.**—Hawes v. Orr, 10 Bush 431; McCann v. Louisville, 23 Ky. L. Rep. 558, 63 S. W. 446; Ogden v. Ogden's Guardian, 8 Ky. L. Rep. 416, 1 S. W. 665. **La.**—Weymouth v. Roselius, 36 La. Ann. 527; Babin v. Delahousaye, 31 La. Ann. 725; Poutz v. Bistes, 15 La. Ann. 636. **Md.**—Wright v. Williams, 93 Md. 66, 48 Atl. 397; State v. Dilley, 64 Md. 314, 1 Atl. 612; Cole v. Fliteraft, 47 Md. 312; Withers v. Denmead, 22 Md. 135; Winn v. Albert, 2 Md. Ch. 42. **Mass.**—Old Dominion C. Min. etc. Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193, 40 L. R. A. (N. S.) 314; In re Opinion of Justices, 201 Mass. 609, 89 N. E. 174, 24 L. R. A. (N. S.) 799; Miller v. Barnstable County, 119 Mass. 485; Stearns v. Stearns, 16 Mass. 167. **Mich.**—Allen v. Allen, 188 Mich. 532, 155 N. W. 488; Citizens Bank of Rudyard v. Chippewa Cir. Judge, 186 Mich. 494, 152 N. W. 1077; Wells v. Montcalm Cir. Judge, 141 Mich. 58, 104 N. W. 318, 113 Am. St. Rep. 520; Hogan v. Wayne Cir. Judge, 106 Mich. 254, 64 N. W. 37. **Minn.**—Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944. **Miss.** Neely v. State, 100 Miss. 211, 56 So. 377; Smithey v. State, 93 Miss. 257, 46 So. 410; Coleman v. State, 83 Miss. 290, 293, 35 So. 937, 64 L. R. A. 807, 1 Ann. Cas. 406 (wherein statute provided an act done in one county taking effect in another could be prosecuted in either, but that the county first assuming jurisdiction should have exclusive jurisdiction); Alexander v. Manning, 58 Miss. 634; Martin v. O'Brien, 34 Miss. 21; Glidewell v. Hite, 5 How. 110; Green v. Robinson, 5 How. 80. **Mo.**—State *ex rel.* Knisely v. Holtcamp, 266 Mo. 347, 181 S. W. 1007; State *ex rel.* Sullivan v. Reynolds, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. (N. S.) 963; Crenshaw v. Looker, 185 Mo. 375, 84 S. W. 885; *In re* Ingenbohs, 173 Mo. App. 261, 266, 158 S. W. 878; State v. Landin, 173 Mo. App. 198, 158 S. W. 883. **Neb.**—Terry v. State, 77 Neb. 612, 110 N. W. 733; Gregory v. Kenyon, 34 Neb. 640, 52 N. W. 685. **N. H.**—Peirce v. Finerty, 76 N. H. 38, 76 Atl. 194, 79 Atl. 23, 29 L. R. A. (N. S.) 547. **N. J.**—State *ex rel.* Hoboken, etc. R. R. Co. v. Hoboken, 76 N. J. L. 122, 68 Atl. 1098; Heinselt v. Smith, 34 N. J. L. 215; Gillen v. Hadley, 75 N. J. Eq. 602, 73 Atl. 847, 849; Bigelow v. Old Dominion C. Min. etc. Co., 74 N. J. Eq. 457, 71 Atl. 153; Atty.-Gen. v. Central R. Co., 68 N. J. Eq. 198, 59 Atl. 348; Youmans v. Youmans, 26 N. J. Eq. 149. **N. M.**—Parsons Min. Co. v. McClure, 17 N. M. 694, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744. **N. Y.** Flatauer v. Loser, 211 N. Y. 15, 104 N. E. 1123; Westerfield v. Rogers, 174 N. Y. 230, 66 N. E. 813; Schuehle v. Reiman, 86 N. Y. 270; Matter of Farrell, 125 App. Div. 702, 110 N. Y. Supp. 41; Matter of Wing, 83 Hun 284, 31 N. Y. Supp. 941, 64 N. Y. St. 736. **N. C.**—Worth v. Piedmont Bank, 121 N. C. 343, 28 S. E. 488; Young v. Rollins, 85 N. C. 485; Haywood v. Haywood, 79 N. C. 42; Childs v. Martin, 69 N. C. 126. **Ohio.**—*Ex parte* Bushnell, 8 Ohio St. 599; Pugh v. Brown, 19 Ohio 202; Merrill v. Lake, 16 Ohio 373, 47 Am. Dec. 377; Spinning v. Ohio, etc. Trust Co., 2 Disn. 336, 13 Ohio Dec. 206; Kappes v. State, 26 Ohio Cir. Ct. 111. **Ore.**—*Ex parte* Bowers, 78 Ore. 390, 153 Pac. 412. **Pa.**—Jones v. Lincoln Sav. & Tr. Co., 222 Pa. 325, 71 Atl. 209; Spriggs v. Commercial Title Ins. Co., 206 Pa. 548, 56 Atl. 33; *In re* Wheatland's Appeal, 125 Pa. 38, 17 Atl. 251; Lorenz v. Wightman, 44 Pa. 27; Cleveland, P. & A. R. Co. v. Erie, 27 Pa. 380, 1 Grant Cas. 212; *In re* Stadelman, 23 Pa. Dist. 403; *In re* Tiemann, 23 Pa. Dist. 607; Com. v. Riddle, 21 Pa. Dist. 1028. **P. I.**—Government v. Gale, 24 Phil. Isl. 95. **R. I.**—Boston & Providence R. R. Corp. v. New York & N. E. R. R. Co., 12 R. I. 220; Chapin v. James, 11 R. I. 86, 23 Am. Rep. 412. **S. C.**—Epperson v. Jackson, 83 S. C. 157, 65 S. E. 217; Shaw v. Barksdale,

the whole controversy, whether the action is criminal or civil.⁴ The institution of the second suit does not deprive the first court of jurisdiction.⁵ Courts of co-ordinate jurisdiction may entertain the same cause of action between the same parties, concurrently, where a judgment is sought in personam,⁶ and both may proceed to judgment in

25 S. C. 204; *Jordan v. Moses*, 10 S. C. 431. **Tenn.**—*Thompson v. Hill*, 3 Yerg. 167. **Tex.**—*Riesner v. Gulf, etc. Co.*, 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171; *Bonner v. Hearne*, 75 Tex. 242, 12 S. W. 38; *Burdett v. State*, 9 Tex. 43; *Clepper v. State*, 4 Tex. 242; *Blossingame v. Cattlemen's Trust Co.* (Tex. Civ. App.), 174 S. W. 900; *Goggan & Bros. v. Morrison* (Tex. Civ. App.), 163 S. W. 119; *Stone v. Bvars*, 32 Tex. Civ. App. 154, 73 S. W. 1086; *McCorkle v. McCorkle*, 25 Tex. Civ. App. 149, 60 S. W. 434. **Vt.** *Bank of Bellows Falls v. Rutland & B. R. Co.*, 28 Vt. 470. **Va.**—*Spiller v. Wells*, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878; *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317. **W. Va.**—*Bank of Wheeling v. Bryan*, 86 S. E. 8; *Hogg v. McGuffin*, 72 W. Va. 86, 77 S. E. 552; *Prewett v. Citizens' Nat. Bank*, 66 W. Va. 184, 66 S. E. 231, 135 Am. St. Rep. 1019; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932; *Parsons v. Snider*, 42 W. Va. 517, 26 S. E. 285. **Wis.**—*Komorowski v. Jackowski*, 164 Wis. 254, 159 N. W. 912; *Northwestern Iron Co. v. Land, etc. Imp. Co.*, 92 Wis. 487, 66 N. W. 515; *Falk v. Goldberg*, 45 Wis. 94. **Can.** *Ex parte Peck*, 39 New Bruns. 274.

See the title "Another Action Pending."

Where property is seized see *infra*, XI, B, 3.

[a] A party having notes secured by a mortgage on real estate may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover judgment on his note, and in another court of law in an action of ejectment to get possession of the land. Here in all the suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The

true effect of the rule in these cases is, that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all other courts. This is the illustration of the rule where the parties are the same in all three of the courts. *Parsons Min. Co. v. McClure*, 17 N. M. 694, 712, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744. See also *Buck v. Colbath*, 3 Wall. (U. S.) 334, 18 L. ed. 257.

4. *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. ed. 399; *People v. Wenk*, 71 Misc. 368, 127 N. Y. Supp. 702.

5. **Ill.**—*Yockey v. Marion*, 269 Ill. 242, 110 N. E. 34. **La.**—*Barkdull v. Herwig*, 30 La. Ann. 618. **Mich.**—*Allen v. Allen*, 188 Mich. 532, 155 N. W. 488. **Vt.**—*Whittier v. McFarland*, 79 Vt. 365, 65 Atl. 81. **Wash.**—*State ex rel. Fidelity & Dep. Co. v. Superior Court*, 87 Wash. 498, 151 Pac. 1094.

[a] Effect on Judgment.—It does not follow that when the parties to a suit submit the controversy without objection to another tribunal having jurisdiction of the subject-matter, that the judgment pronounced therein by the latter court is not binding upon the parties. *Gregory v. Kenyon*, 34 Neb. 640, 52 N. W. 685.

6. **U. S.**—*Stanton v. Embry*, 93 U. S. 548, 23 L. ed. 983; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518; *Jackson v. Parkersburg & O. V. Electric Ry. Co.*, 233 Fed. 784; *Rodgers v. Pitt*, 96 Fed. 668; *Logan v. Greenlaw*, 12 Fed. 10. **Ga.**—*Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, 31

some cases,⁷ although at common law a second suit brought by the same plaintiff against the same defendant on the same cause of action in courts of the same sovereignty would be defeated by a plea in abatement.⁸ The rule has been applied to conflicts between courts of probate and other courts of concurrent jurisdiction,⁹ or between different probate courts in the same state,¹⁰ or conflicts between courts of equity and probate courts.¹¹ Technical creditors' bills are an exception to the foregoing rule, however, for in that class of suits, each

L. R. A. (N. S.) 1057. **N. J.**—Gallagher v. True Am. Pub. Co., 75 N. J. Eq. 171, 71 Atl. 741; Squire v. Princeton L. Co., 72 N. J. Eq. 883, 68 Atl. 176, 15 L. R. A. (N. S.) 657; Gallagher v. Asphalt Co., 65 N. J. Eq. 258, 55 Atl. 259. **N. M.**—Parsons Min. Co. v. McClure, 17 N. M. 694, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744.

See generally "Another Action Pending."

7. Young v. Hamilton, 135 Ga. 339, 69 S. E. 593, 31 L. R. A. (N. S.) 1057.

8. **U. S.**—Knott v. Evening Post Co., 124 Fed. 342, 356. **Conn.**—Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433, *disapproving* Hart v. Granger, 1 Conn. 154. **Pa.**—Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448. **Eng.**—Imlay v. Ellefsen, 2 East 453, 102 Eng. Reprint 442; Maule v. Murray, 7 Term Rep. 470, 101 Eng. Reprint 1081; Bayley v. Edwards, 3 Swans. 703, 710, 36 Eng. Reprint 1029; Ostell v. Lepage, 10 Eng. L. & Eq. 250, 255.

See generally the title "Abatement, Pleas of."

[a] **Determination of Plea.**—The second suit is not, of course, to be abated and dismissed as vexatious, but all the attending circumstances are to be first carefully considered, and the true question will be, what is the aim of the plaintiff? Is it fair and just, or is it oppressive? Hatch v. Spofford, 22 Conn. 485, 494, 58 Am. Dec. 433.

[b] **Objection Not Jurisdictional.** But this is not, unless in a very remote sense, upon the ground that the court in which the first suit was brought acquired jurisdiction to the exclusion of all others, but is primarily upon the ground that a defendant should not be vexed by two such suits at the same time. Knott v. Evening Post Co., 124 Fed. 342, 356; Hatch v.

Spofford, 22 Conn. 485, 58 Am. Dec. 433.

9. **Cal.**—Gurnee v. Maloney, 38 Cal. 85, 99 Am. Dec. 352. **Ill.**—Hupp v. Hupp, 61 Ill. App. 445. **Ind.**—Coon v. Coon, 6 Ind. 268. **Kan.**—Johnson v. Cain, 15 Kan. 532. **La.**—Gee v. Thompson, 37 La. Ann. 598; Bussy & Co. v. Nelson, 30 La. Ann. 25; Guilbeau v. Wiltz, 26 La. Ann. 600; Butterly's Succession, 10 La. Ann. 258. **Mass.**—Stearns v. Stearns, 16 Mass. 167. **Minn.**—Jacobs v. Fouse, 23 Minn. 51. **Mo.**—State *ex rel.* Knisely v. Holtcamp, 266 Mo. 347, 181 S. W. 1007; Overton v. McFarland, 15 Mo. 312. **N. J.**—Search's Admr. v. Search's Admr., 27 N. J. Eq. 137; *In re* Coursen's Will, 4 N. J. Eq. 408. **N. Y.**—Garlock v. Vandevort, 128 N. Y. 374, 28 N. E. 599; Matter of Ayrault, 81 Hun 107, 30 N. Y. Supp. 654, 62 N. Y. St. 628; Matter of De Pierris, 79 Hun 279, 29 N. Y. Supp. 360; *In re* Llado's Est., 50 Misc. 227, 100 N. Y. Supp. 495. **N. C.**—Haywood v. Haywood, 79 N. C. 42. **Ohio.**—Longley v. Sewell, 4 Ohio Dec. 1, 2 Ohio N. P. 376. **Pa.**—Frey's Estate, 12 Phila. 1; Schenck's Estate, 4 W. N. C. 511. **R. I.**—Dean v. Rounds, 18 R. I. 436, 27 Atl. 515, 28 Atl. 802. **S. C.**—Witte Bros. v. Clarke, 17 S. C. 313.

10. **Ill.**—People v. White, 11 Ill. 341. **La.**—Hereford v. Babin, 14 La. Ann. 333; Stanbrough v. Garrett, 1 Rob. 13; State v. Probate Judge, 17 La. 500; Oakey v. Ducker, 13 La. 375; Hodge's Heirs v. Durnford, 13 La. 187. **Minn.**—State *ex rel.* Selover v. Probate Court, 130 Minn. 269, 153 N. W. 520. **N. Y.**—People *ex rel.* Weatherhead v. Waldron, 52 How. Pr. 221; *In re* Buckley's Will, 41 Hun 106, 2 N. Y. St. 673. **Pa.**—Holt's Estate, 11 Phila. 13. **Wash.**—Territory v. Klee, 1 Wash. 183, 23 Pac. 417.

See generally the title "Probate Courts."

11. **Ala.**—Eastburn v. Canizas, 193 Ala. 574, 69 So. 459; Hause v. Hause,

suit has the same general object, and contemplates the same general relief.¹²

2. Limitation of Rule.—The rule that, among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations;¹³ it is confined to suits between the same parties or privies,¹⁴ upon the same case,¹⁵ seeking the same relief

57 Ala. 262; *Moore v. Lesueur*, 33 Ala. 237. **Ark.**—*Eagle v. Terrell*, 95 Ark. 434, 130 S. W. 550; *McCracken v. McBee*, 96 Ark. 251, 131 S. W. 450. **Conn.** *Pitkin v. Pitkin*, 7 Conn. 315. **Mass.** *Jenison v. Hapgood*, 7 Pick. 1, 19 Am. Dec. 258. **Mich.**—*Brooks v. Hargrave*, 179 Mich. 136, 146 N. W. 325. **Mo.** *Gray v. Clement*, 12 Mo. App. 579. **N. J.**—*Streeter v. Braman*, 76 N. J. Eq. 371, 74 Atl. 659; *Bower v. Bower* (N. J. Eq.), 69 Atl. 1077; *Huston v. Read*, 32 N. J. Eq. 591; *Van Mater v. Sickler*, 9 N. J. Eq. 483. **N. Y.** *Whitney v. Monroe*, 4 Edw. 5; *Aubuchon v. Murphy*, 64 Misc. 286, 118 N. Y. Supp. 553. **Pa.**—*Somers v. Hanson*, 5 Phila. 87. **Vt.**—*Merriam v. Hemmenway*, 26 Vt. 565.

12. *Spiller v. Wells*, 96 Va. 598, 606, 32 S. E. 46, 70 Am. St. Rep. 878; *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317.

[a] Such suit is brought for the administration of the entire fund for the benefit of all the creditors according to their respective rights, and each suit having therefore the same common object, and being for the benefit of all the persons interested, no other creditor is required to await or rely on the diligence of him who has first instituted his suit, for until a decree of reference, each complainant has control of his own suit. *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317.

13. *Buck v. Colbath*, 3 Wall. (U. S.) 334, 18 L. ed. 257; *Jackson v. Parkersburg & O. V. Elec. Ry. Co.*, 233 Fed. 784, 789; *Andrews v. Smith*, 19 Blatchf. (U. S.) 100, 5 Fed. 833.

14. U. S.—*Put-in-Bay Waterworks, etc. R. Co. v. Ryan*, 181 U. S. 409, 21 Sup. Ct. 709, 45 L. ed. 927; *Watson v. Jones*, 13 Wall. 679, 715, 20 L. ed. 666; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Feidler v. Bartleson*, 161 Fed. 30, 88 C. C. A. 194; *Jacob Tome Inst. v. Whitcomb*, 160 Fed. 835, 87 C. C. A. 639; *Jackson v. Parkersburg*

& O. V. Electric Ry. Co., 233 Fed. 784; *Straine v. Bradford Sav. Bank, etc. Co.*, 88 Fed. 571; *Powers v. Blue Grass Bldg., etc. Assn.*, 86 Fed. 705; *Deming v. Orient Ins. Co.*, 78 Fed. 1; *New York State Trust Co. v. National Land Imp. Co.*, 72 Fed. 575; *Chicago Trust & Sav. Bank v. Bentz*, 59 Fed. 645; *Coe v. Aiken*, 50 Fed. 640; *Brooks v. Vermont Cent. R. Co.*, 14 Blatchf. 463, 4 Fed. Cas. No. 1,964. **Ala.**—*Gay v. Brierfield Coal & I. Co.*, 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564. **Neb.**—*Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751. **N. M.**—*Parsons Min. Co. v. McClure*, 17 N. M. 694, 711, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744. **N. Y.** *Mutual Life Ins. Co. v. Fleishman*, 149 App. Div. 23, 133 N. Y. Supp. 512; *Richman v. Consolidated Gas Co.*, 114 App. Div. 216, 100 N. Y. Supp. 81. **R. I.**—*Boston & Providence R. R. v. New York & N. E. R. R. Co.*, 12 R. I. 220. **S. C.**—*McKibben v. Salinas*, 41 S. C. 105, 19 S. E. 302. **Vt.**—See *Sabin v. Kelton*, 54 Vt. 283. **W. Va.**—*Jackson v. Parkersburg & O. V. Elect. Ry. Co.*, 233 Fed. 784, 789.

15. U. S.—*Put-in-Bay Water Works, etc. R. Co. v. Ryan*, 181 U. S. 409, 21 Sup. Ct. 709, 45 L. ed. 927; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Guardian Trust Co. v. Kansas City S. R. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Rose Co. v. Southern Exp. Co.*, 223 Fed. 868; *Lighton v. Carthage*, 175 Fed. 145; *Hubbard v. Bellevue*, 3 Fed. 447; *Brooks v. Vermont Cent. R. Co.*, 14 Blatchf. 463, 4 Fed. Cas. No. 1,964. **D. C.**—*Whitney v. Frisbie*, 6 D. C. 262. **Wis.**—*National Foundry, etc. Works v. Oconto City Water Supply Co.*, 105 Wis. 48, 81 N. W. 125.

[a] The relief sought in the two suits must be founded on the same

or remedy.¹⁶ It extends only to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought, and not to all matters which may by possibility become involved in it.¹⁷ It does not prevent other courts from adjudicating upon other matters having a very close connection with those before the first court, and, in some instances requiring the decision of the same question exactly.¹⁸

The identity of the parties, of the case made, and of the relief sought, should be such that if the first suit had been decided it could be pleaded as a bar or a former adjudication.¹⁹ The rule does not

facts, and the title or essential basis of relief sought must be the same. *Watson v. Jones*, 13 Wall. 679, 715, 20 L. ed. 666.

[b] **The rule does not apply** (1) where the second suit rests upon contracts or obligations which from their nature are merged in the judgment in the first suit (*Union Mut. L. Ins. Co. v. Kirchoff*, 149 Ill. 536, 36 N. E. 1031), (2) or where one suit is in personam and the other in rem (*Guardian Trust Co. v. Kansas City S. R. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Ahlhauser v. Butler*, 50 Fed. 705); (3) nor does it apply where the first proceedings were insolvency proceedings under a state statute, as such proceedings are not a suit. *Shelby v. Bacon*, 10 How. (U. S.) 56, 13 L. ed. 326.

[c] **Suits in Equity and at Law.** The existence of an earlier suit in equity will not sustain a plea in abatement to a later action at law in another jurisdiction where the prosecution of the later action does not prevent the determination of the issues and administration of rights and remedies in the former suit. *Guardian Trust Co. v. Kansas City S. R. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Ogden v. Weaver*, 108 Fed. 564, 47 C. C. A. 485; *Defiance Water Co. v. Defiance*, 100 Fed. 178; *Brooks v. Vermont Cent. R. Co.*, 14 Blatchf. 463, 4 Fed. Cas. No. 1,964.

[d] **Federal Question.**—The fact that the state court first obtained jurisdiction of the causes involving a federal question does not operate to oust the jurisdiction of the federal court of causes, subsequently brought to it, between other or the same parties, involving the decision of the same question. *Rose Co. v. Southern Express Co.*, 223 Fed. 868.

16. **U. S.**—*Marsh v. Nichols*, 140 U.

S. 344, 11 Sup. Ct. 798, 35 L. ed. 413 (affirming 61 Mich. 509, 28 N. W. 699); *Guardian Trust Co. v. Kansas City S. R. Co.*, 171 Fed. 43, 96 C. C. A. 285; *Board of County Comrs. v. Tollman*, 145 Fed. 753, 76 C. C. A. 317; *Hubinger v. New York Central Trust Co.*, 94 Fed. 788, 36 C. C. A. 494; *Jackson v. Parkersburg & O. V. Electric Ry. Co.*, 233 Fed. 784; *Laighton v. Carthage*, 175 Fed. 145; *Morrill v. American Reserve Bond Co.*, 151 Fed. 305; *Straine v. Bradford Sav. Bank, etc. Co.*, 88 Fed. 571; *Powers v. Blue Grass Bldg., etc. Assn.*, 86 Fed. 705; *Cohen v. Solomon*, 66 Fed. 411. **Ala.**—*Gay v. Brierfield Coal & I. Co.*, 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564. **La.**—*Puech v. Daret*, 45 La. Ann. 1281, 14 So. 71. **N. J.**—*Gallagher v. Asphalt Co.*, 65 N. J. Eq. 258, 55 Atl. 259. **N. Y.**—*Richman v. Consolidated Gas Co.*, 186 N. Y. 209, 78 N. E. 871; *People v. New York City R. Co.*, 57 Misc. 114, 107 N. Y. Supp. 247. **Okla.**—*Davis v. Mimey*, 159 Pac. 1112.

17. **U. S.**—*Buck v. Colbath*, 3 Wall. 234, 18 L. ed. 257; *Guardian Trust Co. v. Kansas City S. R. Co.*, 171 Fed. 43, 96 C. C. A. 285, 28 L. R. A. (N. S.) 620; *Jackson v. Parkersburg & O. V. Electric Ry. Co.*, 233 Fed. 784, 789; *Laighton v. Carthage*, 175 Fed. 145. **Idaho.**—*Ryan v. Weiser Val. Land & Water Co.*, 20 Idaho 288, 118 Pac. 769. **Mass.**—*Federal Trust Co. v. Bristol, etc. R. Co.*, 222 Mass. 35, 109 N. E. 880.

18. *Buck v. Colbath*, 3 Wall. (U. S.) 234, 18 L. ed. 257; *Parsons Min. Co. v. McClure*, 17 N. M. 694, 711, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744.

19. *Watson v. Jones*, 13 Wall. (U. S.) 679, 20 L. ed. 666; *South Penn Oil Co. v. Miller*, 175 Fed. 729, 99 C. C. A. 305.

apply where the proceedings in the first court are merely colorable and in evasion of jurisdiction.²⁰ The rule has no reference to the supremacy of one tribunal over the other,²¹ nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked;²² and resting as it does upon considerations of convenience, and of decency, order and priority, it must yield to the higher principle which accords to every citizen the right to have a hearing before some court,²³ and it is therefore an essential condition of the application of the rule as to priority of jurisdiction that the first suit should afford the plaintiff in the second an adequate and complete opportunity for the adjudication of rights,²⁴ so that if the court first taking cognizance of the case possesses too limited a jurisdiction to afford all the relief to which the parties are entitled the rule is inapplicable.²⁵

3. Where Property in Custody of Another Court.—a. *General Statement.*—Where different plaintiffs lawfully choose different forums to enforce different rights, the question of priority of service of process so as to give jurisdiction of the person of the defendant is abstract and immaterial unless property is seized.²⁶ But when a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts.²⁷ The res in such

As to former adjudication, see the titles "Judgments;" "Res Judicata."

20. *Clark's Heirs v. Gaines*, 13 La. Ann. 138; *People v. State Treasurer*, 24 Mich. 468.

21. *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, 31 L. R. A. (N. S.) 1057.

22. *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, 31 L. R. A. (N. S.) 1057.

23. *Spiller v. Wells*, 96 Va. 598, 601, 32 S. E. 46, 70 Am. St. Rep. 878.

24. *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, 31 L. R. A. (N. S.) 1057; *Spiller v. Wells*, 96 Va. 598, 601, 32 S. E. 46, 70 Am. St. Rep. 878.

[a] **Bankruptcy Proceedings No Bar to Mechanic's Lien Suit.**—That upon the institution of bankruptcy proceedings and the appointment of a trustee all the property of the bankrupt passes to the custody of the United States court, does not preclude the filing of a suit in the state court to preserve a mechanic's lien. *Clifton v. Foster*, 103 Mass. 233, 4 Am. Rep. 539.

25. *Yonley v. Lavender*, 21 Wall. (U. S.) 276, 22 L. ed. 536; *Williams v. Benedict*, 8 How. (U. S.) 107, 12 L. ed. 1007; *Southern Hardware & S.*

Co. v. Lester, 166 Ala. 86, 52 So. 328.

26. *Knott v. Evening Post Co.*, 124 Fed. 342, 356.

27. **U. S.**—*Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435, s. c., 158 Fed. 705, 85 C. C. A. 603; *Murphy v. Hofman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. ed. 327; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. ed. 379; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. ed. 867; *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342, 30 L. ed. 532; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; *Taylor v. Taintor*, 16 Wall. 366, 21 L. ed. 287; *Mound City Co. v. Castleman*, 187 Fed. 921, 110 C. C. A. 55; *Clay v. Waters*, 178 Fed. 385, 101 C. C. A. 645; *Lang v. Choctaw, O. & G. Ry. Co.*, 160 Fed. 355, 87 C. C. A. 307; *Logan v. Greenlaw*, 12 Fed. 10. **Ala.**—*McAfee v. Arnold*, 155 Ala. 561, 46 So. 870; *King v. Smith*, 15 Ala. 264; *Eaton v. Patterson*, 2 Stew. & P. 9. **Ark.**—*Goodrich v. Fritz*, 4 Ark. 525, *reaffirmed* in *Spring v. Bourland*, 11 Ark. 658, 54 Am. Dec. 243. **Cal.**—*Averill v. The Hartford*, 2 Cal. 308. **Idaho.** *Thum v. Pyke*, 8 Idaho 11, 66 Pac. 157. **Ill.**—*Newman v. Commercial Nat. Bank*, 156 Ill. 530, 41 N. E. 156, *affirming* 55 Ill. App. 534. **Kan.**—*Brown*

case is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty,²⁸ and no other court except one of supervisory or superior jurisdiction may rightfully interfere with that possession,²⁹ either by an action of replevin,³⁰ a libel in admiralty,³¹ or in any other man-

v. Stuart, 90 Kan. 302, 133 Pac. 725; *Missouri Pac. Ry. Co. v. Love*, 61 Kan. 433, 59 Pac. 1072. **Ky.**—*Stemmons v. King*, 8 B. Mon. 559; *Biggs v. Garrard*, 6 B. Mon. 484, 44 Am. Dec. 778. **La.**—*Loeb v. Fischer*, 137 La. 132, 68 So. 383; *Lamoree v. Cox*, 32 La. Ann. 1045; *Adams & Co. v. Daunis*, 29 La. Ann. 315; *Shiff v. Carprette*, 14 La. Ann. 801; *Twitty v. Clarke*, 14 La. Ann. 503. **Md.**—*Jones v. Jones*, 1 Bland 443, 18 Am. Dec. 327. **Mo.**—*Metzner v. Graham*, 57 Mo. 404; *State ex rel. Taubman v. Davis* (Mo. App.), 190 S. W. 964; *Mishawaka W. Co. v. Powell*, 98 Mo. App. 530, 72 S. W. 723. **N. J.** *Day v. Compton*, 37 N. J. L. 514. **N. Y.**—*People v. Murray Hill Bank*, 10 App. Div. 328, 41 N. Y. Supp. 804, 26 Civ. Proc. 1, 75 N. Y. St. 1203; *Kenny v. Geoghegan*, 9 Civ. Proc. 378, 1 N. Y. St. 135. **N. C.**—*Morris v. Whitehead*, 65 N. C. 637; *Bear v. Cohen*, 65 N. C. 511. **Ohio.**—*Ex parte Bushnell*, 8 Ohio St. 599; *In re Cincinnati Consumers' Brewing Co.*, 9 Ohio Dec. 519, 6 Ohio N. P. 472; *Hatch v. St. Clair*, 2 Ohio Cir. Ct. 163, 1 Ohio Cir. Dec. 421. **Okla.**—*Darrough v. First Nat. Bank*, 156 Pac. 191; *Lanyon v. Braden*, 150 Pac. 677. **P. I.**—*Government v. Gale*, 24 Phil. Isl. 95. **Tex.** *Lauraine v. Ashe*, 191 S. W. 563; *Kit-trell v. First Nat. Bank*, 56 Tex. Civ. App. 395, 120 S. W. 1104; *Worden v. Pruter*, 40 Tex. Civ. App. 118, 88 S. W. 434; *Dunovant's Estate v. Stafford & Co.*, 36 Tex. Civ. App. 33, 81 S. W. 101. **Vt.**—*French v. White*, 78 Vt. 89, 62 Atl. 35, 2 L. R. A. (N. S.) 804, 6 Ann. Cas. 479. **Va.**—*Craig v. Hoge*, 95 Va. 275, 28 S. E. 317; *Ford v. Watts*, 95 Va. 192, 28 S. E. 179. **Wash.**—*State ex rel. Titlow v. City of Centralia*, 93 Wash. 401, 161 Pac. 74. **W. Va.**—*Bank of Wheeling v. Bryan*, 86 S. E. 8.

[a] This is because the possession of the res is indispensable to the exercise of its jurisdiction by the court to the end that it may be impressed by its decree. *Louisville Trust Co. v. Knett*, 130 Fed. 820, 65 C. C. A. 158, reversing 124 Fed. 342.

[b] Assignee for Creditors.—(1)

Unless the assignee for creditors is by statute an officer of court (*McCaffrey v. The J. G. Chapman*, 62 Fed. 939), (2) property is not in custodia legis while in his control. *Rothschild v. Hasbrouck*, 65 Fed. 283; *Hogue v. Frankfort*, 62 Fed. 1006; *Lapp v. Van Norman*, 19 Fed. 406.

[c] A divorce action falls within this rule of proceedings in rem. *State ex rel. Taubman v. Davis* (Mo. App.), 190 S. W. 964.

As to proceedings in rem, see generally the title "Proceedings in Rem."

28. *State v. Stone* (Mo.), 190 S. W. 601.

29. *Ahlhauser v. Butler*, 50 Fed. 705.

[a] Jurisdiction of the res is jurisdiction for all purposes, and it is acquired in a divorce suit, so far as dealing with the status of the parties is concerned, by the filing of the petition and the issuance of the summons. When this is done, the entire jurisdiction is absorbed, and nothing is left for another court of concurrent jurisdiction to lay hold on. *Wells v. Montcalm Cire. Judge*, 141 Mich. 58, 104 N. W. 318, 113 Am. St. Rep. 520; *State ex rel. Taubman v. Davis* (Mo. App.), 190 S. W. 964.

[b] To attempt to seize it by a foreign process is futile. *State ex rel. Kern v. Stone* (Mo.), 190 S. W. 601.

[c] Though an adverse title or claim paramount to the title or lien under which the court of seizure holds the property, be set up, the possession cannot be interfered with. *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. ed. 145; *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400.

[d] As to remedy of party, see *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390.

30. *Freeman v. Howe*, 24 How. (U. S.) 450, 16 L. ed. 749; *Darrrough v. First Nat. Bank* (Okla.), 156 Pac. 191.

31. *Taylor v. Carryl*, 20 How. (U. S.) 583, 15 L. ed. 1028.

ner,³² and prohibition will lie to prevent it from so doing.³³ Nor can it render nugatory a judgment or decree of the court of seizure, by subsequently assuming jurisdiction.³⁴

From the fact that another court cannot interfere with the property, it follows that an administrative commission cannot do so.³⁵

The court seizing the property is entitled to retain it to the end of the controversy and to decide all questions which legitimately flow out of the controversy.³⁶ Such rule does not deprive another court of

32. *Darrough v. First Nat. Bank* (Okla.), 156 Pac. 191.

33. *State ex rel. Bowling Green Tr. Co. v. Barnett*, 245 Mo. 99, 149 S. W. 311; *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 15 L. R. A. (N. S.) 963; *State v. Ross*, 122 Mo. 435, 25 S. W. 947, 23 L. R. A. 534; *State ex rel. Taubman v. Davis* (Mo. App.), 190 S. W. 964.

34. *Wabash R. v. Adelbert College*, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. ed. 379; *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *People v. Peoria, etc. R. Co.*, 273 Ill. 440, 113 N. E. 68.

35. *People v. Peoria, etc. R. Co.*, 273 Ill. 440, 113 N. E. 68.

36. **U. S.**—*Rickey Land, etc. Co. v. Miller*, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032; *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435; *In re Chitwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. ed. 782; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *State of Texas v. Palmer*, 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316. **Ala.**—*Kirkbride v. Kelly*, 167 Ala. 570, 52 So. 660; *Gay v. Brierfield Coal & I. Co.*, 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564; *Opelika v. Daniel*, 59 Ala. 211. **Ark.**—*Eagle v. Terrell*, 95 Ark. 434, 130 S. W. 550. **Cal.**—*Isom v. Rex Crude Oil Co.*, 147 Cal. 659, 663, 82 Pac. 317; *Miller v. Higgins*, 14 Cal. App. 156, 111 Pac. 403. **Colo.**—*Consolidated Home Supply Ditch & R. Co. v. New Loveland & G. Irr. & L. Co.*, 27 Colo. 521, 62 Pac. 364. **Fla.**—*Ray v. Williams Phosphate Co.*, 59 Fla. 598, 52 So. 589. **Idaho.**—*State v. Raaf*, 16 Idaho 411, 101 Pac. 747. **Ill.**—*Plume, etc. Mfg. Co. v. Caldwell*, 136 Ill. 163, 26 N. E. 599, 29 Am. St. Rep. 305; *McNab v. Heald*, 41 Ill. 326; *Mason v. Piggott*,

11 Ill. 85. **Ind.**—*Ex parte Boos*, 175 Ind. 389, 94 N. E. 401. **Ia.**—*Gregory v. Howell*, 118 Iowa 26, 91 N. W. 778. **Kan.**—*Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299; *State v. Chinault*, 55 Kan. 326, 40 Pac. 662. **Ky.**—*Clark County Court v. Warner*, 116 Ky. 801, 76 S. W. 828. **Md.**—*Wright v. Williams*, 93 Md. 66, 48 Atl. 397; *Withers v. Denmead*, 22 Md. 135; *Brooks v. Delaplaine*, 1 Md. Ch. 351, 354. **Mass.**—*Carson v. Dunham*, 149 Mass. 52, 20 N. E. 312, 14 Am. St. Rep. 397, 3 L. R. A. 202; *Stearns v. Stearns*, 16 Mass. 167; *Bemis v. Stearns*, 16 Mass. 200, 203. **Miss.**—*Coleman v. State*, 83 Miss. 290, 293, 35 So. 937, 64 L. R. A. 807, 1 Ann. Cas. 406. **Mo.**—*State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 107 S. W. 487, 123 Am. St. Rep. 468, 14 Ann. Cas. 198, 15 L. R. A. (N. S.) 963. **Neb.**—*Terry v. State*, 77 Neb. 612, 110 N. W. 733; *Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751. **N. J.**—*Gillen v. Hadley*, 75 N. J. Eq. 602, 73 Atl. 847, 849; *Bigelow v. Old Dominion Copper Min., etc. Co.*, 74 N. J. Eq. 457, 71 Atl. 153; *Home Ins. Co. v. Howell*, 24 N. J. Eq. 238. **N. M.**—*Parsons Min. Co. v. McClure*, 17 N. M. 694, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744. **N. Y.**—*Matter of Farrell*, 125 App. Div. 702, 110 N. Y. Supp. 41; *Westerfield v. Rogers*, 63 App. Div. 18, 71 N. Y. Supp. 401; *Aubuchon v. Murphy*, 64 Misc. 286, 118 N. Y. Supp. 553. **N. C.**—*State v. Yarbrough*, 8 N. C. 78. **N. D.**—*Rock Island Plow Co. v. Western Implement Co.*, 21 N. D. 608, 132 N. W. 351. **Ohio.**—*Ex parte Bushnell*, 8 Ohio St. 599. **Ore.**—*Eagle Cliff F. Ins. Co. v. McGowan*, 70 Ore. 1, 137 Pac. 766; *Goodnough Merc. Co. v. Galloway*, 48 Ore. 239, 84 Pac. 1049. **Pa.**—*Sprigg v. Commonwealth Title Ins., etc. Co.*, 206 Pa. 548, 56 Atl. 33. **S. C.**—*Epperson*

concurrent jurisdiction, however. It merely operates to prevent such second court from interfering with the first action or proceeding,³⁷ and does not preclude a litigant from instituting a suit in another court so long as it does not interfere with the possession of the property in the hands of the court first obtaining jurisdiction.³⁸ Where a subsequent suit involving the rights of the parties to the same property is commenced in a court of co-ordinate jurisdiction, that suit should not be dismissed, but should be stayed until the proceedings in the other court are concluded, or ample time for their termination has elapsed.³⁹

b. *When Rule Applicable.*—In order that the first court may have exclusive jurisdiction over the property there must be a seizure.⁴⁰ Such seizure may be either actual,⁴¹ or constructive,⁴² as in the case

v. Jackson, 83 S. C. 157, 65 S. E. 217. **Tenn.**—*Merchants of Memphis v. Memphis*, 9 Baxt. 76; *Thompson v. Hill*, 3 Yerg. 167. **Tex.**—*Riesner v. Gulf*, etc. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 122, 16 L. R. A. 564.

v. Case Threshing Mach. Co. (Tex. Civ. App.), 188 S. W. 725; *Cattleman's Tr. Co. v. Blasingame* (Tex. Civ. App.), 154 S. W. 574; *Sparks v. National Bank* (Tex. Civ. App.), 168 S. W. 48; *Harrison v. Littlefield*, 57 Tex. Civ. App. 617, 124 S. W. 212; *Stone v. Byars*, 32 Tex. Civ. App. 154, 73 S. W. 1086. **Va.**—*Hoge v. Fidelity L. & Tr. Co.*, 103 Va. 1, 48 S. E. 494; *Spiller v. Wells*, 96 Va. 598, 600, 32 S. E. 46, 70 Am. St. Rep. 878; *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317; *Haden v. Garden*, 7 Leigh (34 Va.) 157. **W. Va.**—*Prewett v. Citizens' Nat. Bank*, 66 W. Va. 184, 66 S. E. 231, 135 Am. St. Rep. 1019; *Bruner v. Miller*, 59 W. Va. 36, 42, 52 S. E. 995; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932.

37. *Logan v. Greenlaw*, 12 Fed. 10; *Brown v. Stuart*, 90 Kan. 302, 304, 133 Pac. 725.

38. *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; *Holladay's Case*, 27 Fed. 830; *Gay v. Brierfield C. & I. Co.*, 94 Ala. 303, 11 So. 353, 33 Am. St. Rep. 122, 16 L. R. A. 564.

[a] Notwithstanding the property sought to be effected (1) is under the control of another court, the plaintiff may sue defendant and recover a judgment and then issue execution against the proceeds in the hands of the court (*In re Daniel Kaine*, 35 Fed. 785), (2) or file a bill on the judgment in the court having control of the property

(*Holladay's Case*, 27 Fed. 830); (3) or, when necessary to do so, may proceed and file a suit in another court to fix and establish a lien. *Heidritter v. Elizabeth Oil Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; *Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

39. *Sullivan v. Algren*, 160 Fed. 366, 372, 87 C. C. A. 318; *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 667, 68 C. C. A. 288, 305; *Williams v. Neely*, 134 Fed. 1, 15, 67 C. C. A. 171, 185, 69 L. R. A. 232; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 948, 66 C. C. A. 55, 58, 67 L. R. A. 761; *Zimmerman v. So Relle*, 80 Fed. 417, 420, 25 C. C. A. 518, 521.

40. *Buck v. Colbath*, 3 Wall. (U. S.) 234, 18 L. ed. 257; *Powers v. Bluegrass*, etc. Assn., 86 Fed. 705; *In re Hall*, 73 Fed. 527; *Leigh v. Green*, 62 Neb. 344, 356, 86 N. W. 1093, 89 Am. St. Rep. 751.

41. *State v. Palmer*, 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316, *affirmed*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435; *Louisville Trust Co. v. Knott*, 130 Fed. 820, 65 C. C. A. 158; *McDowell v. McCormick*, 121 Fed. 61, 57 C. C. A. 401.

42. *Farmers' Loan & Tr. Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667; *Illinois Steel Co. v. Putnam*, 68 Fed. 515, 15 C. C. A. 556, 558; *Adams v. Mercantile Trust Co.*, 66 Fed. 617, 15 C. C. A. 1, 5; *State ex rel. Fidelity & D. Co. v. Superior Court*, 87 Wash. 498, 151 Pac. 1094.

[a] **The judicial custody of property** (1) may sometimes be acquired in a somewhat less positive way. For example, it may, in some cases and as to certain parties, be accomplished by

of the appointment of a receiver,⁴³ or an adjudication of bankruptcy.⁴⁴ This principle is equally applicable to the case of personal property attached under mesne process, for the purpose of awaiting the final judgment, as in the case of the property seized in a proceeding in rem,⁴⁵ and is held to be applicable to property seized under attachment,⁴⁶ or execution,⁴⁷ though some authorities hold that the levy of an attachment on real estate,⁴⁸ or the commencement of a suit to foreclose a mechanic's or materialman's lien on property⁴⁹ will not give the court from which such process issues such actual or constructive possession of the property as to preclude another court from assuming jurisdiction over the property.

Where Proceedings Are Invalid.—Of course if the first court had no jurisdiction of the cause of which it assumed control,⁵⁰ or the appointment of the receiver was void,⁵¹ the possession of the res by the first court does not preclude the second court from acquiring jurisdiction of the res, though there is authority to the effect that no inquiry will be made in the other court as to the jurisdiction of the court in which

lis pendens (Miller v. Sherry, 2 Wall. [U. S.] 237, 17 L. ed. 827), (2) or, as against parties to the suit, there may be an equitable levy by virtue of the suit itself, where equitable assets are sought to be subjected by means of a creditors' bill (Freedman's Sav. & Tr. Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. ed. 301), (3) though in all such cases there must be a suit upon a judgment, and a return of nulla bona, or there may be cases where the property is in the custody of the probate court by reason of its having been committed to the hands of an administrator, executor, or curator. Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. ed. 867. (4) But while in these cases the property is only potentially—that is, constructively—in custodia legis, it is nevertheless so under a certain form of judicial stress, and by virtue of a judicial proceeding, the nature of which must be appropriate to that result. Knott v. Evening Post Co., 124 Fed. 342, 357.

43. Riesner v. Gulf, C. & S. F. Ry. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171; Texas Trunk Ry. Co. v. Lewis, 81 Tex. 1, 16 S. W. 647; Northwestern Iron Co. v. Land & River Imp. Co., 92 Wis. 487, 66 N. W. 515; Milwaukee & St. P. R. Co. v. Milwaukee & M. R. Co., 20 Wis. 165.

[a] Appointment of receiver, not actual taking possession of property determines assumption of jurisdiction. Texas v. Palmer, 158 Fed. 705, 85 C.

C. A. 603, 22 L. R. A. (N. S.) 316.

[b] Jurisdiction over the property is acquired when the receiver is appointed, the judicial process served, and the receiver duly qualified, although the state receiver has not taken actual possession of the property. Palmer v. Texas, 212 U. S. 118, 129, 29 Sup. Ct. 230, 53 L. ed. 435; Farmers' Loan & Tr. Co. v. Lake St. El. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667.

44. Darrough v. First Nat. Bank (Okla.), 156 Pac. 191.

45. Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; Taylor v. Carryl, 20 How. (U. S.) 583, 15 L. ed. 1028; Freeman v. Howe, 24 How. (U. S.) 450, 16 L. ed. 749.

46. Covell v. Heyman, 111 U. S. 176, 184, 4 Sup. Ct. 355, 28 L. ed. 390.

47. Covell v. Heyman, 111 U. S. 176, 184, 4 Sup. Ct. 355, 28 L. ed. 390.

48. Pacific Coast P. Co. v. Conrad City Water Co., 237 Fed. 673; Leigh v. Green, 62 Neb. 344, 356, 86 N. W. 1093, 89 Am. St. Rep. 751.

49. National Foundry & P. Works v. Oconto City W. S. Co., 105 Wis. 48, 81 N. W. 125.

50. Hammock v. Loan & Trust Co., 105 U. S. 77, 26 L. ed. 1111, holding seizure by federal court was lawful because prior appointment of receiver by state court in vacation was void under state law.

51. Pacific Coast P. Co. v. Conrad City W. Co., 237 Fed. 673.

the suit is pending, that being a matter to be raised there by any interested party asserting it.⁵² Nor will the court allow an interfering claimant to question the validity of the orders under which possession was obtained on the ground that they were improvidently made.⁵³

When the litigation is ended, or the possession discharged, other courts can then deal with it.⁵⁴ The rendition of a judgment in the first cause does not exhaust the jurisdiction of the first court,⁵⁵ but it continues until the judgment is satisfied.⁵⁶

Interference by Leave of Court of Seizure. — The rule prohibits interference by the second court with the possession of the property or res except by permission of the first court.⁵⁷

c. *What Determines Priority.* — The question as to which authority should for the time prevail, does not depend upon the rights of the respective parties to the property seized, but upon the question, which jurisdiction had first attached by the seizure and custody of the property.⁵⁸ This rule applies not only to cases where property has been actually seized before the institution of a second suit in another court, but also where, in the progress of the litigation, the court acquiring jurisdiction may be compelled to assume the possession and

52. *Interstate Ry. Co. v. Philadelphia, B. & T. S. R. Co.*, 164 Fed. 770.

53. *Russell v. East Anglian Ry. Co.*, 3 McN. & G. 104, 42 Eng. Reprint 201.

54. *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. ed. 660; *Buck v. Colbath*, 3 Wall. (U. S.) 334, 18 L. ed. 257; *Leigh v. Green*, 62 Neb. 344, 356, 86 N. W. 1093, 89 Am. St. Rep. 751.

[a] As where a receiver appointed by the court is discharged (1) and the property restored to the owner, who has given a bond for the forthcoming of the property to answer the judgment, in lieu of such property. *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. ed. 660. (2) But where the bond is not given in lieu of the property the property is still in custodia legis of the court first obtaining control thereof. *Hagan v. Lucas*, 10 Pet. (U. S.) 400, 9 L. ed. 470. (3) And an appeal from the order appointing the receiver and the giving of a supersedeas bond does not discharge the receivership so as to permit another court of concurrent jurisdiction to assume jurisdiction over the property involved in the receivership. *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435; *Sullivan v. Algram*, 160 Fed. 866, 87 C. C. A. 318; *Isom v. Rex Crude Oil Co.*, 147 Cal. 663, 82 Pac. 319.

[b] It does not authorize the assumption of jurisdiction (1) by another court of concurrent jurisdiction of the res, that the court refuses to appoint a receiver over the res (*Colston v. Southern Home Bldg. & L. Assn.*, 99 Fed. 305), (2) or that such receiver has been subsequently temporarily enjoined by the court appointing him from assuming possession of the property involved in the controversy (*Central Trust Co. v. South Atlantic & O. R. Co.*, 57 Fed. 3), (3) or that his appointment has subsequently been revoked. *Interstate R. Co. v. Philadelphia, B. & T. S. R. Co.*, 164 Fed. 770.

55. *United States ex rel. Riggs v. Johnson County*, 6 Wall. (U. S.) 166, 18 L. ed. 768.

56. *United States ex rel. Riggs v. Johnson County*, 6 Wall. (U. S.) 166, 18 L. ed. 768.

57. *Walling v. Miller*, 108 N. Y. 173, 15 N. E. 65, 2 Am. St. Rep. 400.

[a] The proper practice is for the second court to authorize its proper officer to petition the court which has possession, to turn over to its officer the property, the possession of which it claims is necessary for the full assertion of its jurisdiction and the grant of the relief prayed. *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057.

58. *Freeman v. Howe*, 24 How. (U.

control of specific property.⁵⁹ Where a receiver is appointed, the jurisdiction of the court will, under the doctrine of relation, after the order made, commence from the time of the filing of the bill for appointment, although no possession has been taken by the receiver of the property sought to be administered by the court.⁶⁰

4. Over Offenses Against State and Municipality.—While under some statutory provisions municipal courts⁶¹ and justices of the peace⁶² have concurrent jurisdiction to try one accused of a crime against the state, the same act may constitute a violation of both a state statute and a municipal ordinance, and in such case both a state court and a municipal court may take jurisdiction to punish the defendant for such act,⁶³ unless the constitution and statutes of the state

S.) 450, 16 L. ed. 749; *Peck v. Jenness*, 7 How. (U. S.) 612, 624, 12 L. ed. 841.

[a] **The mere priority of commencement of litigation is not**, but the priority of judicial seizure is, the test of jurisdiction over the res in all cases where property is the subject of contention. *State v. Palmer*, 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316, *affirmed*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435; *Knott v. Evening Post Co.*, 124 Fed. 342, 355.

59. U. S.—*Louisville Trust Co. v. Knott*, 130 Fed. 820, 65 C. C. A. 158, *reversing* 124 Fed. 342; *Merritt v. American Steel Barge Co.*, 79 Fed. 228, 24 C. C. A. 530; *McKinney v. Kansas Nat. Gas. Co.*, 206 Fed. 772. **Minn.**—*State ex rel. Tomka v. Jelley*, 159 N. W. 788. **N. M.**—*Parsons Min. Co. v. McClure*, 17 N. M. 694, 707, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744. **Wash.**—*State ex rel. Titlow v. City of Centralia*, 93 Wash. 401, 161 Pac. 74.

[a] **Where a court has taken jurisdiction of a case for the purpose of subjecting assets within its territory, the assets are thereby brought into custodia legis and beyond the power of another court although no receiver has been appointed, as a receiver may be appointed at any time.** *Louisville Trust Co. v. Knott*, 130 Fed. 820, 65 C. C. A. 158. See *Parsons Min. Co. v. McClure*, 17 N. M. 694, 709, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744.

60. Parsons Min. Co. v. McClure, 17 N. M. 694, 710, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 37 L. R. A. (N. S.) 744; *Waters-Pierce Oil Co. v. State*, 47 Tex. Civ. App. 162, 103 S. W. 836.

61. Walker v. Fayetteville, 93 Ark.

443, 125 S. W. 412; *Barnett v. Malvern*, 92 Ark. 483, 123 S. W. 759; *Searcy v. Turner*, 88 Ark. 210, 114 S. W. 472; *McCall v. Helena*, 86 Ark. 442, 111 S. W. 274.

62. Armstrong v. State, 54 Ark. 364, 15 S. W. 1036; *State v. Smith*, 26 Ark. 149.

63. Conn.—*State v. Welch*, 36 Conn. 215. **Ga.**—*Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265; *Vason v. Augusta*, 38 Ga. 542; *Fountain v. Fitzgerald*, 2 Ga. App. 713, 58 S. E. 1129. **Ill.**—*Hankins v. People*, 106 Ill. 628; *Seivold v. People*, 86 Ill. 33; *Fant v. People*, 45 Ill. 259; *Berry v. People*, 36 Ill. 423; *Amboy v. Sleeper*, 31 Ill. 499; *Petersburg v. Metzker*, 21 Ill. 205. **Ind.**—*Williams v. Warsaw*, 60 Ind. 457. **Ia.**—*Bloomfield v. Trimble*, 54 Iowa 399, 6 N. W. 586, 37 Am. Rep. 212. **Kan.**—*Rice v. State*, 3 Kan. 141. **Ky.**—*Leitchfield Mercantile Co. v. Com.*, 143 Ky. 162, 136 S. W. 639; *March v. Com.*, 12 B. Mon. 25. **La.**—*State v. Prats*, 10 La. Ann. 785. **Minn.**—*State v. Charles*, 16 Minn. 474. **Mo.**—*State v. Wister*, 62 Mo. 592; *State v. Gordon*, 60 Mo. 383; *St. Louis v. Cafferata*, 24 Md. 94; *St. Louis v. Bentz*, 11 Mo. 61; *State v. Ledford*, 3 Mo. 102. **Neb.**—*Brownville v. Cook*, 4 Neb. 101. **N. J.**—*Howe v. Treasurer of Plainfield*, 37 N. J. L. 145; *State v. Plunkett*, 18 N. J. L. 5. **N. Y.**—*Brooklyn v. Toynbee*, 31 Barb. 282. **Okla.**—*Ex parte Simmons*, 5 Okla. Crim. 399, 115 Pac. 380. **Ore.**—*State v. Bergman*, 6 Ore. 341.

[a] **The test of whether both may proceed against the defendant is whether the act is not only against the peace and dignity of the state, but also subversive of, or dangerous to the peace, good order, safety or health of**

preclude the exercise of jurisdiction by the municipal courts,⁶⁴ or by more than one of these courts.⁶⁵ A state court has no jurisdiction to punish the defendant for an infraction of the city ordinance,⁶⁶ especially where exclusive jurisdiction thereof has been conferred upon the courts of the municipality.⁶⁷

C. AS BETWEEN STATE AND FEDERAL COURTS. — 1. In General. The constitution of the United States merely extends the judicial power of the United States to specified cases and controversies, leaving it to congress to determine whether the courts to be established by it from time to time shall be given exclusive cognizance of such cases or controversies, or shall only exercise jurisdiction concurrent with those of the several states.⁶⁸

Since the jurisdiction of the state courts is not to be defeated by implication,⁶⁹ the mere grant by congress of jurisdiction to a federal court does not render such jurisdiction exclusive,⁷⁰ the courts of the states having concurrent jurisdiction with the courts of the United States in all cases wherein the jurisdiction of the latter is not made exclusive, either by direct legislation, or by necessary implication, or by such incompatibility with the existence of state authority that it could not be supposed the state courts should undertake the matter,⁷¹

the municipality. *Howe v. Treasurer of Plainfield*, 37 N. J. L. 145, 150.

64. *Ga.*—*Reich v. State*, 53 *Ga.* 73, 21 *Am. Rep.* 265; *Savannah v. Hussey*, 21 *Ga.* 80, 68 *Am. Dec.* 452. *Ia.*—*Mt. Pleasant v. Breeze*, 11 *Iowa* 399. *Ky.* *Louisville v. Wehmhoff*, 116 *Ky.* 812, 79 *S. W.* 201. *N. C.*—*State v. McCoy*, 116 *N. C.* 1059, 21 *S. E.* 690; *State v. Langston*, 88 *N. C.* 692. *Ohio.*—*Wells-ville v. O'Connor*, 24 *Ohio Cir. Ct.* 689. *Tenn.*—*Raleigh v. Dougherty*, 3 *Humph.* 11, 39 *Am. Dec.* 149.

65. *Burdette v. Danville (Ky.)*, 125 *S. W.* 275.

66. *Garland v. Denver*, 11 *Colo.* 534, 19 *Pac.* 460.

67. *State v. Gordon*, 60 *Mo.* 383; *State v. Threadgill*, 76 *N. C.* 17; *State v. White*, 76 *N. C.* 15.

68. *Plaquemines Fruit Co. v. Henderson*, 170 *U. S.* 511, 517, 18 *Sup. Ct.* 685, 42 *L. ed.* 1126.

69. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 *U. S.* 481, 32 *Sup. Ct.* 205, 56 *L. ed.* 517.

[a] Where a federal statute creating a right is silent on the subject, there is no presumption that congress intended to deprive the state court of jurisdiction, but rather the contrary. *Galveston, H. & S. A. R. Co. v. Wallace*, 223 *U. S.* 481, 32 *Sup. Ct.* 205, 56 *L. ed.* 517.

70. *Houston v. Moore*, 5 *Wheat. (U. S.)* 1, 24, 5 *L. ed.* 19.

71. *U. S.*—*Defiance Water Co. v. Defiance*, 191 *U. S.* 184, 24 *Sup. Ct.* 63, 48 *L. ed.* 140; *Clafin v. Houseman*, 93 *U. S.* 130, 23 *L. ed.* 833; *United States v. Andersen*, 169 *Fed.* 201; *Lewis Publishing Co. v. Wyman*, 152 *Fed.* 200. *Ala.*—*Raisler v. Oliver*, 97 *Ala.* 710, 12 *So.* 238, 38 *Am. St. Rep.* 213. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Hesterly*, 98 *Ark.* 240, 135 *S. W.* 874. *Ga.*—*Southern Pac. R. Co. v. Crenshaw*, 5 *Ga. App.* 675, 63 *S. E.* 865. *Idaho.* *McCormick v. Smith*, 23 *Idaho* 487, 130 *Pac.* 999. *Ia.*—*Coad v. Chicago, St. P., M. & O. R. Co.*, 171 *Iowa* 747, 154 *N. W.* 396; *McCoullough v. Chicago, R. I. & P. R. Co.*, 160 *Iowa* 524, 142 *N. W.* 67, 47 *L. R. A. (N. S.)* 23; *Bradbury v. Chicago, R. I. & P. R. Co.*, 149 *Iowa* 51, 128 *N. W.* 1, 5, 40 *L. R. A. (N. S.)* 684. *Ky.*—*Louisville & N. R. Co. v. Scott*, 133 *Ky.* 724, 118 *S. W.* 990. *Md.* *Ordway v. Central Nat. Bank*, 47 *Md.* 217, 28 *Am. Rep.* 455. *Mass.*—*Fay v. Locke*, 201 *Mass.* 378, 87 *N. E.* 753, 131 *Am. St. Rep.* 402. *Mich.*—*Holmberg v. Lake Shore & M. S. R. Co.*, 188 *Mich.* 605, 155 *N. W.* 504. *Minn.* *Lindstrom v. Mutual S. S. Co.*, 132 *Minn.* 328, 156 *N. W.* 669. *Mo.*—*Fish v. Chicago, R. I. & P. R. Co.*, 263 *Mo.* 106, 172 *S. W.* 340. *N. J.*—*Bruen v. Ogden*, 11 *N. J. L.* 370, 20 *Am. Dec.*

provided the state court has jurisdiction of the subject-matter under the state law.⁷²

There are only two classes of cases in which the jurisdiction of the courts of the United States may justly be regarded as exclusive.⁷³ The first, where the jurisdiction is made exclusive by the express terms, or by the necessary construction of the provisions of the federal constitution.⁷⁴ The second, when an act of congress confers a jurisdiction, that before its passage could not have been exercised at all—that is, when the act not merely confers, but creates the jurisdiction.⁷⁵ The mere fact that an act of congress gives its courts jurisdiction does not impair or affect the original jurisdiction of the state courts.⁷⁶ Thus, a legal or equitable right acquired under the state laws, may be prosecuted in the state courts, and also, if the parties reside in different states, in the federal courts.⁷⁷ So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class: subject, however, to this qualification, that where a right arises under a law of the United States, congress may, if it see fit, give to the federal courts

593. **N. C.**—*Smith v. Southern Exp. Co.*, 166 N. C. 155, 82 S. E. 15. **Okla.** *Missouri, K. & T. R. Co. v. Lenahan*, 39 Okla. 283, 294, 135 Pac. 383. **Pa.** *Bletz v. Columbia Nat. Bank*, 87 Pa. 87, 30 Am. Rep. 343; *United States v. Scofield Co.*, 21 Pa. Dist. 709. **S. C.** *Aldrich v. Southern R. Co.*, 95 S. C. 427, 79 S. E. 316. **S. D.**—*Elliott v. Chicago, M. & St. P. R. Co.*, 35 S. D. 57, 150 N. W. 777. **Tenn.**—*Divine v. Unaka Nat. Bank*, 125 Tenn. 98, 107, 140 S. W. 747, 39 L. R. A. (N. S.) 586. **Tex.**—*Pecos & N. T. Ry. Co. v. Porter* (Tex. Civ. App.), 183 S. W. 98; *Pecos & N. T. Ry. Co. v. Porter* (Tex. Civ. App.), 156 S. W. 267; *Missouri, K. & T. Ry. Co. v. Blalack* (Tex. Civ. App.), 128 S. W. 706. **W. Va.** *Easter v. Virginian R. Co.*, 86 S. E. 37.

[a] This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of congress, by a proper action in a state court. The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much

bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the state federal governments. *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

72. *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833.

73. *Woolsey v. Judd*, 11 How. Pr. (N. Y.) 49, 4 Duer 379.

74. *Woolsey v. Judd*, 11 How. Pr. (N. Y.) 49, 4 Duer 379.

[a] Matters arising under the constitution and laws of the Union are within the exclusive jurisdiction of the federal courts. *Boston & Providence R. R. Corp. v. New York & N. E. R. Co.*, 12 R. I. 220.

75. *Woolsey v. Judd*, 11 How. Pr. 49, 4 Duer (N. Y.) 379.

76. *Woolsey v. Judd*, 11 How. Pr. 49, 4 Duer (N. Y.) 379.

77. *Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455.

exclusive jurisdiction,⁷⁸ the concurrent jurisdiction of the state tribunals depending altogether upon the pleasure of congress,⁷⁹ which may extinguish their jurisdiction whenever it thinks proper, in every case in which the subject-matter can constitutionally be made cognizable in the federal courts.⁸⁰ In such cases the state courts do not exercise a new jurisdiction conferred upon them, but their ordinary jurisdiction derived from the state law.⁸¹

That the cause of action created by congress is a penalty to be recovered in a civil action of debt by the party grieved, constitutes no objection to the state courts taking cognizance of it, and enforcing the right,⁸² nor does the fact that a corporation is incorporated under an act of congress and it is declared to be capable of being sued in the United States courts give such courts exclusive jurisdiction.⁸³ The jurisdiction of the United States courts will be treated elsewhere.⁸⁴

2. Priority and Retention of Jurisdiction.—a. *In General.* Where there is a mere controversy between the parties without the possession by the court of any property taken under its control for the purposes of the suit, the pendency of a suit in a state court involving the same subject-matter, is no bar to the prosecution of a suit in a federal court,⁸⁵ although between the same parties and for the same cause of action.⁸⁶ In that event it is the duty of another court, whenever redress is sought in its forum, to take cognizance of

78. U. S.—*Claffin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Teal v. Felton*, 12 How. 284, 13 L. ed. 990; *Houston v. Moore*, 5 Wheat. (U. S.) 1, 5 L. ed. 19. Ala.—*Raisler v. Oliver*, 97 Ala. 710, 12 So. 238, 38 Am. St. Rep. 213. Md.—*Ordway v. Central Nat. Bank*, 47 Md. 217, 28 Am. Rep. 455. Pa.—*Bletz v. Columbia Nat. Bank*, 87 Pa. 87, 30 Am. Rep. 343.

79. Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

80. Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

81. Claffin v. Houseman, 93 U. S. 130, 23 L. ed. 833.

82. Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455.

83. Scheffer v. National Life Ins. Co., 25 Minn. 534.

84. See generally the title "United States Courts."

85. Mutual Life Ins. Co. v. Harris, 97 U. S. 331, 24 L. ed. 959; *Stanton v. Embrey*, 93 U. S. 548, 23 L. ed. 983; *Buck v. Colbath*, 3 Wall. (U. S.) 234, 345, 18 L. ed. 257; *Consumers' Gas Trust Co. v. Quimby*, 137 Fed. 882, 893, 70 C. C. A. 220, certiorari denied, 198 U. S. 585, 25 Sup. Ct. 803, 49 L. ed. 1174; *Ogden City v. Weaver*, 103 Fed. 564, 47 C. C. A. 485; *Standley v.*

Roberts, 59 Fed. 836, 8 C. C. A. 305, 19 U. S. App. 407; *McKinney v. Kansas Nat. Gas Co.*, 206 Fed. 772; *The Gordon Campbell*, 131 Fed. 963; *Defiance Water Co. v. City of Defiance*, 100 Fed. 178. See generally the title "Another Action Pending."

[a] The rule is well recognized that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the federal court having jurisdiction, for both the state and federal courts have certain concurrent jurisdiction over such controversies, and when they arise between citizens of different states the federal jurisdiction may be invoked, and the cause carried to judgment, notwithstanding a state court may also have taken jurisdiction of the same case. *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. ed. 762.

86. McClellan v. Carland, 217 U. S. 268, 282, 30 Sup. Ct. 501, 54 L. ed. 762; *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 27 Sup. Ct. 529, 51 L. ed. 821; *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772; *Scott v. George's Creek Coal & Iron Co.*, 202 Fed. 251, 256; *Bixler v. Pennsylvania R. Co.*, 201 Fed. 553.

[a] **Not Ground for Abatement.**—It

the rights of the parties,⁸⁷ although it may refrain from doing so as a matter of comity or necessity,⁸⁸ unless the federal court exercises superior jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States.⁸⁹ For the rule is well settled that as between federal and state courts of concurrent jurisdiction that the court first acquiring jurisdiction will retain it to the end of the controversy, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and decide every issue arising in the case without interference from and to the exclusion of the other,⁹⁰ and the proceedings in the court first acquiring jurisdiction will not be arrested by subsequent proceedings instituted in

is not per se ground for abatement. *Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55; *People's Gas-light & Coke Co. v. City of Chicago*, 192 Fed. 398.

[b] It is no ground for an abatement or stay of proceedings in the federal court where no conflict arises over the custody or dominion of the property. *McClellan v. Carland*, 187 Fed. 915, 921, 110 C. C. A. 49.

[c] **When Res Is Identical.**—The presence of and need for deciding similar questions in each court for the disposition of the causes does not make the "res" in each identical. There must be a more tangible subject-matter of the controversy, which is the same in each suit, before it can be said that the court, which first obtains jurisdiction of the matter, excludes the jurisdiction of all other co-ordinate courts from controversies relating to that subject-matter. *R. M. Rose Co. v. Southern Express Co.*, 223 Fed. 868.

87. *The Gordon Campbell*, 131 Fed. 963.

88. *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 78 Fed. 517, 24 C. C. A. 195; *Ahlhauser v. Butler*, 50 Fed. 705.

[a] **Matter of Necessity.**—See: *U. S. Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390. *Minn.*—*State v. Chicago, M. & St. P. R. Co.*, 130 Minn. 144, 153 N. W. 320, L. R. A. 1916B, 764. *Neb.*—*Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751.

[b] **Staying Proceedings.**—(1) The second court may, and ordinarily should, in the exercise of its discretion, stay proceedings to await the termination of the prior suit involving the same matters (*Benoist v. Smith*, 191 Fed. 514; *Gamble v. San Diego*, 79 Fed.

487), (2) provided the question be raised by appropriate pleadings. *Gilman v. Perkins*, 10 Biss. 430, 7 Fed. 887; *Farnsworth v. Western Union Tel. Co.*, 53 Hun 636, 6 N. Y. Supp. 735, 25 N. Y. St. 393, 3 Silv. 30. See generally the title "**Supersedeas and Stay of Proceedings.**"

89. *Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057.

[a] **The mere pendency of suits in the state courts** involving the decision of the same question presented in this cause, *i. e.*, the constitutionality of the Alabama anti-shipping law as related to the provisions of the federal constitution, affords no reason for the federal court to decline to assume jurisdiction and decide the question involved, since it is a federal question. *R. M. Rose Co. v. Southern Express Co.*, 223 Fed. 868.

90. **U. S.**—*Rickey Land & Cattle Co. v. Miller*, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032, *affirming* 152 Fed. 11, 81 C. C. A. 207; *Palmer v. Texas*, 212 U. S. 118, 125, 29 Sup. Ct. 230, 53 L. ed. 212; *Ex parte Young*, 209 U. S. 123, 161, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932; *Prout v. Starr*, 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584; *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. ed. 399; *Ex parte Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. ed. 782; *In re New York & P. R. S. S. Co.*, 155 U. S. 523, 15 Sup. Ct. 183, 39 L. ed. 246; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *Byers v. McAuley*, 149 U. S. 608, 617, 13 Sup. Ct. 906, 37 L. ed. 867; *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; *Ober v.*

the other court,⁹¹ the rule being reciprocal, irrespective of which court

Gallagher, 93 U. S. 199, 23 L. ed. 829; Taylor v. Taintor, 16 Wall. 366, 370, 21 L. ed. 287; Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; McGraw v. Walsh, 232 Fed. 122, 146 C. C. A. 314; Brown v. Fletcher, 231 Fed. 92, 145 C. C. A. 280; Barker v. Eastman, 206 Fed. 865, 124 C. C. A. 525; Hall v. Ames, 190 Fed. 138, 111 C. C. A. 178; Morgan Engineering Co. v. General Casting Co., 177 Fed. 347, 101 C. C. A. 323; Wright v. Harris, 221 Fed. 736; Berton v. Tietjen & Lang Dry Dock Co., 219 Fed. 763; Boston & M. R. R. Co. v. Niles, 218 Fed. 944; Sharp v. Bonham, 213 Fed. 660; Hirsh v. Independent Steel Co., 196 Fed. 104, 111; People's Gas-light & C. Co. v. Chicago, 192 Fed. 398; Barnes Co. v. One Dredge Boat, 169 Fed. 895. **Colo.**—Parks v. Wilcox, 6 Colo. 489. **Ga.**—Young v. Hamilton, 135 Ga. 339, 69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057; Hines v. Rawson, 40 Ga. 356, 2 Am. Rep. 581. **Ill.**—Mail v. Maxwell, 107 Ill. 554; Crown Coal & T. Co. v. Taylor, 90 Ill. App. 569. **Ky.**—Chesapeake & O. R. Co. v. Bank's Admr., 144 Ky. 137, 137 S. W. 1066. **La.**—Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 864, 872, 44 So. 510. **Mass.**—Ayers v. Farwell, 196 Mass. 349, 82 N. E. 35; Foster v. The Richard Busteded, 100 Mass. 409, 1 Am. Rep. 125. **Mich.**—Michigan R. R. Comm. v. Detroit & M. R. Co., 182 Mich. 234, 148 N. W. 285. **Minn.**—State v. Chicago, M. & St. P. R. Co., 130 Minn. 144, 153 N. W. 320, L. R. A. 1916B, 764. **Mo.**—State ex rel. Bowling Green T. Co. v. Barnett, 245 Mo. 99, 149 S. W. 311; State ex rel. Missouri Pac. R. Co. v. Williams, 221 Mo. 227, 120 S. W. 740; Beekman Lumber Co. v. Acme Harvester Co., 215 Mo. 221, 114 S. W. 1087; Cobe v. Ricketts, 111 Mo. App. 105, 85 S. W. 131. **Neb.**—State v. Chicago, R. I. & P. R. Co., 159 N. W. 410. **N. Y.**—Couch Patents Co. v. Berman, 137 App. Div. 297, 121 N. Y. Supp. 978; Farnsworth v. Western Union Tel. Co., 53 Hun 636, 6 N. Y. Supp. 735, 25 N. Y. St. 393, 3 Silv. 30; People ex rel. American S. Co. v. Benham, 71 Misc. 345, 128 N. Y. Supp. 610; People v. New York City R. Co., 57 Misc. 114, 107 N. Y. Supp. 247; Johnson v. Woodend, 44 Misc. 524, 90 N. Y. Supp. 43. **N. D.**—Rock Island Plow Co. v. West-

ern Imp. Co., 21 N. D. 608, 132 N. W. 351. **Ohio.**—Stunt v. The Steamboat Ohio, 3 Ohio Dec. (Reprint) 362, 4 Am. L. Reg. 49; Coopers v. Central Ohio R. Co., 2 Ohio Dec. (Reprint) 199, 2 West. L. Month. 63. **Okla.**—Lanyon v. Braden, 150 Pac. 677, 678. **Ore.**—Eagle Cliff Fishing Co. v. McGowan, 70 Ore. 1, 137 Pac. 766. **Pa.**—Taylor v. Carryl, 24 Pa. 259. **R. I.**—Boston & Providence R. R. Corp. v. New York & N. E. R. Co., 12 R. I. 220. **S. C.**—State ex rel. Lyon v. State Dispensary Comm., 79 S. C. 316, 60 S. E. 928. **Tex.**—Palestine Water & P. Co. v. Palestine, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203; Riesner v. Gulf, C. & S. F. Ry. Co., 89 Tex. 656, 36 S. W. 53, 59 Am. St. Rep. 84, 33 L. R. A. 171; Waters-Pierce Oil Co. v. State, 47 Tex. Civ. App. 162, 103 S. W. 836. **Wash.**—Tacoma v. Sperry & Hutchinson Co., 82 Wash. 393, 396, 144 Pac. 544. **W. Va.**—Central Dist. & P. Tel. Co. v. Parkersburg & O. V. E. Ry. Co., 85 S. E. 65. **Wis.**—Ashland v. Wisconsin Cent. R. Co., 121 Wis. 646, 98 N. W. 532, 99 N. W. 431; State ex rel. Graham v. Chamber of Commerce, 20 Wis. 63; Booth v. Ableman, 16 Wis. 460, 84 Am. Dec. 711; *In re* Booth, 3 Wis. 1.

[a] So long as the court still retains and is exercising jurisdiction over a cause, a co-ordinate court can not treat its proceedings as *coram non jure*, even as to the nonresident defendants. It may be that they will in the course of the proceedings voluntarily appear in that court, and so eliminate the question of lack of personal jurisdiction over the nonresident defendants. *R. M. Rose Co. v. Southern Express Co.*, 223 Fed. 868, 872.

[b] The case "remains in the hands of that court so long as there is any judicial proceeding essential to the full and complete execution of the judgment." *Central Vt. R. Co. v. Redmond*, 189 Fed. 683, 689.

91. **U. S.**—Railroad & W. Comrs. v. St. Louis, etc. R. Co., 230 U. S. 474, 33 Sup. Ct. 975, 57 L. ed. 1571; *Ex parte* Chetwood, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. ed. 782; *United States v. Johnson County*, 6 Wall. 166, 18 L. ed. 768; *Cornue v. Ingersoll*, 176 Fed. 194, 99 C. C. A. 548; *Lang v. Choctaw, etc. R. Co.*, 160 Fed. 355, 87 C. C. A. 307; *Rickey Land, etc. Co. v. Miller*, 152 Fed. 11, 81 C. C. A. 207; *Kansas City*

first acquires jurisdiction,⁹² and applicable alike to both civil and criminal cases.⁹³

The rule is not limited in its application to cases where property has actually been seized under judicial process before the institution of a second suit, but is applicable to actions dealing actually or potentially with specific property,⁹⁴ but it has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims in behalf of which the conflicting jurisdiction is invoked.⁹⁵

b. *Determination of Priority.*—There is some conflict as to when the jurisdiction attaches which secures priority.⁹⁶ Generally this depends upon when the action is commenced,⁹⁷ depending somewhat upon the law governing the procedure in the particular jurisdiction.⁹⁸ Some authorities maintain that in personal actions as distinguished from actions in rem in which the res is in the custody of the court, priority is determined by the time that the parties are served with process, and not by the date of the filing of the action,⁹⁹ especially where the law

Gas Co. v. Kansas City, 198 Fed. 500; Federal Min. & S. Co. v. Bunker Hill & S. M. & C. Co., 187 Fed. 474; Hall v. Ames, 182 Fed. 1008; Sims v. United Wireless Tel. Co., 179 Fed. 540; State Nat. Bank v. Syndicate Co., 178 Fed. 359; Waters v. Shinn, 178 Fed. 345; Robinson v. Mutual Reserve L. Ins. Co., 162 Fed. 794. La.—Lake Bisteneau Lumb. Co. v. Mimms, 49 La. Ann. 1283, 22 So. 730; Van Wych v. Gaines, 13 La. Ann. 235. Mass.—Hill Mfg. Co. v. Providence & New York S. S. Co., 113 Mass. 495, 18 Am. Rep. 527. Miss.—Griffith v. Vicksburg Water Wks. Co., 88 Miss. 271, 40 So. 1011. Mo.—Rogers & Baldwin etc. Hdw. Co. v. Cleveland Bldg. Co., 132 Mo. 442, 34 S. W. 57, 53 Am. St. Rep. 494, 31 L. R. A. 335; Seibel v. Simeon, 62 Mo. 255. Ohio.—Adelbert College v. Toledo W. & W. Ry. Co., 5 Ohio Dec. 14, 3 Ohio N. P. 15. Ore. Eagle Cliff Fishing Co. v. McGowan, 70 Ore. 1, 137 Pac. 766. Tex.—Arthur v. Batte, 42 Tex. 159. Wash.—State *ex rel.* Titlow v. City of Centralia, 93 Wash. 401, 161 Pac. 74.

[a] When a proceeding in mandamus is pending in a state court to compel the removal of a railroad bridge which tends to obstruct the flow of a river, and to flood the neighborhood and imperil the lives and homes of the people, a later proceeding in a federal court to foreclose a mortgage on the railroad property does not operate to abate the action in the state court nor to oust the jurisdiction of the latter. Kaw Valley Drainage Dist. v. Mis-

souri Pac. R. Co., 99 Kan. 188, 161 Pac. 937.

92. Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 435, *modifying and affirming* 158 Fed. 705, 85 C. C. A. 603, 22 L. R. A. (N. S.) 316; United States *ex rel.* Riggs v. Johnson County, 6 Wall. (U. S.) 166, 18 L. ed. 768; Wheeler v. Walton, 65 Fed. 720.

93. Taylor v. Taintor, 16 Wall. (U. S.) 366, 21 L. ed. 287; South Penn Oil Co. v. Miller, 175 Fed. 729, 99 C. C. A. 305; Dodds v. Palmer Mt. T. Co., 188 Fed. 447; Hall v. Ames, 182 Fed. 1008; Ewing v. Mallison, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299.

94. Westfeldt v. North Carolina Min. Co., 166 Fed. 706, 92 C. C. A. 378; Charles Barnes Co. v. One Dredge Boat, 169 Fed. 895.

95. Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 305, 5 Sup. Ct. 135, 28 L. ed. 729; Covell v. Heyman, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. ed. 390; Merritt v. American Steel Barge Co., 79 Fed. 228, 24 C. C. A. 530.

96. Wells v. Montcalm Circuit Judge, 141 Mich. 58, 104 N. W. 318, 113 Am. St. Rep. 520.

97. Spinning v. Ohio, etc. Trust Co., 2 Disn. (Ohio) 336, 13 Ohio Dec. 206. See the title "Suits and Actions."

98. Spinning v. Ohio, etc. Trust Co., 2 Disn. (Ohio) 336, 13 Ohio Dec. 206.

99. U. S.—United States v. Eisenbeis, 112 Fed. 190, 50 C. C. A. 179; Hughes v. Green, 84 Fed. 833, 28 C. C. A. 537; Zimmerman v. So Relle, 49 U. S. App. 387, 80 Fed. 417, 25 C. C.

provides such service constitutes the commencement of the action.¹ But the rule supported by the weight of authority is that prior jurisdiction is determined by the priority in filing the petition or complaint,² especially in proceedings in rem,³ and where the statute provides that the filing of the petition constitutes the commencement of an action.⁴

3. Where Property in Custody of Court.—a. *In General.*—The rule is quite different, when, after a suit is brought in either a state or federal court which affects the custody of property, or at some stage of the proceeding may affect its custody, a suit of a like nature is subsequently brought in the other court.⁵ In such case the court first acquiring possession of the res has exclusive jurisdiction over it for the time,⁶ irrespective of whether the suits are between different

A. 518; *Benoist v. Smith*, 191 Fed. 514; *Owens v. Ohio Cent. R. Co.*, 20 Fed. 10; *Union Mutual L. Ins. Co. v. University of Chicago*, 6 Fed. 443; *Bell v. Ohio Life & Trust Co.*, 1 Biss. 260, 3 Fed. Cas. No. 1,260. **N. M.**—*Parsons Min. Co. v. McClure*, 17 N. M. 694, 133 Pac. 1063, Ann. Cas. 1915B, 1110, 47 L. R. A. (N. S.) 744. **Va.**—*Spiller v. Wells*, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878; *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317.

[a] **In Equity Cases.**—*Wheeler v. Walton & Whann Co.*, 65 Fed. 720; *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 8; *Union Trust Co. v. Rockford*, etc. R. Co., 6 Biss. 197, 24 Fed. Cas. No. 14,401; *Platt v. Archer*, 9 Blatchf. 559, 19 Fed. Cas. No. 11,213.

1. *Craig v. Hoge*, 95 Va. 275, 28 S. E. 317. See *Chicago, K. & W. R. Co. v. Comrs. of Chase County*, 42 Kan. 223, 21 Pac. 1071.

2. U. S.—*Farmers' Loan & Tr. Co. v. Lake St. El. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; *Waldo v. Wilson*, 231 Fed. 654, 145 C. C. A. 540; *Illinois Steel Co. v. Putnam*, 68 Fed. 515, 15 C. C. A. 556. **Kan.**—*Chicago, K. & W. R. Co. v. Comrs. of Chase County*, 42 Kan. 223, 21 Pac. 1071. **Mich.**—*Wells v. Montcalm Circ. Judge*, 141 Mich. 58, 104 N. W. 318, 113 Am. St. Rep. 520. **Ohio.** *Spinning v. Ohio, etc. Trust Co.*, 2 Disn. 336, 13 Ohio Dec. 206. **Tex.** *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776. **Wash.**—*State v. Superior Court*, 87 Wash. 498, 151 Pac. 1094.

[a] A suit in equity is commenced

by filing a bill of complaint. *Waldo v. Wilson*, 231 Fed. 654, 145 C. C. A. 540.

3. *Mound City Co. v. Castleman*, 187 Fed. 921, 110 C. C. A. 55, *affirming* 177 Fed. 510.

4. *Mound City Co. v. Castleman*, 177 Fed. 510; *State ex rel. Taubman v. Davis* (Mo. App.), 190 S. W. 964.

5. *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Ogden City v. Weaver*, 108 Fed. 564, 47 C. C. A. 485.

6. U. S.—*Murphy v. John Hofman Co.*, 211 U. S. 562, 569, 29 Sup. Ct. 154, 53 L. ed. 327; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. ed. 379; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. ed. 981; *Rio Grande Ry. Co. v. Vinet*, 132 U. S. 478, 10 Sup. Ct. 155, 35 L. ed. 400; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 304, 5 Sup. Ct. 135, 28 L. ed. 729; *Pulliam v. Osborne*, 17 How. 471, 15 L. ed. 154; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Peck v. Jemess*, 7 How. 612, 12 L. ed. 841; *Empire Trust Co. v. Brooks*, 232 Fed. 641, 146 C. C. A. 567; *Corbett v. Riddle*, 209 Fed. 811, 126 C. C. A. 535; *In re Farrell*, 201 Fed. 338, 119 C. C. A. 576; *Ogden v. Weaver*, 108 Fed. 564, 47 C. C. A. 485; *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518, 49 U. S. App. 387; *Merritt v. American S. Barge Co.*, 79 Fed. 228, 24 C. C. A. 530, 49 U. S. App. 85; *Gates v. Bucki*, 53 Fed. 961, 4 C. C. A. 116, 12 U. S. App. 69; *Jackson v. Parkersburg & O. V. Elect. Ry. Co.*, 233 Fed. 784, 789; *Johnson v. Johnson*, 225 Fed. 413; *Kantor v. Murchie*, 210 Fed. 573; *Martin Co. v. Shannonhouse*, 203 Fed.

parties and on different causes of action,⁷ and notwithstanding the seizure was made in the suit subsequently commenced,⁸ and has, during the continuance of such possession, and as incident thereto and as ancillary to the suit on which it was acquired, exclusive jurisdiction to hear and determine all questions respecting the title, the possession, or the control of such property, and the other is without power to render any judgment which invades or disturbs such possession.⁹ The court has the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it will

517; *Mound City Co. v. Castleman*, 177 Fed. 510; *Knott v. Evening Post Co.*, 124 Fed. 342; *Beckett v. Sheriff Harford Co.*, 21 Fed. 32. **Ala.**—*Steele v. Walker*, 115 Ala. 483, 21 So. 942, 67 Am. St. Rep. 62. **Cal.**—*Swinerton v. Oregon Pac. R. Co.*, 123 Cal. 417, 56 Pac. 40. **Colo.**—*Thatcher v. Valentine*, 22 Colo. 201, 43 Pac. 1031; *Louden Irr. Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535; *Smith v. Bauer*, 9 Colo. 380, 12 Pac. 397; *Parks v. Wilcox*, 6 Colo. 489. **Ga.**—*Young v. Hamilton*, 135 Ga. 339, 69 S. E. 593, Ann. Cas. 1912A, 144, 31 L. R. A. (N. S.) 1057; *Home Bldg. & Loan Assn. v. Cherry*, 62 Ga. 269. **Ill.**—*Mail v. Maxwell*, 107 Ill. 554; *Munson v. Harroun*, 34 Ill. 422, 85 Am. Dec. 316; *Hannebutt v. Cunningham*, 3 Ill. App. 353. **La.**—*State v. New Orleans W. Supply Co.*, 111 La. 1049, 36 So. 117; *Moore v. Withenburgh*, 13 La. Ann. 22; *Lowry v. Erwin*, 6 Rob. 192, 39 Am. Dec. 556. **Md.**—*Jordan v. Downey*, 40 Md. 401. **Mass.**—*Tobin v. Central Vermont R. Co.*, 185 Mass. 337, 70 N. E. 431. **Minn.**—*Talbott v. Gere*, 8 Minn. 85; *Lewis v. Buck*, 7 Minn. 104, 82 Am. Dec. 73. **Mo.**—*State v. Taylor*, 3 Mo. App. 351. **Mont.**—*Burns v. Smith*, 21 Mont. 251, 53 Pac. 742, 69 Am. St. Rep. 653. **Nev.**—*Feusier v. Lammon*, 6 Nev. 209. **N. Y.**—*Passage v. Dansville & Mt. M. R. Co.*, 41 App. Div. 182, 58 N. Y. Supp. 770; *Morrison v. Menhaden Co.*, 37 Hun 522; *Delaware, L. & W. R. Co. v. New York, S. & W. R. Co.*, 12 Misc. 230, 33 N. Y. Supp. 1081. **Pa.** *Tenth Nat. Bank v. Smith Constr. Co.*, 227 Pa. 354, 76 Atl. 67, 136 Am. St. Rep. 884; *In re Dungan's Appeal*, 68 Pa. 204, 8 Am. Rep. 169. **S. C.**—*Burrell v. Letson*, 1 Strobb. 239. **Wis.** *Booth v. Ableman*, 18 Wis. 495.

See *supra*, XI, B, 4.

7. *McKinney v. Kansas Natural Gas Co.*, 206 Fed. 772; *Knott v. Evening Post Co.*, 124 Fed. 342, 355.

8. *Ogden City v. Weaver*, 108 Fed. 564, 47 C. C. A. 485; *Jackson v. Parkersburg & O. V. E. R. Co.*, 233 Fed. 784, 791.

9. **U. S.**—*Palmer v. Texas*, 212 U. S. 118, 125, 29 Sup. Ct. 230, 53 L. ed. 435; *Murphy v. John Hofman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. ed. 327; *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. ed. 379 (rehearing *denied*, 208 U. S. 609, 28 Sup. Ct. 425, 52 L. ed. 642); *Frank v. Volkammer*, 205 U. S. 521, 27 Sup. Ct. 596, 51 L. ed. 911; *Farmers' Loan & T. Co. v. Lake St. Elec. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. ed. 667; *In re Chetwood*, 165 U. S. 443, 460, 17 Sup. Ct. 385, 41 L. ed. 782; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; *Hall v. Ames*, 190 Fed. 138, 110 C. C. A. 178, (*affirming* 182 Fed. 1008); *Mound City Co. v. Castleman*, 187 Fed. 921, 110 C. C. A. 55 (*affirming* 177 Fed. 510); *Brun v. Mann*, 151 Fed. 145, 152, 158, 80 C. C. A. 513; *Zimmerman v. So. Relle*, 80 Fed. 417, 25 C. C. A. 518; *Pacific Coast P. Co. v. Conrad City W. Co.*, 237 Fed. 673; *Jackson v. Parkersburg & O. V. Elec. Ry. Co.*, 233 Fed. 784, 790; *McCauley v. McCauley*, 202 Fed. 280; *Scott v. George's Creek Coal & Iron Co.*, 202 Fed. 251, 256; *Stirling v. Seattle, R. & S. R. Co.*, 198 Fed. 913; *Hirsch v. Independent Steel Co.*, 196 Fed. 104, 111; *Central Vt. R. Co. v. Redmond*, 189 Fed. 683; *Gay v. Hudson River Elec. Power Co.*, 182 Fed. 279; *Ball v. Tompkins*, 41 Fed. 486. **N. Y.**—*Skilton v. Codrington*, 185 N. Y. 80, 85, 86, 77 N. E. 790, 113 Am. St. Rep. 885. **Okla.** *Darrrough v. First Nat. Bank*, 156 Pac. 191.

[a] The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adel-*

permit any other court to interfere with such possession and jurisdiction.¹⁰ Before any interference may be had with the property in the hands of the court, application must be made to the court having such custody.¹¹ Its jurisdiction continues after the property has passed out of the possession of the court by a sale under its decree, to the extent of ascertaining the rights of, and extent of liens asserted by, parties to the suit and which are expressly reserved by the decree and subject to which the purchaser takes title; and any one asserting any of such reserved matters as against the property must pursue his remedy in that court.¹²

The rule forbidding interference is restricted to such procedure as invades the custody of the court over the property,¹³ and does not pre-

bert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. ed. 379.

[b] **The exclusive authority extends,** not only to the decisions of all questions affecting its jurisdiction, and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but also to all questions affecting the identity of the person or property seized and held under color of its authority, and the right to exempt them from its operation. *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390.

[c] **Such possession cannot be disturbed** by process out of another court. *Byers v. McAuley*, 149 U. S. 608, 614, 13 Sup. Ct. 906, 37 L. ed. 867; *Brun v. Mann*, 151 Fed. 145, 149, 80 C. C. A. 513; *American Baptist Home Mission Soc. v. Stewart*, 192 Fed. 976.

[d] **Ancillary Jurisdiction.**—Possession of the res draws to the court having possession all controversies concerning it by ancillary jurisdiction. *Brun v. Mann*, 151 Fed. 145, 158, 80 C. C. A. 513; *American Baptist Home Mission Soc. v. Stewart*, 192 Fed. 976.

10. *Palmer v. Texas*, 212 U. S. 118, 126, 29 Sup. Ct. 230, 53 L. ed. 435; *People's Bank v. Calhoun*, 102 U. S. 256, 261, 26 L. ed. 101.

[a] **Bankruptcy.**—Where property is in the possession of the bankrupt at the time of the appointment of a receiver, the bankruptcy court has jurisdiction to determine the title to it as against an adverse claimant, and the receiver has no right to deliver it to him without the order of the court. *Murphy v. John Hoffman Co.*, 211 U. S. 562, 29 Sup. Ct. 154, 53 L. ed. 327; *Whitney v. Wenman*, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. ed. 1157.

11. *Wiswall v. Sampson*, 14 How. (U. S.) 52, 14 L. ed. 322; *Jackson v. Parkersburg & O. V. Electric Co.*, 233 Fed. 784, 788.

12. *Jackson v. Parkersburg & O. V. Elect. Ry. Co.*, 233 Fed. 784, 790.

[a] The courts of the United States may exercise this ancillary jurisdiction though it is not authorized by any statute. *Darrough v. First Nat. Bank (Okla.)*, 156 Pac. 191.

13. *Rio Grande R. Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155, 33 L. ed. 400; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. ed. 729; *National Foundry & P. Works v. Oconto City W. S. Co.*, 105 Wis. 48, 66, 81 N. W. 125.

[a] **Action for Value of Property.**

(1) Thus possession of property by a marshal of a court of the United States under its writ against A is a complete defense to an action of replevin by B, the rightful owner of the property (*Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390; *Freeman v. Howe*, 24 How. [U. S.] 450, 16 L. ed. 749), (2) but does not prevent an action in trespass in a state court to recover the value of the property seized. *Lammon v. Feusier*, 111 U. S. 17, 4 Sup. Ct. 286, 28 L. ed. 327; *Buck v. Colbath*, 3 Wall. (U. S.) 334, 18 L. ed. 257.

[b] **No Formal Order of Dismissal Filed.**—Where a state court appointed a receiver of a national bank, but he never obtained possession of its property, and the original complainant discontinued, and the defendant filed a motion to dismiss, but no formal order of dismissal was entered, the pendency of the suit in that condition was no bar to a subsequent suit between the same parties in a federal court for the

vent a pursuit of the same right in both courts where such conflict does not arise.¹⁴ It does not preclude one not a party to the original suit or judgment from enforcing in the court of concurrent jurisdiction all remedies which he may have, against officers or parties, not involving the withdrawal of the property from the custody and jurisdiction of the court.¹⁵ Such rule does not interfere with the exercise of jurisdiction by the federal courts for the purpose of enforcing the supremacy of the constitution and laws of the United States,¹⁶ nor does it prevent the court which first acquires jurisdiction from deciding questions not involving possession.¹⁷

Actual Possession Not Essential.—Jurisdiction over the res does not necessarily depend on actual possession of the property.¹⁸

b. *When Jurisdiction Ceases.*—This exclusive jurisdiction continues as long as the property remains in custodia legis,¹⁹ and ceases whenever the litigation is ended, or when the property which is the subject of the controversy is no longer in the possession of the court first acquiring jurisdiction.²⁰ Jurisdiction, however, may be retained

appointment of a receiver. *Lake Nat. Bank v. Wolfeborough Sav. Bank*, 78 Fed. 517, 24 C. C. A. 195.

14. *Ahlhauser v. Butler*, 50 Fed. 705; *Logan v. Greenlaw*, 12 Fed. 10; *National Foundry & P. Works v. Oconto City W. S. Co.*, 105 Wis. 48, 66, 81 N. W. 125.

15. *Byers v. McAuley*, 149 U. S. 608, 614, 13 Sup. Ct. 906, 37 L. ed. 867; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390.

16. *Byers v. McAuley*, 149 U. S. 608, 615, 13 Sup. Ct. 906, 37 L. ed. 867; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. ed. 390.

17. *U. S.—Equitable Trust Co. v. Pollitz*, 207 Fed. 74, 124 C. C. A. 634.

18. *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 212; *Stirling v. Seattle, R. & S. R. Co.*, 198 Fed. 913, 919.

[a] "Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected." *Farmers' Loan & Trust Co. v. Lake St. Elec. R. Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. ed.

667; quoted with approval in *Palmer v. Texas*, 212 U. S. 118, 129, 29 Sup. Ct. 230, 53 L. ed. 212; *Stirling v. Seattle, R. & S. R. Co.*, 198 Fed. 913, 919; *Hirsch v. Independent Steel Co.*, 196 Fed. 104, 112; *People's Gaslight & Coke Co. v. City of Chicago*, 192 Fed. 398, 403.

[b] The possession contemplated as sufficient to give exclusive jurisdiction is that which the court by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. *Ball v. Tompkins*, 41 Fed. 486; *National Foundry & P. Works v. Oconto City W. S. Co.*, 105 Wis. 48, 81 N. W. 125.

[c] **Possession May Be Actual or Constructive.**—*Leigh v. Green*, 62 Neb. 344, 86 N. W. 1093, 89 Am. St. Rep. 751. But see *Compton v. Jesup*, 68 Fed. 263, 15 C. C. A. 397.

19. *Stirling v. Seattle, R. & S. R. Co.*, 198 Fed. 913, 918.

[a] **Effect of Appeal and Supersedeas.**—Jurisdiction over property acquired by a state court on qualification of a receiver is not lost by the giving of a supersedeas pending an appeal from the order of appointment where such order is merely suspended thereby. *Palmer v. Texas*, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. ed. 212.

20. *The Gordon Campbell*, 131 Fed. 963.

by reservations in the judgment or decree even after physical possession of the property has been abandoned.²¹

c. *Remedy*.—If the federal court first acquires jurisdiction, it may enjoin proceedings in the state court interfering therewith,²² and may, by ancillary proceedings, protect the title which it has decreed, as against all parties to the original suit and may prevent them from relitigating in a state court the questions then determined.²³

If the state court first acquires jurisdiction, the federal court will stay proceedings subsequently commenced therein.²⁴ This relief is not limited to the parties to the original action.²⁵

4. **Over Offenses Against United States or States and Territories.** State courts have no jurisdiction over offenses against the United States,²⁶ and the United States courts have no jurisdiction of offenses

[a] **Giving Bond in Lieu of Property.**—Where, after appointing a receiver for a corporation, the federal court accepts a bond in lieu of the property, discharges the receiver, and orders him to turn over the property to such corporation, which he does, the property ceases to be in custodia legis, and becomes free for the action of any other court of competent jurisdiction. *Shields v. Coleman*, 157 U. S. 168, 178, 15 Sup. Ct. 570, 39 L. ed. 660.

21. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 28 Sup. Ct. 379, 52 L. ed. 379, rehearing denied, 208 U. S. 609, 28 Sup. Ct. 642, 28 Sup. Ct. 425; *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. ed. 629.

22. *Freeman v. Howe*, 24 How. (U. S.) 450, 16 L. ed. 749; *Gay v. Hudson River Elec. Power Co.*, 182 Fed. 279. See also 12 STANDARD PROC. 1017.

[a] **The statute prohibiting the granting of an injunction by a federal court to stay proceedings in a state court has no application in such case.** *Rickey Land & Cattle Co. v. Miller*, 152 Fed. 11, 81 C. C. A. 207, *affirmed*, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed. 1032.

23. *Riverdale Cotton Mills v. Alabama & Ga. Mfg. Co.*, 198 U. S. 188, 25 Sup. Ct. 629, 49 L. ed. 1008; *Julian v. Central Trust Co.*, 193 U. S. 93, 112, 24 Sup. Ct. 399, 48 L. ed. 629.

24. *Zimmerman v. So Relle*, 80 Fed. 417, 25 C. C. A. 518; *Benoist v. Smith*, 191 Fed. 514.

[a] **The suit should not be dismissed but should be stayed until the proceedings in the court which first obtained jurisdiction are concluded, or ample time for their termination has elapsed.** *Barber Asphalt Pav. Co. v. Morris*, 132

Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761.

[b] **The suit should proceed as far as may be without creating a conflict concerning the possession of the property before a stay is granted.** *McClellan v. Carland*, 187 Fed. 915, 921, 110 C. C. A. 49; *Mound City Co. v. Castleman*, 187 Fed. 921, 110 C. C. A. 55, *affirming* 177 Fed. 510.

[c] **The federal court will reserve to itself the right to determine when the litigation in the state court has been ended.** *Scott v. George's Creek Coal & Iron Co.*, 202 Fed. 251, 258.

[d] **Priority of Possession of the Property Controls.**—Hence the possession of a receiver of a federal court will not be surrendered to a receiver of a state court appointed subsequently in an action commenced before the one in the federal court, but which was an amicable proceeding in which there was no immediate intention, when it was brought to procure a receiver. *East Tenn., V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608.

25. *Freeman v. Howe*, 24 How. (U. S.) 450, 16 L. ed. 749.

[a] **Any party may file the bill whose interests are affected by the second suit.** *Freeman v. Howe*, 24 How. (U. S.) 450, 16 L. ed. 749.

26. **U. S.**—*Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *Tennessee v. Davis*, 100 U. S. 257, 262, 25 L. ed. 648; *Ex parte Roach*, 166 Fed. 344; *Swarts v. Christie Grain, etc. Co.*, 166 Fed. 338; *Stearns v. United States*, 2 Paine 300, 22 Fed. Cas. No. 13,341. **Ark.**—*McIntosh v. Bullard*, 95 Ark. 227, 129 S. W. 85; *State v. Kirkpatrick*, 32 Ark. 117. **Cal.** *People v. Kelly*, 38 Cal. 145, 99 Am.

committed against the sovereignty of the state.²⁷ But where the same act or series of acts may constitute an offense against the United States and the state, the courts of both the United States and the state have jurisdiction,²⁸ except in so far as the laws of congress under the constitution of the United States have asserted an exclusive jurisdiction,²⁹ or the exercise of state authority is incompatible with the exercise of federal authority granted by the constitution of the United

Dec. 360. **D. C.**—*Brown v. United States*, 35 App. Cas. 548. **Ga.**—*Ross v. State*, 55 Ga. 192, 21 Am. Rep. 278. **Ind.**—*Snoddy v. Howard*, 51 Ind. 411, 19 Am. Rep. 738. **Mass.**—*Com. v. Felton*, 101 Mass. 204. **Mich.**—*People v. Fonda*, 62 Mich. 401, 29 N. W. 26. **Mo.** *Mattison v. State*, 3 Mo. 421. **N. Y.** *People v. Welch*, 141 N. Y. 266, 275, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117; *United States v. Lathrop*, 17 Johns. 4. **Ohio.**—*United States v. Campbell*, Tapp. 61. **Pa.**—*Huber v. Reily*, 53 Pa. 112. **S. C.**—*State v. McBride*, Rice 400. **Va.**—*Samuels v. Com.*, 110 Va. 901, 66 S. E. 222; *Com. v. Feely*, 1 Va. Cas. (3 Va.) 321.

[a] **Perjury.**—The federal courts have exclusive jurisdiction to punish perjury committed in a federal tribunal. **U. S.**—*In re Loney*, 134 U. S. 372, 10 Sup. Ct. 384, 33 L. ed. 949. **Ark.** *McIntosh v. Bullard*, 95 Ark. 227, 129 S. W. 85; *State v. Kirkpatrick*, 32 Ark. 117. **Cal.**—*People v. Kelly*, 38 Cal. 145. **Ky.**—*Commonwealth v. Kitchen*, 141 Ky. 655, 133 S. W. 586. **N. H.**—*State v. Pike*, 15 N. H. 83.

27. *Ex parte Ballinger*, 88 Fed. 781; *United States v. Shepherd*, 1 Hughes 520, 27 Fed. Cas. No. 16,274.

28. **U. S.**—*Sexton v. California*, 189 U. S. 319, 23 Sup. Ct. 543, 47 L. ed. 833; *Crossley v. California*, 168 U. S. 640, 18 Sup. Ct. 242, 42 L. ed. 610; *Pettibone v. United States*, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. ed. 419; *Cross v. North Carolina*, 132 U. S. 131, 10 Sup. Ct. 47, 33 L. ed. 287; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Moore v. People*, 14 How. 13, 14 L. ed. 306; *United States v. Marigold*, 9 How. 560, 13 L. ed. 257; *Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Morris v. United States*, 229 Fed. 516, 143 C. C. A. 584; *Rosencranz v. United States*, 155 Fed. 38, 83 C. C. A. 634; *United States v. Franklin*, 174 Fed. 163; *United States v. McClellan*, 127 Fed. 971. **Ala.**—*Pearce v. State*, 115 Ala. 115, 22 So. 502. **Ark.**—*State v. Kirkpatrick*, 32 Ark.

117. **Cal.**—*People v. McDonnell*, 80 Cal. 285, 22 Pac. 190, 13 Am. St. Rep. 159; *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360. **Conn.**—*State v. Tuller*, 34 Conn. 280. **Fla.**—*Sligh v. Kirkwood*, 65 Fla. 123, 61 So. 185. **Ill.**—*Eells v. People*, 5 Ill. 498, *affirming* 14 How. (U. S.) 13, 14 L. ed. 306. **Ind.**—*State v. Moore*, 6 Ind. 436; *State v. Adams*, 4 Blackf. 146; *Chess v. State*, 1 Blackf. 198. **Kan.**—*State v. McCullagh*, 96 Kan. 786, 153 Pac. 557. **Mass.**—*Com. v. Barry*, 116 Mass. 1; *Com. v. Tenney*, 97 Mass. 50; *Com. v. Fuller*, 8 Mete. 313, 41 Am. Dec. 509. **Mich.**—*Harlan v. People*, 1 Dougl. 207. **Mont.**—*Territory v. Guyott*, 9 Mont. 46, 22 Pac. 134. **N. H.**—*State v. Whittemore*, 50 N. H. 245, 9 Am. Rep. 196; *State v. Pike*, 15 N. H. 83. **N. Y.**—*People v. Welch*, 141 N. Y. 266, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117. **N. C.**—*State v. Cross*, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53. **Pa.**—*Rump v. Com.*, 30 Pa. 475; *White v. Com.*, 4 Binn. 418. **S. C.**—*State v. Tutt*, 2 Bailey 44, 21 Am. Dec. 508; *State v. Pitman*, 1 Brev. 32, 2 Am. Dec. 645. **Tenn.**—*Sizemore v. State*, 3 Head 26. **Utah.**—*State v. Norman*, 16 Utah 457, 52 Pac. 986. **Va.** *Jett v. Com.*, 18 Gratt. (59 Va.) 933. **Wash.**—*State v. Coss*, 12 Wash. 673, 42 Pac. 127. **W. Va.**—*Weil v. Black*, 86 S. E. 666. **Wyo.**—*In re Murphy*, 5 Wyo. 297, 40 Pac. 398.

[a] In view of the provision of Rev. St., §5328, saving the jurisdiction of the state courts under their criminal laws, a state court has jurisdiction of a prosecution under its laws for the crime of extortion based on a threat to accuse one of an act made a crime by the federal statutes only, though such extortion would also be a crime under the federal statutes. *Sexton v. California*, 189 U. S. 319, 23 Sup. Ct. 543, 47 L. ed. 833.

29. **U. S.**—*Fox v. Ohio*, 5 How. 410, 12 L. ed. 213; *Ex parte Bridges*, 2 Woods 428, 4 Fed. Cas. No. 1,862. **Ark.** *State v. Kirkpatrick*, 32 Ark. 117. **Cal.**

States.³⁰ In order to exclude the jurisdiction of the state courts over matters within their ordinary jurisdiction, the intention of congress to exercise this power should be clear and unambiguous.³¹

5. Statutory Provisions.—*a. Crimes.*—The federal courts have exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States.³²

b. Suits for Penalties and Forfeitures.—The federal courts have exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States.³³

c. Admiralty.—The federal courts have exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction,³⁴ saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.³⁵ Their jurisdiction to enforce maritime liens against vessels is exclusive, even where such liens are

People *v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360. Conn.—State *v. Tuller*, 34 Conn. 280. Ind.—State *v. Adams*, 4 Blackf. 146. Mass.—Com. *v. Barry*, 116 Mass. 1; Com. *v. Felton*, 101 Mass. 204; Com. *v. Peters*, 12 Mete. 387; Com. *v. Fuller*, 8 Mete. 313, 41 Am. Dec. 509. Mont.—Territory *v. Burgess*, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808. N. H. State *v. Pike*, 15 N. H. 83. N. Y. People *v. Welch*, 141 N. Y. 266, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117; People *v. Sweetman*, 3 Park. Crim. 358. S. C.—State *v. Pitman*, 1 Brev. 32, 2 Am. Dec. 645.

30. *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. ed. 949.

31. People *v. Welch*, 141 N. Y. 266, 273, 36 N. E. 328, 38 Am. St. Rep. 793, 24 L. R. A. 117.

32. U. S.—Act March 3, 1911, ch. 231, §256, subd. 1, 36 St. at L. 1160 (this provision is a re-enactment of Rev. St., §711, subsec. 1, which is expressly repealed by §297 of the code); New York *v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. ed. 80; Martin *v. Hunter's Lessee*, 1 Wheat. 304, 337, 4 L. ed. 97; Curley *v. United States*, 130 Fed. 1, 64 C. C. A. 369 (certiorari denied, 195 U. S. 628, 25 Sup. Ct. 787, 49 L. ed. 351); *Ex parte Roach*, 166 Fed. 344; *Ex parte Houghton*, 7 Fed. 657. Ark.—State *v. Kirkpatrick*, 32 Ark. 117. Cal.—People *v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360. S. C.—State *v. McBride*, 1 Rice 400. Tenn.—State *v. Shelley*, 11 Lea 594. Va.—Com. *v. Feely*, 1 Va. Cas. (3 Va.) 321.

[a] Illustrations.—(1) The United States courts have exclusive jurisdiction over murder committed on land

bought by the United States and on which was being built a postoffice and court house (*Battle v. United States*, 209 U. S. 36, 28 Sup. Ct. 422, 52 L. ed. 670), (2) over perjury committed by a witness in the federal court (*McIntosh v. Bullard*, 95 Ark. 227, 129 S. W. 85; State *v. Shelley*, 11 Lea [Tenn.] 594), (3) over perjury committed before a United States commissioner (Com. *v. Kitchen*, 141 Ky. 655, 133 S. W. 586), (4) such as a commissioner in bankruptcy (State *v. Pike*, 15 N. H. 83), (5) or in a deposition to be used upon a contested election of a member of congress (*In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. ed. 949, affirming 38 Fed. 101); (6) also over breaking into a postoffice and stealing property of the United States therefrom. *Ex parte Roach*, 166 Fed. 344.

33. Act March 3, 1911, ch. 231, §256, subsec. 2, 36 St. at L. 1160. The same provision was contained in Rev. St. §711, subsec. 2, which is expressly repealed by §297 of the code. See the title "Penalties, Forfeitures and Fines."

34. Steamship *Jefferson*, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. ed. 125; Knapp, Stout & Co. *v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921; Act March 3, 1911, ch. 231, §256, subd. 3, 36 St. at L. 1160. This provision is a re-enactment of Rev. St., §711, subsec. 3, which is expressly repealed by §297 of the judicial code.

See the title "Admiralty."

35. Knapp, Stout & Co. *v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921; Act March 3, 1911, ch. 231, §256, subd. 3, 36 St. at L. 1160.

given by state statutes and though state statutes provide for the enforcement thereof in the state courts,³⁶ but remedies provided by state statutes for torts of a non-maritime character may be pursued in the state courts, even though such statutes give a lien on the vessel.³⁷

d. *Seizures Under Federal Laws.*—The federal courts have exclusive jurisdiction of all seizures under the laws of the United States, on land or on waters not within admiralty and maritime jurisdiction.³⁸

e. *Prize Cases.*—The federal courts have exclusive jurisdiction of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize.³⁹

f. *Cases Under Patent Laws.*—The federal courts have exclusive jurisdiction of all cases arising under the patent laws,⁴⁰ but not of all questions in which a patent may be the subject-matter of the controversy.⁴¹ To constitute such a case the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of those laws.⁴²

The courts of a state may try questions of title to patents,⁴³ and may construe and enforce contracts relating to patents.⁴⁴ They are not ousted of jurisdiction merely because the validity of a patent is incidentally involved.⁴⁵

36. *The Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. ed. 296, and cases there cited; *Aurora Shipping Co. v. Boyce*, 191 Fed. 960, 112 C. C. A. 372. See the title "**Admiralty.**"

37. *Martin v. West*, 222 U. S. 191, 32 Sup. Ct. 42, 56 L. ed. 159; *The Winnebago*, 205 U. S. 354, 27 Sup. Ct. 509, 51 L. ed. 836; *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 20 Sup. Ct. 824, 44 L. ed. 921. See also the title "**Admiralty.**"

38. U. S.—Act March 3, 1911, ch. 231, §256, subsec. 4, 36 St. at L. 1160; *Slocum v. Mayberry*, 2 Wheat. (U. S.) 1, 4 L. ed. 169; *Clark v. Five Hundred and Five Thousand Feet of Lumber*, 65 Fed. 236, 12 C. C. A. 628; *United States v. The Helena*, 26 Fed. Cas. No. 15,341. Pa.—*Buchanan v. Biggs*, 2 Yeates 232. Vt.—*Stoughton v. Mott*, 13 Vt. 175.

39. Act March 3, 1911, ch. 231, §256, subsec. 4, 36 St. at L. 1160. See 1 STANDARD PROC. 371.

40. Act March 3, 1911, ch. 231, §256, subsec. 5; *New Marshall Eng. Co. v. Marshall Eng. Co.*, 223 U. S. 473, 32 Sup. Ct. 238, 56 L. ed. 513; *American Graphophone Co. v. Pickard*, 201 Fed. 546. See the title "**Patents.**"

41. *New Marshall Eng. Co. v. Mar-*

shall Eng. Co., 223 U. S. 473, 32 Sup. Ct. 238, 56 L. ed. 513.

[a] "There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading, be it a bill, complaint or declaration, sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals." *Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 259, 18 Sup. Ct. 62, 42 L. ed. 458.

42. *Pratt v. Paris Gas Light & Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. ed. 458. See the title "**Patents.**"

43. *New Marshall Eng. Co. v. Marshall Eng. Co.*, 223 U. S. 473, 32 Sup. Ct. 238, 56 L. ed. 513.

44. *New Marshall Eng. Co. v. Marshall Eng. Co.*, 223 U. S. 473, 32 Sup. Ct. 238, 56 L. ed. 513; *Wade v. Lawder*, 165 U. S. 624, 17 Sup. Ct. 425, 41 L. ed. 851.

45. *Pratt v. Paris Gas & Coke Co.*, 168 U. S. 255, 18 Sup. Ct. 62, 42 L. ed. 458, because its invalidity is set up as incidental to a defense.

g. *Cases Under Copyright Laws.*—The federal courts have exclusive jurisdiction of all cases arising under the copyright laws of the United States.⁴⁶

h. *Bankruptcy Proceedings.*—The federal courts have exclusive jurisdiction of all matters and proceedings in bankruptcy.⁴⁷

i. *Where a State Is a Party.*—The extension by the constitution of the judicial power of the United States to controversies between a state and citizens of other states, and the conferring on the supreme court of original jurisdiction in all cases in which a state shall be a party, does not of itself render the jurisdiction of the federal courts exclusive in such cases, but whether it shall be exclusive or concurrent with that of the courts of the various states is left to congress to determine.⁴⁸ The judicial code provides that the federal courts shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens.⁴⁹ Hence, in so far as the federal constitution and laws are concerned, a state court may take cognizance of suits by such state against citizens of other states,⁵⁰ subject to the right of the defendant to remove such suit to the proper federal court, in cases where such right of removal is authorized by the federal law,⁵¹ and subject, also, to the authority of the supreme court to review the judgment of the state court, if the case be one within its appellate jurisdiction.⁵²

j. *Suits Against Ambassadors and Consuls.*—The federal courts have exclusive jurisdiction of all suits against ambassadors, or other public ministers, or their domestics or domestic servants, or against consuls or vice-consuls,⁵³ and this is true though a third party is

46. Act March 3, 1911, ch. 231, §256, subsec. 5, 36 St. at L. 1160. See the title "**Copyright Proceedings.**"

47. Act March 3, 1911, ch. 231, §256, subsec. 5, 36 St. at L. 1160. See the title "**Bankruptcy Proceedings.**"

48. *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 18 Sup. Ct. 685, 42 L. ed. 1126.

49. Act March 3, 1911, ch. 231, §256, subsec. 7. See also Act March 3, 1911, ch. 231, §233 (in which latter cases it shall have original, but not exclusive, jurisdiction); *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 18 Sup. Ct. 685, 42 L. ed. 1126; *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. ed. 842 (*affirming* 24 Fed. 55); *North Carolina v. Temple*, 134 U. S. 22, 10 Sup. Ct. 509, 33 L. ed. 849.

[a] *Suit against chief magistrate of a state in his official name will be considered as a suit against the state. Governor v. Madrazo*, 1 Pet. (U. S.) 110, 123, 7 L. ed. 73.

[b] *Suit by One State Against Another.*—*Virginia v. West Virginia*, 11 Wall. (U. S.) 39, 20 L. ed. 67; *Florida v. Georgia*, 11 How. (U. S.) 293, 13 L. ed. 702; *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657, 9 L. ed. 1233.

50. *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 521, 18 Sup. Ct. 685, 42 L. ed. 1126.

51. *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 521, 18 Sup. Ct. 685, 42 L. ed. 1126.

52. *Plaquemines Fruit Co. v. Henderson*, 170 U. S. 511, 521, 18 Sup. Ct. 685, 42 L. ed. 1126.

53. **U. S.**—Act March 3, 1911, §256, subsec. 8, 36 St. at L. 1160; *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419; *Davis v. Packard*, 7 Pet. (U. S.) 276, 280, 8 L. ed. 684; *United States v. Ortega*, 11 Wheat. (U. S.) 467, 6 L. ed. 521. **N. J.**—*Sartori v. Hamilton*, 13 N. J. L. 107. **N. Y.**—*In re Aycinena*, 1 Sandf. 690. **Pa.**—*Durand v. Holbach*, 1 Miles 46.

joined with such official as defendant.⁵⁴ State courts accordingly have no jurisdiction in suits against them,⁵⁵ but they have jurisdiction of suits brought by them.⁵⁶ The exemption of consuls from suit in the state courts is the privilege of the state or government which the consul represents, and not that of the consul himself,⁵⁷ and hence it is not waived by the failure of the consul to plead it or otherwise claim it,⁵⁸ and may be taken advantage of at any stage of the proceeding.⁵⁹

6. Right To Enforce Federal Statutes in State Courts.—Except where exclusive jurisdiction is given to the federal courts by the federal statutes,⁶⁰ rights of civil recovery arising under acts of congress may be enforced in the state courts, when the ordinary jurisdiction of the latter, as prescribed by local laws, is appropriate to the occasion and is invoked in conformity to those laws, and the right is susceptible of adjudication according to the prevailing rules of procedure.⁶¹ In

54. *Rock River Bank v. Hoffman*, 22 How. Pr. (N. Y.) 510, 14 Abb. Pr. 72; *In re Tracy*, 14 Jones & S. (N. Y.) 48; *Durand v. Halbach*, 1 Miles (Pa.) 46.

55. *Davis v. Packard*, 7 Pet. (U. S.) 276, 8 L. ed. 684; *Com. v. Kosloff*, 5 Serg. & R. (Pa.) 545.

56. *Sagory v. Wissman*, 2 Ben. 240, 21 Fed. Cas. No. 12,217.

57. *Bors v. Preston*, 111 U. S. 252, 256, 4 Sup. Ct. 407, 28 L. ed. 419; *Davis v. Packard*, 7 Pet. (U. S.) 276, 284, 8 L. ed. 684; *Durand v. Halbach*, 1 Miles (Pa.) 46.

58. *Bors v. Preston*, 111 U. S. 252, 256, 4 Sup. Ct. 407, 28 L. ed. 419; *Davis v. Packard*, 7 Pet. (U. S.) 276, 284, 8 L. ed. 684.

59. *Miller v. Van Loben Sells*, 66 Cal. 341, 5 Pac. 512; *Griffin v. Dominguez*, 2 Duer (N. Y.) 656.

[a] **Such question may be raised after pleading** the general issue. *Davis v. Packard*, 6 Wend. (N. Y.) 327.

60. *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833; *Delaware, L. & W. R. Co. v. Lyne*, 193 Fed. 984, 113 C. C. A. 604.

61. *Delaware, L. & W. R. Co. v. Lyne*, 193 Fed. 984, 113 C. C. A. 604.

[a] "The fact that a state court derives its existence and functions from the state laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the state as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the state; and the courts of the two jurisdictions are not foreign to each other, nor to be

treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. . . . It is true the sovereignties are distinct and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney, in the case of *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169, and hence the state courts have no power to revise the action of the federal courts, nor the federal the state, except where the federal constitution or laws are involved. But this is no reason why the state courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied." *Clafin v. Houseman*, 93 U. S. 130, 23 L. ed. 833, *quoted* with approval in *Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. St. 169, 56 L. ed. 327.

[b] **Employers' Liability Act.**—*In re Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 33 L. R. A. (N. S.) 44 (*affirming* 173 Fed. 494, and *reversing* 82 Conn. 373, 73 Atl. 762); *St. Louis, I. M. & S. R. Co. v. Conley*, 187 Fed. 949, 110 C. C. A. 97.

[c] Such a case is not removable from a state court to the federal courts under the express provisions of §28 of the Judicial Code. *Lee v. Toledo, St. L. & W. R. Co.*, 193 Fed. 685; *Strauser v. Chicago, B. & Q. R. Co.*, 193 Fed. 293. See generally the title "Removal of Causes."

[d] **Interstate Commerce.**—An action based on the Carmack amendment to the Hepburn Act of 1906. *Galves-*

such case it is the duty of the state court to assume such jurisdiction,⁶² and this, too, regardless of the fact that its exercise may be onerous,⁶³ or though the rules of law to be applied are unlike those applied in other cases.⁶⁴

State courts are competent to decide federal questions arising before them, and it is their duty to decide them.⁶⁵

7. Persons in Custody of State Courts.—While the federal courts may interfere by habeas corpus to release or discharge a person in custody in the state courts in violation of the constitution of the United States,⁶⁶ they are not imperatively required to do so,⁶⁷ and such courts will not interfere by habeas corpus to release a person under indictment or arrest in the state courts for violation of a state statute until after the final action of the state courts,⁶⁸ notwithstanding the state statute is in conflict with the constitution of the United States,⁶⁹ ex-

ton, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. 205, 56 L. ed. 517.

62. *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327, 38 L. R. A. (N. S.) 44, (affirming 173 Fed. 494, and reversing 82 Conn. 373, 73 Atl. 762); *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 512, 20 Sup. Ct. 726, 44 L. ed. 864; *Delaware, L. & W. R. Co. v. Lyne*, 193 Fed. 984, 113 C. C. A. 604.

63. *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327.

64. *In re Second Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. ed. 327.

65. *Missouri Pac. R. Co. v. Fitzgerald*, 160 U. S. 556, 583, 18 Sup. Ct. 389, 40 L. ed. 536; *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. 544, 28 L. ed. 542; *W. G. Coyle & Co. v. Stern*, 193 Fed. 582, 113 C. C. A. 450.

[a] **Whether a State Statute Violates the Federal Constitution.**—(1) *Defiance Water Co. v. Defiance*, 191 U. S. 184, 193, 24 Sup. Ct. 63, 48 L. ed. 140. (2) "Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them." *Robb v. Connolly*, 111 U. S. 624, 637, 4 Sup. Ct. 544, 28 L. ed. 542, quoted with approval in *Cook v. Hart*, 146 U. S. 183, 195, 13 Sup. Ct. 40, 36 L. ed. 934; *In re Wood*, 140 U. S. 278, 286, 11 Sup. Ct. 738, 35 L. ed. 505.

[b] State courts, consistent with existing federal legislation, may determine cases at law or in equity arising under the constitution or laws of the United States, or involving rights dependent upon such constitution or laws. *Ex parte Martin*, 180 Fed. 209.

66. *Hunter v. Wood*, 209 U. S. 205, 28 Sup. Ct. 472, 52 L. ed. 747; *Urquhart v. Brown*, 205 U. S. 179, 181, 27 Sup. Ct. 459, 51 L. ed. 760; *Filer v. Steele*, 228 Fed. 242; *United States v. Chapel*, 54 Fed. 140; *In re Ah Jow*, 29 Fed. 181; *Ex parte Reynolds*, 3 Hughes. 559, 20 Fed. Cas. No. 11,720.

67. *United States v. Lewis*, 200 U. S. 1, 8, 26 Sup. Ct. 229, 50 L. ed. 343; *Riggins v. United States*, 199 U. S. 547, 549, 26 Sup. Ct. 147, 50 L. ed. 303; *Minnesota v. Brundage*, 180 U. S. 499, 501, 21 Sup. Ct. 455, 45 L. ed. 639; *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. ed. 80; *Ex parte Terry*, 128 U. S. 289, 302, 9 Sup. Ct. 77, 32 L. ed. 405; *Ex parte Royall*, 117 U. S. 241, 251, 6 Sup. Ct. 734, 29 L. ed. 868.

68. *Urquhart v. Brown*, 205 U. S. 179, 182, 27 Sup. Ct. 459, 51 L. ed. 760; *Boske v. Comingore*, 177 U. S. 459, 466, 20 Sup. Ct. 701, 44 L. ed. 846; *Markuson v. Boucher*, 175 U. S. 184, 20 Sup. Ct. 76, 44 L. ed. 124; *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. ed. 406; *Andrews v. Swartz*, 156 U. S. 272, 15 Sup. Ct. 389, 39 L. ed. 422; *New York v. Eno*, 155 U. S. 89, 15 Sup. Ct. 30, 39 L. ed. 80; *Ex parte Royall*, 117 U. S. 241, 251, 6 Sup. Ct. 734, 29 L. ed. 868; *Filer v. Steele*, 228 Fed. 242; *Ex parte Blodgett*, 192 Fed. 77; *Ex parte Rogers*, 138 Fed. 961.

69. *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535.

cept where the case is one of great urgency,⁷⁰ or exceptional circumstances exist.⁷¹

8. Person in Custody of United States Court.—The courts or judges of the state have no authority to release a prisoner upon a habeas corpus when the prisoner is in the custody of the authorities of the United States, pursuant to a judgment of conviction by a federal tribunal of exclusive jurisdiction in the case.⁷² This rule is applicable where the prisoner is in custody of a United States court,⁷³ or commissioner,⁷⁴ or of a United States officer.⁷⁵

70. *Urquhart v. Brown*, 205 U. S. 179, 182, 27 Sup. St. 459, 51 L. ed. 760; *Boske v. Comingore*, 177 U. S. 459, 20 Sup. Ct. 701, 44 L. ed. 846; *Tinsley v. Anderson*, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. ed. 91; *In re Strauss*, 126 Fed. 327, 63 C. C. A. 99; *In re Matthews*, 122 Fed. 248.

71. *Pitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. ed. 535; *In re Brundage*, 96 Fed. 963; *Nesbit v. Hert*, 91 Fed. 123; *In re Grice*, 79 Fed. 627; *United States v. Chapel*, 54 Fed. 140.

[a] **Illustrations.**—(1) The federal court will act if the prisoner is in custody for an act done or omitted in pursuance of a law of the United States or of an order or process of a court of the United States (*Ohio v. Thomas*, 173 U. S. 276, 19 Sup. Ct. 453, 43 L. ed. 699; *Baker v. Grice*, 169 U. S. 284, 18 Sup. Ct. 323, 42 L. ed. 748; *Whitten v. Tomlinson*, 160 U. S. 231, 241, 16 Sup. Ct. 297, 40 L. ed. 406; *New York v. Eno*, 155 U. S. 89, 93, 15 Sup. Ct. 30, 39 L. ed. 80; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. ed. 55; *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. ed. 949; *Ex parte Siebold*, 100 U. S. 371, 394, 25 L. ed. 717), (2) or where he is a citizen or subject of a foreign state and is in custody for an act done under authority of his own government. (*Minnesota v. Brundage*, 180 U. S. 499, 501, 21 Sup. Ct. 455, 45 L. ed. 639; *Davis v. Burke*, 179 U. S. 399, 402, 21 Sup. Ct. 210, 45 L. ed. 249; *Whitten v. Tomlinson*, 160 U. S. 231, 241, 16 Sup. Ct. 297, 40 L. ed. 406; *New York v. Eno*, 155 U. S. 89, 94, 15 Sup. Ct. 30, 39 L. ed. 80; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. ed. 55; *Wildenhush Case*, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. ed. 565; *Ex parte Royall*, No. 1, 117 U. S. 241, 252, 29 L. ed. 868), (3) or to bring a person in the custody of the state authorities to testify in the United States courts (*Minnesota v. Brundage*, 180 U. S. 499, 500, 21 Sup.

Ct. 455, 45 L. ed. 639), (4) but not where the prisoner claims he is in custody without due process of law (*Davis v. Burke*, 179 U. S. 399, 401, 21 Sup. Ct. 210, 45 L. ed. 249; *In re Frederick*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. ed. 653), (5) or under erroneous sentence (*In re Wood*, 140 U. S. 278, 287, 11 Sup. Ct. 738, 35 L. ed. 505), (6) though where the state court is entirely without jurisdiction the federal jurisdiction may be invoked. *Valentina v. Mercer*, 201 U. S. 131, 140, 26 Sup. Ct. 368, 50 L. ed. 693; *Whitten v. Tomlinson*, 160 U. S. 231, 241, 16 Sup. Ct. 297, 40 L. ed. 406; *In re Jugiro*, 140 U. S. 291, 296, 11 Sup. Ct. 770, 35 L. ed. 510; *In re Loney*, 134 U. S. 372, 10 Sup. Ct. 584, 33 L. ed. 949; *Ex parte Royall*, 117 U. S. 241, 253, 6 Sup. Ct. 734, 29 L. ed. 868; *Ex parte Lange*, 18 Wall. (U. S.) 163, 21 L. ed. 872.

72. **U. S.**—*Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544, 28 L. ed. 542; *United States v. Tarble*, 13 Wall. 397, 20 L. ed. 597; *Ableman v. Booth*, 21 How. 506, 16 L. ed. 169; *In re Farrand*, 1 Abb. 140, 8 Fed. Cas. No. 4,678. **Cal.**—*Ex parte Le Bur*, 49 Cal. 159. **Ill.**—*In re Salisbury*, 16 Ill. 350. **Mo.**—*Copenhaver v. Stewart*, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382. **Nev.**—*Ex parte Hill*, 5 Nev. 154. **N. J.**—*State v. Zulich*, 29 N. J. L. 409. **N. Y.**—*People ex rel. Macdonnell v. Fiske*, 45 How. Pr. 294. **Ohio.**—*Ex parte Bushnell*, 8 Ohio St. 599; *Ex parte Early*, 3 Ohio Dec. 105, 1 West. L. Month. 264, 3 Wkly. L. Gaz. 234. **Pa.**—*In re Williamson*, 26 Pa. 9, 67 Am. Dec. 374. **Tex.**—*Ex parte Chance* (Tex. Civ. App.), 58 S. W. 110.

73. *Ex parte Royall*, 117 U. S. 241, 249, 6 Sup. Ct. 734, 29 L. ed. 868.

74. *Ex parte Royall*, 117 U. S. 241, 249, 6 Sup. Ct. 734, 29 L. ed. 868.

75. *Ex parte Royall*, 117 U. S. 241, 249, 6 Sup. Ct. 734, 29 L. ed. 868; *Robb v. Connolly*, 111 U. S. 624, 634, 4 Sup. Ct. 544, 28 L. ed. 542; *Tarble's Case*,

9. **Persons in Custody of Military Authorities.**—The authority of the United States courts over persons in custody under the authority or color of authority of the military authorities is exclusive,⁷⁶ and hence state courts cannot interfere to release or discharge persons so held in custody.⁷⁷

D. **COURTS OF DIFFERENT STATES OR COUNTRIES.**—Except as modified by statute,⁷⁸ the law is well settled that the mere pendency of a prior suit in personam between the same parties for the same cause of action, in a foreign country,⁷⁹ or in the courts of a sister state,⁸⁰ will not preclude a court from taking cognizance of a cause.⁸¹ It is only the definitive judgment on the merits that will be considered conclusive.⁸² In legal contemplation the jurisdiction of the courts of another state of the United States is foreign to the jurisdiction of the forum.⁸³ But notwithstanding these rules, the rule of priority applies as between the courts of the various states, and if the courts of one state have acquired jurisdiction of the subject-matter and the parties to a cause, the courts of another state will not assume control of a subsequent suit between the same parties as to the same subject-matter

13 Wall. (U. S.) 397, 402, 20 L. ed. 597; *Ableman v. Booth*, 21 How. (U. S.) 506, 16 L. ed. 169.

76. *United States v. Tarble*, 13 Wall. (U. S.) 397, 20 L. ed. 597.

[a] **In Custody of Recruiting Officer.**—*State v. Tarble*, 13 Wall. (U. S.) 397, 20 L. ed. 597.

As to jurisdiction where martial law prevails, see the title "**Martial Law.**"

77. *United States v. Tarble*, 13 Wall. (U. S.) 397, 20 L. ed. 597; *Ex parte Yerger*, 8 Wall. (U. S.) 85, 19 L. ed. 332; *In re Neill*, 8 Blatchf. 156, 17 Fed. Cas. No. 10,089.

78. *Cooper v. Dismal Swamp Canal Co.*, 6 N. C. 195.

79. *Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 448; *Lowry v. Hall*, 2 Watts & S. (Pa.) 129, 133, 38 Am. Dec. 495; *Bayley v. Edwards*, 3 Swanst. (Eng.) 703. See the title "**Another Action Pending.**"

80. Conn.—*Hatch v. Spafford*, 22 Conn. 485, 58 Am. Dec. 433. Md.—*Cole v. Flitcraft & Co.*, 47 Md. 312, 319; *SeEVERS v. Clement*, 28 Md. 426. N. Y.—*Brinkley v. Brinkley*, 50 N. Y. 184, 202, 10 Am. Rep. 460. Pa.—*Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 448; *Baxley v. Linah*, 16 Pa. 241, 13 Law Rep. 55, 55 Am. Dec. 494; *Loury v. Hall*, 2 Watts & S. 129, 133, 38 Am. Dec. 495. Tex.—*North British M. Ins. Co. v. First Nat. Bank*, 3 Tex. Civ. App. 293, 22 S. W. 992. Wash.—*State*

ex rel. Bank v. Superior Court, 14 Wash. 686, 45 Pac. 670.

[a] **The true reason is**, every country or state is entirely sovereign and unrestricted in its powers, whether legislative, judicial, or executive, and hence does not acknowledge the right of any other nation, to hinder its own sovereign acts and proceedings. Nor will the courts of one country take notice of the courts of another, nor of its laws, or rules for the administration of justice; and therefore, the courts of a country, where a second suit is brought, will not dismiss a suitor, merely because initiatory steps have been taken elsewhere. It may be cause for staying proceedings; but, to abate a suit is to put a final end to its existence; should it do this, it might learn, too late, that no adequate remedy can be had elsewhere. *Hatch v. Spofford*, 22 Conn. 485, 498, 58 Am. Dec. 433.

81. Ky.—*Salmon v. Wootton*, 9 Dana 422. N. Y.—*Walsh v. Durkin*, 12 Johns. 99; *Boune v. Joy*, 9 Johns. 221; *Mitchell v. Bunch*, 2 Paige 606, 22 Am. Dec. 669; *Cook v. Litchfield*, 5 Sandf. 330, 342; *Williams v. Ayrault*, 21 Barb. 264. Pa.—*Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 448.

82. *Cole v. Flitcraft & Co.*, 47 Md. 312; *SeEVERS v. Clement*, 28 Md. 426. See generally the titles "**Another Action Pending**;" "**Judgments.**"

83. *Rickey Land & C. Co. v. Miller*, 218 U. S. 258, 31 Sup. Ct. 11, 54 L. ed.

for the same relief.⁸⁴ Especially will the courts of one state not interfere with the possession of property in the custody or control of the courts of another state.⁸⁵

XII. AMOUNT IN CONTROVERSY OR VALUE OF PROPERTY AS TEST OF JURISDICTION.—A. IN GENERAL.—In most states jurisdiction is frequently made to depend upon the amount or value in controversy.⁸⁶ This amount is determined by varying⁸⁷

1032; *Buckner v. Finley*, 2 Pet. (U. S.) 586, 7 L. ed. 528.

84. Ala.—*Worthy v. Lyon*, 18 Ala. 784. **Conn.**—*Clark's Appeal*, 70 Conn. 195, 39 Atl. 155. **Ga.**—*Cement Gravel Co. v. Wyly*, 105 Ga. 204, 31 S. E. 161. **Ill.**—*Royal League v. Kavanagh*, 233 Ill. 175, 84 N. E. 178. **La.**—*State v. Crescent City Gas-Light Co.*, 24 La. Ann. 318. **Md.**—*Cole v. Flitcraft & Co.*, 47 Md. 312; *Seever v. Clement*, 28 Md. 426; *Winn v. Albert*, 2 Md. Ch. 42. **Mich.**—*Citizens' Bank of Rudyard v. Circuit Judge*, 186 Mich. 494, 152 N. W. 1077; *Woodruff v. Young*, 43 Mich. 548, 6 N. W. 85. **N. Y.**—*Sulz v. Mutual Reserve Fund L. Assn.*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; *In re Colles*, 4 Dem. Sur. 387; *Bayard v. Scanlon*, 1 City Ct. 487; *Parker v. Murray*, 60 Hun 576, 14 N. Y. Supp. 79, 37 N. Y. St. 949. **N. C.**—*Cooper v. Dismal Swamp Canal Co.*, 6 N. C. 195. **Okla.**—*Missouri, K. & T. R. Co. v. Bradshaw*, 37 Okla. 317, 132 Pac. 327. **Pa.**—*Freeman's Appeal*, 68 Pa. 151; *Smith v. Lathrop*, 44 Pa. 326, 84 Am. Dec. 448; *Seitzinger's Estate*, 2 Woodw. 348. **Tex.**—*Wade v. Crump* (Tex. Civ. App.), 173 S. W. 538. **Vt.**—*Jennison v. Hapgood*, 2 Aik. 31.

[a] **But the Rule Rests Upon Comity Only.**—*Cole v. Flitcraft & Co.*, 47 Md. 312.

85. U. S.—*The Santissima Trinidad*, 7 Wheat. 283, 5 L. ed. 454; *Groom v. Mortimer Land Co.*, 192 Fed. 849, 113 C. C. A. 173; *Connor v. Hanover Ins. Co.*, 28 Fed. 549. **Kan.**—*Denny v. Faulkner*, 22 Kan. 89. **La.**—*Myers v. Myers*, 8 La. Ann. 369, 58 Am. Dec. 689; *Wingate v. Wheat*, 6 La. Ann. 238. **Pa.**—*Van Dyke's Appeal*, 6 Leg. Gaz. 70. **Tex.**—*Continental Ins. Co. v. Chase*, 89 Tex. 212, 34 S. W. 93.

86. See the discussion following.

[a] **Definition.**—See the following cases: **Ark.**—*Sherrill v. Wilson*, 29 Ark. 384. **Minn.**—*Barber v. Kennedy*, 18 Minn. 216. **N. C.**—*Duckworth v. Mull*, 143 N. C. 461, 55 S. E. 850. **Pa.**—*Kline v. Wood*, 9 Serg. & R. 294, 301.

87. See the constitutions and statutes.

[a] **Alabama.**—(1) City court. *Black v. Ryan*, 194 Ala. 667, 69 So. 633; *Reese v. Bessemer Plumbing & Mfg. Co. (Ala.)*, 42 So. 56. (2) Circuit court. *Tolbert v. Falkenberry*, 147 Ala. 204, 40 So. 120 (enforcement of liens); *Camp v. Marion County*, 91 Ala. 240, 8 So. 786; *Mobile Light & R. Co. v. George*, 2 Ala. App. 545, 57 So. 50; *Cavender v. Funderburg*, 9 Port. (Ala.) 460. (3) Justices of the peace. *Tolbert v. Falkenberry*, 147 Ala. 204, 40 So. 120; *Alford v. Hicks*, 142 Ala. 355, 38 So. 752; *Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705; *Brown v. Alabama G. S. R. Co.*, 87 Ala. 370, 6 So. 295; *Alabama G. S. R. Co. v. Christian*, 82 Ala. 307, 1 So. 121; *Rodgers v. Gaines*, 73 Ala. 218; *Griffin v. Appleby*, 69 Ala. 409; *Burns v. Henry*, 67 Ala. 209; *Carter v. Alford*, 64 Ala. 236; *State v. McAllister*, 60 Ala. 105; *Taylor v. Woods*, 52 Ala. 474; *Solomon v. Ross*, 49 Ala. 198; *Pearce v. Pope*, 42 Ala. 319; *Cavender v. Funderburg*, 9 Port. (Ala.) 460. (4) Courts of equity. *Campbell & Wright v. Conner*, 78 Ala. 211; *Hall v. Cannte*, 22 Ala. 650; *Wood v. Wood*, 3 Ala. 756. See *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 So. 569.

[b] **Arizona.**—*Miami Copper Co. v. State*, 17 Ariz. 179, 149 Pac. 758, 760, Ann. Cas. 1916E, 494.

[c] **Arkansas.**—(1) Circuit courts. *Paris Merc. Co. v. Hunter*, 74 Ark. 615, 86 S. W. 808; *Harris-Damon Lumb. Co. v. Craddock*, 72 Ark. 334, 80 S. W. 228. See *St. Louis, I. M. & S. R. Co. v. Edwards*, 94 Ark. 394, 127 S. W. 713. (2) As courts of equity, they have jurisdiction irrespective of the amount involved. *Uptmoor v. Young*, 57 Ark. 528, 22 S. W. 169. (3) County courts. *Huddleston v. Spear*, 8 Ark. 406. See *Carroll County Bank v. State*, 95 Ark. 194, 128 S. W. 1042. (4) Justices of the peace. *Adair v. Quincy Stove Mfg. Co.*, 119 Ark. 263, 177 S. W. 909; *Ft. Smith Paper Co. v. Templeton*, 113

statutory and constitutional provisions, in construing which the

Ark. 490, 168 S. W. 1092; *Shelton v. Little Rock Auto Co.*, 103 Ark. 142, 146 S. W. 129; *Kilgore Lumb. Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62; *Storm v. Montgomery*, 79 Ark. 172, 95 S. W. 149; *Kaufman v. Kelly*, 78 Ark. 176, 95 S. W. 448; *Rose v. Christinett*, 77 Ark. 582, 92 S. W. 866; *Thompson v. Willard*, 66 Ark. 346, 50 S. W. 870; *Hunton v. Luce*, 60 Ark. 146, 29 S. W. 151, 46 Am. St. Rep. 165, 28 L. R. A. 221; *St. Louis, I. M. & S. Ry. Co. v. Briggs*, 47 Ark. 59, 14 S. W. 464. (5) "The term 'matters of contract' embraces an action for unliquidated damages when the action is founded upon a contract." *Smith v. Taylor*, 97 Ark. 424, 134 S. W. 634.

[c*] **California.**—(1) Supreme court. *Dashiell v. Slingerland*, 60 Cal. 653; *Maxfield v. Johnson*, 30 Cal. 545. (2) Appellate court. *Dewing Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035. (3) Superior court. *Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080; *Raisch v. Sausalito Land & F. Co.*, 131 Cal. 215, 63 Pac. 346; *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. 78. (4) Justices of the peace. *Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657.

[d] **Colorado.**—(1) County courts. *Greene v. Gibson*, 53 Colo. 346, 127 Pac. 239. (2) Justice of the peace. *Robinson v. Bonjour*, 16 Colo. App. 458, 66 Pac. 451.

[e] **Connecticut.**—(1) The superior court. *Brennan v. Berlin Iron Bridge Co.*, 75 Conn. 393, 53 Atl. 779. (2) Court of common pleas. *Bronson v. Leibold*, 87 Conn. 293, 87 Atl. 979; *Prince v. Takash*, 75 Conn. 616, 54 Atl. 1003. (3) District court of Waterbury. *Clark v. Manufacturers' Nat. Bank*, 74 Conn. 263, 50 Atl. 727. (4) City court. *Cantoni v. Betts*, 70 Conn. 386, 39 Atl. 604. (5) Justice of the peace. *Prince v. Takash*, 75 Conn. 616, 54 Atl. 1003.

[f] **District of Columbia.**—*Newmeyer v. Cowling*, 6 Mackey (D. C.) 504, supreme court.

[g] **Florida.**—(1) Circuit courts. *Sumner Lumb. Co. v. Mills*, 64 Fla. 513, 60 So. 757; *Georgia, F. & A. R. Co. v. Andrews*, 61 Fla. 246, 54 So. 461. See *Seaboard Air Line Ry. v. Moxey*, 64 Fla. 487, 60 So. 353. (2) County courts. *Ring v. Merchants Broom Co.*, 68 Fla. 515, 67 So. 132. See *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110.

(3) Justices of the peace. *Georgia, F. & A. R. Co. v. Andrews*, 61 Fla. 246, 54 So. 461.

[h] **Georgia.**—(1) County courts. *Dowdle v. Stein*, 103 Ga. 94, 29 S. E. 595; *Aycock v. Subers*, 73 Ga. 807; *Warren v. Slaton*, 14 Ga. App. 734, 82 S. E. 307; *Gower v. Fowler*, 1 Ga. App. 814, 57 S. E. 1054; *DeLamar v. Dollar*, 1 Ga. App. 687, 57 S. E. 85, 1054. (2) A county judge can issue a distress warrant irrespective of the amount claimed. *Greer v. Woolfolk*, 60 Ga. 623; *Graves v. Tift*, 50 Ga. 122. (3) A distress warrant for more than \$200 issued by the county court may be returned to either the superior court or the county court. *Lathrop & Co. v. Clewis*, 63 Ga. 282; *Brown v. Alfrend*, 61 Ga. 12. (4) The city court. *Baxley Banking Co. v. Carter*, 112 Ga. 529, 37 S. E. 728 (of Baxley); *Georgia State Bldg. & L. Assn. v. Owens*, 88 Ga. 224, 14 S. E. 210 (of Savannah); *McIntosh v. Patton*, 12 Ga. App. 305, 77 S. E. 6 (of Monroe); *Long v. Ivey*, 12 Ga. App. 147, 76 S. E. 1055 (same); *Griffin v. Humphreys*, 11 Ga. App. 842, 76 S. E. 647 (of Moultrie); *Stovall v. Kelley Bros.*, 8 Ga. App. 550, 70 S. E. 17 (of Atlanta). (5) Justice of the peace. *Griffith v. Elder*, 110 Ga. 453, 35 S. E. 641; *Slaughter v. Manning*, 11 Ga. App. 650, 75 S. E. 1059.

[i] **Idaho.**—Justice of the peace. *Quayle v. Glenn*, 6 Idaho 549, 57 Pac. 308.

[j] **Illinois.**—(1) County courts. *Lachman v. Deisch*, 71 Ill. 59; *Kieper v. American Coal & S. Co.*, 187 Ill. App. 131. (2) Justice of the peace. *Johnson v. Hartman*, 119 Ill. App. 206.

[k] **Indiana.**—Justices of the peace. *Fawknor v. Baden*, 89 Ind. 587; *Grubaugh v. Jones*, 78 Ind. 350; *Deam v. Dawson*, 62 Ind. 22; *Caffrey v. Dudgeon*, 38 Ind. 512, 10 Am. Rep. 126; *Harrell v. Hammond's Admr.*, 25 Ind. 104; *Everett Piano Co. v. Bash*, 31 Ind. App. 498, 68 N. E. 329.

[l] **Iowa.**—*Leathers v. Geitz*, 135 Iowa 145, 112 N. W. 191. Justices of the peace. *Evans v. Murphy*, 133 Iowa 550, 110 N. W. 1025; *Hannasch v. Hoyt*, 127 Iowa 232, 103 N. W. 102; *Wedge-wood v. Parr*, 112 Iowa 514, 84 N. W. 528; *Hopkins Fine Stock Co. v. Reid*, 106 Iowa 78, 75 N. W. 656; *Chesmore v. Barker*, 101 Iowa 576, 70 N. W. 701;

courts are guided by those principles which tend to make the results

Houghton v. Bauer, 70 Iowa 314, 30 N. W. 577; *Schlisman v. Webber*, 65 Iowa 114, 21 N. W. 209; *Brown v. Davis*, 59 Iowa 641, 13 N. W. 861; *Marshalltown Bank v. Kennedy*, 53 Iowa 357, 5 N. W. 508.

[m] **Kansas.**—Justices of the peace. *Missouri Pac. Ry. Co. v. Atehison*, 43 Kan. 529, 23 Pac. 610; *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565; *Griffiths v. Wheeler*, 31 Kan. 17, 2 Pac. 842.

[n] **Kentucky.**—(1) Circuit court. *Barnes v. Barnett (Ky.)*, 118 S. W. 997; *Hefflin v. Kimmel*, 12 Ky. L. Rep. 507. (2) Justices of the peace. *Gullett v. Blanton*, 157 Ky. 437, 163 S. W. 465.

[o] **Louisiana.**—(1) Parish court. *Walling's Heirs v. Howell's Succession*, 28 La. Ann. 856; *In re Estate of Brown*, 28 La. Ann. 716; *Lay v. Succession of O'Neil*, 25 La. Ann. 608; *Johnson v. Labatt*, 25 La. Ann. 143; *Bynum v. Bynum*, 24 La. Ann. 127; *Mayer v. Dayries*, 24 La. Ann. 206; *Succession of Truxillo*, 24 La. Ann. 453; *Nugent v. Randolph*, 23 La. Ann. 693; *Kilbourn v. Pennebaker*, 23 La. Ann. 700; *Montgomery v. All the World*, 23 La. Ann. 239; *Hebert v. Winn*, 22 La. Ann. 109; *Swan v. Gayle*, 21 La. Ann. 478; *Succession of Bartlett*, 21 La. Ann. 531. (2) District court. *Hopkins v. Crow*, 136 La. 409, 67 So. 197. (3) City courts of New Orleans. *State v. Fernandez*, 49 La. Ann. 249, 21 So. 260; *Clerc v. Boudreaux*, 38 La. Ann. 732; *State v. Judge of Second City Court*, 37 La. Ann. 583. (4) Justices of the peace. *Turner v. Woods*, 124 La. 675, 50 So. 649.

[p] **Maryland.**—(1) Courts of city of Baltimore, see *Legum v. Blank*, 105 Md. 126, 65 Atl. 1071; *Reese v. Hawks*, 63 Md. 130; *Rohr v. Anderson*, 51 Md. 205. (2) Justices of the peace. *Reese v. Hawks*, 63 Md. 130.

[q] **Massachusetts.**—(1) Supreme court. *Ives v. Hamlin*, 5 Cush. (Mass.) 534; *Farrar v. Parker*, 7 Mete. (Mass.) 43. (2) Superior court. *Wright v. Potomska Mills Corp.*, 138 Mass. 328; *Octo v. Teahan*, 133 Mass. 430. (3) Police and district courts. *Bossidy v. Branniff*, 135 Mass. 290.

[r] **Michigan.**—Circuit courts. *Detroit Lumb. Co. v. The Petrel*, 153 Mich. 528, 117 N. W. 80; *Sands & Maxwell Lumb. Co. v. Gay*, 138 Mich. 82, 101 N. W. 53; *Dewey v. Duyer*, 39 Mich. 509.

[s] **Minnesota.**—(1) Justice of the peace. *Parker v. Bradford*, 68 Minn. 437, 71 N. W. 619. (2) Municipal court of Minneapolis. *Juster v. Court of Honor*, 120 Minn. 325, 139 N. W. 701.

[t] **Mississippi.**—Justices of the peace. *Johnson v. Tabor*, 101 Miss. 78, 57 So. 365; *Vicksburg Waterworks Co. v. Ford*, 97 Miss. 198, 52 So. 208.

[u] **Missouri.**—(1) Circuit court. *Davidson v. Schmidt*, 256 Mo. 18, 164 S. W. 577; *Williams v. Payne*, 80 Mo. 409; *Cranston v. Union Trust Co.*, 75 Mo. 29; *Knight v. Quincy, O. & K. C. R. Co.*, 120 Mo. App. 311, 96 S. W. 716. (2) Justices of the peace. *Stephens v. Reberet*, 186 Mo. App. 456, 171 S. W. 638; *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612; *Barnes v. Metropolitan St. R. Co.*, 119 Mo. App. 303, 95 S. W. 971; *Bay v. Trusdell*, 92 Mo. App. 377.

[v] **Nebraska.**—(1) County courts. *Bates & Co. v. Stanley*, 51 Neb. 252, 70 N. W. 972. (2) Justices of the peace. *Strang v. Krickbaum*, 18 Neb. 365, 25 N. W. 364; *Bunker v. State Nat. Bank*, 16 Neb. 234, 20 N. W. 256; *Bullock v. Jordon*, 15 Neb. 665, 19 N. W. 508.

[w] **New Hampshire.**—The supreme court. *Stevens v. Chase*, 61 N. H. 340; *Adams v. Spaulding*, 64 N. H. 384, 10 Atl. 688.

[x] **New Jersey.**—(1) District courts. *Thompson v. Walker*, 62 N. J. L. 631, 43 Atl. 572; *Joy & Seliger Co. v. Blum*, 55 N. J. L. 518, 26 Atl. 861; *Koch v. Vanderhoof*, 49 N. J. L. 619, 9 Atl. 771; *Baldwin v. Hertzman*, 47 N. J. L. 225. (2) Court of chancery. *Quairoli v. Italian Beneficial Society*, 64 N. J. Eq. 205, 53 Atl. 622; *Allen v. Demarest*, 41 N. J. Eq. 162, 2 Atl. 655. (3) Justices of the peace. *Wright v. Moran*, 43 N. J. L. 49.

[y] **New York.**—(1) County Courts. *Halpern v. Langrock Bros. Co.*, 169 App. Div. 464, 155 N. Y. Supp. 167. (2) Municipal courts. *People ex rel. Evarts v. Municipal Court*, 162 App. Div. 477, 147 N. Y. Supp. 615; *Friedland v. Union Surety & G. Co.*, 43 Miss. 38, 86 N. Y. Supp. 937; *Cohen v. Lewsen*, 92 N. Y. Supp. 59.

[z] **North Carolina.**—(1) Superior court. *Reese v. Savage*, 171 N. C. 437,

of their construction the most reasonable and certain in their effect.⁸⁸ Where the statute provides that there shall be no jurisdiction in a court except where the sum in controversy exceeds a specified amount, jurisdiction does not exist where claim is made for that precise sum,⁸⁹ but where jurisdiction in an amount not to exceed a specified sum is granted a claim for that precise sum is within the court's jurisdiction.⁹⁰

Pending actions are not, ordinarily, affected by statutory changes

88 S. E. 725. (2) Justice of the peace. *Wilson v. Life Ins. Co.*, 155 N. C. 173, 71 S. E. 79; *Scott-Sparger Co. v. Ferguson*, 152 N. C. 346, 67 S. E. 750; *Houser v. Bonsal & Co.*, 149 N. C. 51, 62 S. E. 776; *Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Smaw v. Cohen*, 95 N. C. 85; *Katzenstein v. Raleigh & G. R. Co.*, 84 N. C. 688.

[aa] **Oklahoma.**—(1) County court. *Musser v. Baker*, 158 Pac. 442; *First Nat. Bank v. Latham*, 37 Okla. 286, 132 Pac. 891; *First Nat. Bank v. Ingle*, 37 Okla. 276, 132 Pac. 895; *St. Paul Fire & M. Ins. Co. v. Peck*, 37 Okla. 85, 130 Pac. 805; *State Bank of Paden v. Latham*, 34 Okla. 485, 126 Pac. 220; *Cooper v. Austin*, 30 Okla. 297, 119 Pac. 206. (2) District court. *Dallas v. Pitchford*, 29 Okla. 10, 115 Pac. 1110; *Stanford Furniture Co. v. Pitchford*, 29 Okla. 12, 115 Pac. 1110.

[bb] **Tennessee.**—Justice of the peace. *Redd v. Brown*, 3 Lea 615.

[cc] **Texas.**—(1) District court. *State v. Eggerman*, 81 Tex. 569, 16 S. W. 1067; *Henderson v. Anglo-American L. & C. Co.*, 7 S. W. 837; *Mixan v. Grove*, 59 Tex. 573; *Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459; *Pye v. Wyatt* (Tex. Civ. App.), 151 S. W. 1086; *Waller v. Gray*, 43 Tex. Civ. App. 405, 94 S. W. 1098; *Braggins v. Holekamp* (Tex. Civ. App.), 68 S. W. 57; *Ostrom v. McCloskey* (Tex. Civ. App.), 44 S. W. 307. (2) The district court has no jurisdiction where the exact sum of \$500 is in controversy. *Carroll v. Silk*, 70 Tex. 23, 11 S. W. 116; *Garrison v. Pacific Exp. Co.*, 69 Tex. 345, 6 S. W. 842; *Gulf, C. & S. F. Ry. Co. v. Rambolt*, 67 Tex. 654, 4 S. W. 356. (3) County court. *Texas & P. R. Co. v. Butler*, 102 Tex. 322, 116 S. W. 360; *De Witt County v. Wischemper*, 95 Tex. 435, 67 S. W. 882; *White v. Barrow* (Tex. Civ. App.), 182 S. W. 1154; *Smith Bros. Grain Co. v. Jensen* (Tex. Civ. App.), 174 S. W.

981; *Eppler v. Hilley* (Tex. Civ. App.), 166 S. W. 87; *Thompson v. Perryman* (Tex. Civ. App.), 141 S. W. 184; *Lyons Bros. Co. v. Corley* (Tex. Civ. App.), 135 S. W. 603; *Aquilla State Bank v. Knight*, 60 Tex. Civ. App. 221, 126 S. W. 893; *Arnold v. McNinch & Raney*, 56 Tex. Civ. App. 555, 121 S. W. 904; *Bigby v. Brantley*, 38 Tex. Civ. App. 44, 85 S. W. 311; *Lazarus v. Swafford*, 15 Tex. Civ. App. 367, 39 S. W. 389.

[dd] **Vermont.**—Justice of the peace. *Luce v. Minard*, 87 Vt. 177, 88 Atl. 728.

88. *Denver Brick & Mfg. Co. v. McAllister*, 6 Colo. 326.

89. **Ala.**—*Reese v. Bessemer Plumb- ing & Mfg. Co.*, 42 So. 56; *McClure v. Lay*, 30 Ala. 208; *Mobile Light & R. Co. v. George*, 2 Ala. App. 545, 57 So. 50. **Ark.**—*Smith v. Taylor*, 97 Ark. 424, 134 S. W. 634; *Martin v. Foreman*, 18 Ark. 249. **Fla.**—*Seaboard Air Line Ry. v. Maxey*, 64 Fla. 487, 60 So. 353. **Ky.**—*Burnes v. Cade*, 10 Bush 251; *Griswold v. Peckenpaugh*, 1 Bush 220. **Okla.**—*Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 132 Pac. 899, 49 L. R. A. (N. S.) 600. **Tex.**—*Robinson v. Lingner* (Tex. Civ. App.), 183 S. W. 850; *O'Bannon v. Pleasants* (Tex. Civ. App.), 153 S. W. 719.

[a] Provision that when less than a specified amount is claimed jurisdiction shall be in a particular court, was construed, in view of the context, to confer jurisdiction where that exact amount was claimed. *Butcher v. Smith*, 29 Ohio St. 604. And see *Monks v. Strange*, 25 Mo. App. 12, 15.

[b] Alternative claims, one of which is for an amount below the jurisdiction of the court, render the action one for the recovery of the smaller amount, as far as the question of jurisdiction is concerned. *Robinson v. Lingner* (Tex. Civ. App.), 183 S. W. 850.

90. See *Walcott v. McNew* (Tex. Civ. App.), 62 S. W. 815.

in the amount over which a court has jurisdiction.⁹¹ The amount in which the claim made falls above or below the jurisdictional amount, is immaterial.⁹² The fact that payment of an obligation is not to be made in money is immaterial on the question of jurisdiction.⁹³

B. IN SUITS IN EQUITY.⁹⁴—Courts of equity, even in the absence of a statute refuse to take cognizance of trivial demands.⁹⁵ But the intrinsic value of the property immediately involved is not the sole criterion, and even though such value be small, if the property be of peculiar value to the owner, or other rights or property affected by the suit be the important matter, equity will not decline jurisdiction.⁹⁶

91. *State Bank of Paden v. Lanam*, 34 Okla. 485, 126 Pac. 220; *Spurrier Lumb. Co. v. Dodson*, 30 Okla. 412, 120 Pac. 934.

92. *Kan.*—*Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565. *Mo.*—*Guhman v. Dunaway*, 183 Mo. App. 659, 167 S. W. 598, sixteen cents. *Tex.*—*Clark v. Brown*, 48 Tex. 212; *Wilson v. Ware* (Tex. Civ. App.), 166 S. W. 705.

[a] "A few cents being as effectual to deprive the justice of the power to hear and determine as several dollars or several hundreds of dollars." *Evans v. Murphy*, 133 Iowa 550, 110 N. W. 1025.

93. *Cooper v. Chambers*, 15 N. C. 261, 25 Am. Dec. 710; *Hay v. Lea*, 8 Yerg. (Tenn.) 89. *Compare Farrow v. Summers*, 3 Litt. (Ky.) 460; *Bedford v. Hickman*, 1 Yerg. (Tenn.) 165; *Arnold v. Embree, Peck* (Tenn.) 134.

[a] "The mode of payment (viz: 'in trade,' which I conceive to mean valuable articles of trade), is not an objection to the jurisdiction of a justice of the peace, if the value of the articles in money, at the time they were to be delivered, would be a sum within his jurisdiction." *Cooper v. Chambers*, 15 N. C. 261, 25 Am. Dec. 710.

94. Determination of amount in controversy, see *infra*, XII, E, 3.

95. *Cal.*—*Mietzsch v. Berkhout*, 4 Cal. Unrep. 419, 35 Pac. 321. *Ill.* *Tascher v. Timerman*, 67 Ill. App. 568. *Me.*—*Woodbury v. Portland Marine Soc.*, 90 Me. 18, 37 Atl. 323. *Mass.* *Sandford v. Wright*, 164 Mass. 85, 41 N. E. 120; *Gale v. Nickerson*, 151 Mass. 428, 24 N. E. 400, 9 L. R. A. 200; *Smith v. Williams*, 116 Mass. 510; *Cummings v. Barrett*, 10 Cush. 186. *Miss.* See *Champenois v. Fort*, 45 Miss. 355. *N. J.*—*Kelahr v. English*, 62 N. J. Eq. 674, 50 Atl. 902; *Allen v. Demarest*,

41 N. J. Eq. 162, 2 Atl. 655. *Ohio.* *Carr v. Iglehart*, 3 Ohio St. 457.

[a] Basis of Rule.—See *Carr v. Iglehart*, 3 Ohio St. 457, 458. The ancient rule "protects this court, and, what is of more importance, protects defendants against 'expensive and mischievous litigation about trifling matters which in consequence of the insignificance of the amount involved would do the parties themselves more harm than good.' . . . The machinery of the court of chancery is not adapted to the determination of controversies which involve merely a trifling sum of money, a sum less than \$50." *Kelahr v. English*, 62 N. J. Eq. 674, 50 Atl. 902.

[b] Where less than fifty dollars is involved it is customary for them to refrain from exercising jurisdiction. *Vredenberg v. Johnson*, Hopk. Ch. (N. Y.) 112.

96. *U. S.*—*Union Mill & M. Co. v. Dangberg*, 81 Fed. 73. *Mich.*—*Mastenbrook v. Alger*, 110 Mich. 414, 68 N. W. 213 (suit to enjoin diversion of stream); *White v. Forbes*, *Watk. Ch.* 112. *Nev.*—*Barnes v. Sabron*, 10 Nev. 217. *N. J.*—*Swedish Evangelical Luth. Church v. Shivers*, 16 N. J. Eq. 453.

[a] In a suit to reform a deed the small value of the land omitted is not controlling. "There was omitted from the deeds about one-twenty-seventh of an acre. The value of the omitted land upon the basis of the purchase price, respondent points out, is eighty-three dollars, but we cannot agree with respondent that because these are the facts, equity will treat the omitted land as a minute discrepancy of no material importance. The price or value of omitted lands is, of course, an element in determining whether or not equity will take cognizance of a suit to recover the omitted portion.

At the present day, the matter is frequently regulated by statutes which expressly determine the amount or value which must be involved in order to confer jurisdiction.⁹⁷ The amount in controversy or the matter in demand, governs in suits to resist the payment of money, as well as it does in actions to obtain the payment of a money demand.⁹⁸ In some jurisdictions the limitation applies to money demands.⁹⁹

C. COUNTERCLAIMS AND SET-OFFS.—The general rule is that a set-off, cross-complaint or cross-demand must not exceed in amount the sum of which a court is given general original jurisdiction.¹ The fact that the plaintiff's claim, if allowed, would reduce the amount of the defendant's recovery to a sum within the jurisdiction of the court does

. . . But in a suit for land, value is by no means the all-controlling and determinative consideration. The omitted land may be of great importance to the value of plaintiff's remaining land. It may have a peculiar value, *pretium affectionis*, in plaintiff's eyes. Many other considerations may enter into the matter making it of importance to plaintiffs to recover that which is rightfully theirs." *Danielson v. Neal*, 164 Cal. 748, 750, 130 Pac. 716.

[b] If property has a special, personal and peculiar value to its owner, apart from the intrinsic worth, a court of equity will afford relief. *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830.

[c] A cup offered as a prize has such a special value to those entitled to its possession as takes a case involving it out of the general rule. *Wilkinson v. Stitt*, 175 Mass. 581, 56 N. E. 830.

97. *Ala.*—*Hall v. Cannte*, 22 Ala. 650. *Ga.*—See *Smith v. Ashcraft*, 25 Ga. 132, 71 Am. Dec. 163. *Md.*—*Kuenzel v. Baltimore*, 93 Md. 750, 49 Atl. 649; *Reynolds v. Howards*, 3 Md. Ch. 331. *Mich.*—*Detroit v. Wayne Circuit Judge*, 128 Mich. 438, 87 N. W. 376; *Sanford v. Haines*, 71 Mich. 116, 38 N. W. 777; *Dewey v. Dwyer*, 39 Mich. 509; *Steinbach v. Hill*, 25 Mich. 78. *N. Y.*—*Marsh v. Benson*, 19 How. Pr. 415, 11 Abb. Pr. 241; *Shepard v. Walker*, 7 How. Pr. 46; *Church v. Ide*, 1 Clarke Ch. 494; *Sarsfield v. Van Vaughner*, 15 Abb. Pr. 65, 38 Barb. 444, applying the law subsequent to the constitution of 1846. *Tenn.*—*Malone v. Dean*, 9 Lea 336 (suit to enforce vendor's lien under \$50); *Birmingham v. Tapscott*, 4 Heisk. 382. *Tex.*—*De Witt County v. Wischkemper*, 95 Tex. 435, 67 S. W. 882 (in-

junction); *Tomlin v. Clay* (Tex. Civ. App.), 167 S. W. 204; *Johnson v. Clemmons* (Tex. Civ. App.), 158 S. W. 797 (injunction); *Staley v. Derden*, 57 Tex. Civ. App. 142, 121 S. W. 1136; *Lazarus v. Swafford*, 15 Tex. Civ. App. 367, 39 S. W. 389.

[a] A bill for discovery, in aid of an action at law, must show that the matter in controversy involves the jurisdictional amount. *Skinner v. Judson*, 8 Conn. 528, 21 Am. Dec. 691. Compare *Schroepel v. Redfield*, 5 Paige (N. Y.) 245.

[b] A suit to enjoin collection of judgment at law must involve the specified amount. *Blakeslee v. Murphy*, 44 Conn. 188.

98. *Blakeslee v. Murphy*, 44 Conn. 188.

99. *Barnett v. Woods*, 55 N. C. 198; *Chunn v. McCarrson*, 17 N. C. 73.

1. *Ark.*—*Kilgore Lumb. Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62; *Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437. *Cal.*—*Maxfield v. Johnson*, 30 Cal. 545; *Malson v. Vaughn*, 23 Cal. 61; *Hillger v. Yenrick*, 25 Cal. App. 604, 144 Pac. 980. *Colo.*—*Ramer v. Smith*, 4 Colo. App. 434, 36 Pac. 302. *Kan.* *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631. *Minn.*—*Duresen v. Blackmarr*, 117 Minn. 206, 135 N. W. 530, Ann. Cas. 1913D, 158. *Mo.*—*Robinett v. Nunn*, 9 Mo. 246. *N. J.*—*Ward v. Hauck*, 87 N. J. L. 198, 93 Atl. 583 (recoupment); *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124; *Kienzle v. Gardner*, 73 N. J. L. 258, 63 Atl. 10; *State v. Neumeyer*, 51 N. J. L. 299, 17 Atl. 154. *N. C.* *General Electric Co. v. Williams*, 123 N. C. 51, 31 S. E. 288; *Boyett v. Vaughan*, 85 N. C. 363; *Derr v. Stubbs*, 83 N. C. 539. *Pa.*—*Walden v. Berry*, 48 Pa. 456; *Milliken & Co. v. Gardner*,

not ordinarily authorize the interposition of set-off or counterclaim in an amount in excess of that specified as the limit of the court's jurisdiction,² though there are numerous authorities to the contrary,³ at least where defendant limits his recovery to an amount within the

37 Pa. 456; *Holden v. Wiggins*, 3 Pen. & W. 469; *Selser v. Mackenzie*, 19 Pa. Co. Ct. 280. **S. C.**—*Corley v. Evans*, 69 S. C. 520, 48 S. E. 459; *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803. **Tex.**—*Hardeman & Son v. Morgan*, 48 Tex. 103 (reconvention); *Willett v. Herrin* (Tex. Civ. App.), 161 S. W. 26; *Bishop v. Mount* (Tex. Civ. App.), 152 S. W. 442; *Johe E. Morrison Co. v. Harrell* (Tex. Civ. App.), 148 S. W. 1122; *Smith v. Colquitt* (Tex. Civ. App.), 144 S. W. 690; *Johnson v. W. H. Goolsby Lumb. Co.* (Tex. Civ. App.), 121 S. W. 883; *Dixon v. Watson*, 52 Tex. Civ. App. 412, 115 S. W. 100; *Cable Co. v. Rogers*, 44 Tex. Civ. App. 620, 99 S. W. 736; *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806; *Sullivan & Co. v. Owens* (Tex. Civ. App.), 78 S. W. 373; *Pioneer Sav. & L. Co. v. Wilson* (Tex. Civ. App.), 39 S. W. 1095; *Hall v. McGill* (Tex. Civ. App.), 38 S. W. 828; *Cain v. Culbreath* (Tex. Civ. App.), 35 S. W. 809; *Pickett v. Edwards* (Tex. Civ. App.), 25 S. W. 32. **Vt.**—*Temple v. Bradley*, 14 Vt. 254. **Wis.**—*Martin v. Eastman*, 109 Wis. 286, 85 N. W. 359.

[a] **Limitation of Jurisdictional Amount Applies to Both Parties.**—"In no case for the recovery of money will the answer of defendant be referred to in determining the question of the court's jurisdiction of the plaintiff's cause of action. The action as stated in the complaint controls that question. Precisely the same rule applies to defendant where he interposes a counterclaim. A counterclaim is a cross-action against the plaintiff, and to entitle a defendant to be heard thereon in that court the cause of action stated by him must be within the limits of the court's jurisdiction." *Duresen v. Blackmarr*, 117 Minn. 206, 135 N. W. 530, Ann. Cas. 1913D, 158.

[b] **The portion in excess of the court's jurisdiction may be withheld and enforced in a subsequent action, under some statutes—it need not be remitted.** *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631.

2. **Ark.**—*Kilgore Lumb. Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62.

Mo.—*Reed v. Snodgrass*, 55 Mo. 180; *Almeida v. Sigerson*, 20 Mo. 497; *Vance v. McHugh*, 187 Mo. App. 708, 173 S. W. 80. **N. J.**—*Clancy v. Neumeyer*, 51 N. J. L. 299, 17 Atl. 154.

[a] **Difficulties of Such a Practice Stated.**—"The motion, upon which such a practice is advised, is that the court may entertain a suit where the cross-demands are of such a character that a trial may result in finding that a balance exists of over \$200. That means that a trial may be had when one of the parties claims that he is entitled to a recovery of over \$200, which recovery of course the opposing party disputes. The amount in dispute is therefore in excess of the jurisdictional sum limited by the statute, and it is the amount in dispute, not what may be ultimately recovered, that is the test of jurisdiction." *Clancy v. Neumeyer*, 51 N. J. L. 299, 301, 17 Atl. 154.

[b] **A statute was held unconstitutional which attempted to establish this rule.** *Kilgore Lumb. Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62.

[c] **Even though defendant admits the validity of plaintiff's claim, credits it on his own demand, and the balance he seeks to recover is within the jurisdiction of the court.** *Gimbel v. Gomprecht*, 89 Tex. 497, 35 S. W. 470; *Williamson v. Bodan Lumb. Co.*, 36 Tex. Civ. App. 446, 82 S. W. 340; *Rylie v. Elam* (Tex. Civ. App.), 79 S. W. 326; *Clark v. Smith*, 29 Tex. Civ. App. 363, 68 S. W. 532; *Pennybacker v. Hazlewood*, 26 Tex. Civ. App. 183, 61 S. W. 153; *Smith v. Dye*, 21 Tex. Civ. App. 662, 52 S. W. 981. *Contra*, *Bowler v. Osborne*, 75 N. J. L. 903, 70 Atl. 149. And see *South v. Hall*, 1 N. J. L. 29.

3. **Ala.**—*Smith v. Fleming*, 9 Ala. 768. See *Bowman v. Gary*, Minor 326, in this case the balance claimed to be due the defendant was within the jurisdiction of the court. **Ill.**—*Seafkas v. Evey*, 29 Ill. 178; *Nichols v. Ruckells*, 4 Ill. 298. But see *Turgrinson v. Meyer*, 155 Ill. App. 553. **Ind.**—*Murphy v. Evans*, 11 Ind. 517; *Gharkey v. Halstead*, 1 Ind. 389; *Alexander v.*

court's jurisdiction.⁴ In some jurisdictions, the demand made in the complaint is regarded as the sole test of jurisdiction even though the amount demanded in a counterclaim is above the jurisdictional amount.⁵ In still other jurisdictions, a set-off or counterclaim in excess of the court's general jurisdiction may be pleaded but the court will thereupon on motion of either party remove the case to a court having jurisdiction of the amount involved.⁶

But a defendant may, as a pure matter of defense and without seeking affirmative relief, set up and rely upon a cause of action or transaction involving more than the amount over which the court would have original jurisdiction,⁷ though if affirmative relief is demanded

Peck, 5 Blackf. 308; *Regina Co. v. Gal-
loway*, 50 Ind. App. 92, 98 N. E. 81.
1a.—*West v. Hatfield*, 1 Morris 493.
Miss.—*Glass v. Moss*, 1 How. 519. **Tenn.**
McClain v. Kincaid, 5 Yerg. 232.

4. Ill.—*Nichols v. Ruckells*, 4 Ill.
298. **Ind.**—*Murphy v. Evans*, 11 Ind.
517. **Mo.**—*Vance v. McHugh*, 187 Mo.
App. 708, 173 S. W. 80; *Wells v. De
Gouveia*, 161 Mo. App. 563, 143 S. W.
517. **S. C.**—*Haygood v. Boney*, 43 S. C.
63, 20 S. E. 803. **Tex.**—*Scott v. Mex-
ican Nat. R. Co. (Tex. App.)*, 18 S. W.
137.

**Reduction of claim by remission of
excess, see *infra*, XII, E, 10, b.**

**5. Howard Iron Wks. v. Buffalo Ele-
vating Co.**, 176 N. Y. 1, 68 N. E. 66
(in this case, however, the counter-
claim arose out of the same transac-
tion set forth in the complaint);
Weinstein v. Helfenberg, 78 Misc. 190,
139 N. Y. Supp. 303.

[a] "The reason for this discrim-
ination between plaintiff and defend-
ant, in respect to the amount of their
claims, is apparent. The plaintiff
chooses his forum and has no excuse
for coming into a justice's court with
a claim which exceeds the jurisdiction
of that court. The defendant, on the
other hand, is compelled to come into
the justice's court to make his de-
fense; and must be permitted to inter-
pose such counterclaim as he has with-
out reference to its amount." *Heigle
v. Willis*, 50 Hun 588, 590, 3 N. Y.
Supp. 497. "The right to try and ren-
der judgment upon any counterclaim
that the defendant had followed the
case as a necessary incident of the
jurisdiction without regard to its
amount." *Howard Iron Wks. v. Buffalo
Elevating Co.*, 176 N. Y. 1, 68 N. E.
66.

[b] In courts of record the claim of

recovery must be limited to the amount
over which the court is given juris-
diction. *Garfield Oil Mills v. Stephens*,
16 Ga. App. 655, 85 S. E. 983. But see
Ware v. Fambro, 67 Ga. 515, rule other-
wise in justice court.

6. Gullett v. Blanton, 157 Ky. 457,
163 S. W. 465.

[a] In the absence of such a motion
the court will proceed with the case,
giving effect to the defendant's claim
in so far as it may operate as a de-
fense to plaintiff's action, or is within
the jurisdiction of the court. *Gullett
v. Blanton*, 157 Ky. 457, 460, 163 S. W.
465.

7. Mich.—*Cross v. Eaton*, 48 Mich.
184, 12 N. W. 35, judgment of discon-
tinuance may be rendered or a judg-
ment for costs for the defendant. **Minn.**
See *Duresen v. Blackmarr*, 117 Minn.
206, 135 N. W. 530, Ann. Cas. 1913D,
158. **Mo.**—*Emery v. St. Louis, K. &
N. W. Ry. Co.*, 77 Mo. 339. **N. C.**
Stacey Cheese Co. v. Pipkin, 155 N.
C. 394, 71 S. E. 442, 37 L. R. A. (N.
S.) 606 (*distinguishing* and in effect
overruling Raisin & Co. v. Thomas, 88
N. C. 148; *Meneely & Co. v. Craven*, 86
N. C. 364); *Hurst, Miller & Co. v.
Everett*, 91 N. C. 399; *McClenahan v.
Cotten*, 83 N. C. 332. **Vt.**—*Temple v.
Bradley*, 14 Vt. 254.

[a] Affirmative matter in the an-
swer, improperly designated as a coun-
terclaim but in reality merely consti-
tuting a defense and on which no af-
firmative judgment could be recovered,
may properly be pleaded though the
amount therein involved is above the
court's jurisdiction. *Lynch v. Free*, 64
Minn. 277, 66 N. W. 973.

[b] A pleading which is in effect
no more than a plea of payment, is
good although it sets forth a transac-
tion involving more than the amount

such a claim is beyond the jurisdiction of the court.⁸

The pleading of a counterclaim beyond the jurisdiction of the court does not oust the court of jurisdiction of the cause of action stated in the complaint.⁹

A counterclaim or cross-demand which is in amount below the jurisdiction of the court, cannot be set up where it arises out of a distinct contract or transaction other than that involved in the complaint;¹⁰ but where it arises out of the transaction set forth in the complaint or is connected with the subject-matter of the action and is pleaded as purely defensive matter in reduction or extinguishment of the claim of the plaintiff, the fact that it may be below the jurisdictional amount is immaterial.¹¹

A counterclaim or set-off in an amount in excess of the jurisdiction of the justice court cannot be interposed on appeal;¹² nor can an appellate court which exercises a purely derivative and appellate jurisdiction, reduce the amount of an excessive counterclaim so as to bring

over which the court has jurisdiction. *Eule v. Dorn*, 41 Tex. Civ. App. 520, 92 S. W. 828.

[c] **Matter in recoupment** is subject to the same general rules. "In an action before a justice the defendant may recoup on account of any liability, whether in contract or tort, arising out of or connected with the demand sued on, which goes to abate or reduce the amount claimed, by showing a partial failure of consideration, or that the damages claimed are not as great as claimed by plaintiff. This is strictly a defensive recoupment and the justice has jurisdiction to entertain it if he has jurisdiction of the plaintiff's demand to which it is an incident. But if the defendant asks to recoup on account of a cause of action existing in his favor, which admits the value and amount of plaintiff's demand and assumes to oppose it by showing damages in his favor on this other cause of action equal to or in excess of the plaintiff's demand, the court cannot entertain it by way of recoupment or counterclaim unless it has jurisdiction to entertain the cause of action upon which the cross-damages are claimed." *Emery v. St. Louis, K. & N. W. Ry. Co.*, 77 Mo. 339, 350. And see *Kienzle v. Gardner*, 73 N. J. L. 258, 63 Atl. 10; *Hurst, Miller & Co. v. Everett*, 91 N. C. 399.

S. Stacey Cheese Co. v. Pipkin, 155 N. C. 394, 71 S. E. 442, 37 L. R. A. (N. S.) 606; *General Elec. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288; *Boyett v. Vaughan*, 85 N. C. 363.

9. *Cal.*—*Hillger v. Yenrick*, 25 Cal. App. 604, 144 Pac. 930. *Colo.*—*Ramer v. Smith*, 4 Colo. App. 434, 36 Pac. 302. *Ind.*—*Alexander v. Peck*, 5 Blackf. 308. *Minn.*—*Duresen v. Blackmarr*, 117 Minn. 206, 135 N. W. 530, Ann. Cas. 1913D, 158; *Barber v. Kennedy*, 18 Minn. 216. *N. J.*—*Clancy v. Neumeyer*, 51 N. J. L. 299, 17 Atl. 154; *Montgomery v. Snowhill*, 2 N. J. L. 361. *S. C.*—*Corley v. Evans*, 69 S. C. 520, 48 S. E. 459. *Wis.*—*Martin v. Eastman*, 109 Wis. 286, 85 N. W. 359.

10. *Griswold v. Pieratt*, 110 Cal. 259, 42 Pac. 820.

11. *Sullivan v. California Realty Co.*, 142 Cal. 201, 75 Pac. 767; *Freeman v. Seitz*, 126 Cal. 291, 58 Pac. 690; *Moore v. Groftholdt*, 10 Cal. App. 714, 103 Pac. 149; *Garrett v. Robinson*, 93 Tex. 406, 55 S. W. 564; *Heidemann v. Martinez* (Tex. Civ. App.), 173 S. W. 1166; *Sachs v. Goldberg* (Tex. Civ. App.), 159 S. W. 92; *Kelsey v. Collins*, 49 Tex. Civ. App. 236, 108 S. W. 793; *Collins v. Kelsey* (Tex. Civ. App.), 97 S. W. 122; *Haberzettle v. Dearing* (Tex. Civ. App.), 80 S. W. 539, cross-demand against codefendant.

12. *Cal.*—*Maxfield v. Johnson*, 30 Cal. 545. *Colo.*—*Ramer v. Smith*, 4 Colo. App. 434, 36 Pac. 302. *Kan.*—*Thompson v. Stone*, 63 Kan. 881, 64 Pac. 969. But see *Gregg v. Garverick*, 33 Kan. 190, 5 Pac. 751; *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631. *Mich.*—See *Cross v. Eaton*, 48 Mich. 184, 12 N. W. 35. *Miss.*—*McLeod v. Gray*, 4 So. 544. *Mo.*—*Vance v. McHugh*, 187 Mo. App. 708, 173 S.

the claim within the jurisdiction of the lower court and within its own appellate jurisdiction.¹³ It has been held that though the plaintiff's claim is insufficient to confer jurisdiction, if the defendant files a claim for an amount within the court's jurisdiction, it may proceed with the case.¹⁴

D. ON APPEAL. — 1. **In General.** — The general rules governing the jurisdiction of appellate courts, in so far as the amount in controversy is concerned, have been treated elsewhere.¹⁵

2. **Appeals From Justice's Courts.** — a. *In General.* — The right of appeal is founded upon express legislative enactment.¹⁶ While in some states an appeal lies to a higher court from any judgment of a justice of the peace,¹⁷ in many states no appeal lies from the judgment of a justice of the peace unless the amount involved on the appeal exceeds an amount specified by statute, and varying considerably in different jurisdictions.¹⁸ In some states if the trial was with a jury

W. 80. Pa.—*Deihm v. Snell*, 119 Pa. 316, 13 Atl. 283. Vt.—*Compare Temple v. Bradley*, 14 Vt. 254.

And see the article "Justices of the Peace."

Jurisdiction of counterclaim passed on below though without the jurisdictional limits of lower court, see *infra*, XII, D, 2, b.

13. *Robinet v. Nunn*, 9 Mo. 246; *Ijames v. McClamroch*, 92 N. C. 362.

14. *Brunson v. Dawson State Bank* (Tex. Civ. App.), 175 S. W. 438; *Joyce v. Hagelstein* (Tex. Civ. App.), 163 S. W. 356; *Smith v. Wilson*, 18 Tex. Civ. App. 24, 44 S. W. 556; *Phelps & Bigelow Windmill Co. v. Parker* (Tex. Civ. App.), 30 S. W. 365. *Compare De Witt County v. Wischkemper*, 95 Tex. 435, 67 S. W. 882; *Le Master v. Lee* (Tex. Civ. App.), 150 S. W. 315.

[a] "The order in which the parties appear in court is of but little consequence. It is to the substance more than the form, that we must look." *Phelps & Bigelow Windmill Co. v. Parker* (Tex. Civ. App.), 30 S. W. 365.

15. See 2 STANDARD PROC. 185, et seq.

Counterclaim not within jurisdiction of court below, see *supra*, XII, C.

16. Ga.—*Johnson v. Humphrey*, 13 Ga. App. 557, 79 S. E. 530. Minn.—*Ross v. Evans*, 30 Minn. 206, 14 N. W. 897. Tex.—*Hudson v. Smith* (Tex. Civ. App.), 133 S. W. 486.

See the titles "Appeals;" "Justices of the Peace."

17. Ill.—*Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Swingley v.*

Haynes, 22 Ill. 214. La.—*State v. Voorhies*, 51 La. Ann. 500, 25 So. 96, applying the law under the constitution of 1898—under the constitution of 1879, no appeal could be taken unless at least \$10 was involved. Mich.—*Wilson v. Davis*, 1 Mich. 156. Mo.—*Whitsett v. Gharky*, 17 Mo. 325; *Harris v. Hughes*, 16 Mo. 599. *Compare Sipp v. Circuit Court*, 1 Mo. 356, where the trial was by jury.

[a] **Appeal to a jury in the justice's court** is sometimes allowed, in all cases. See *Hendrix v. Mason*, 70 Ga. 523.

18. Conn.—*Parrott v. Stevens*, 37 Conn. 93 (\$15); *Palmer v. Palmer*, 6 Conn. 409, under early statute. Ga.—*Atlanta & W. P. R. Co. v. Georgia Ry. & Elec. Co.*, 125 Ga. 798, 54 S. E. 753 (\$50); *Vaughn & Co. v. Gloer*, 108 Ga. 238, 33 S. E. 846 (even where no issue of fact is involved); *Tibbs v. Williamson*, 61 Ga. 74; *Humphrey v. Johnson*, 13 Ga. App. 557, 79 S. E. 530; *Southern R. Co. v. Gordan*, 9 Ga. App. 469, 71 S. E. 763. Ind.—*Pennsylvania Co. v. Trimble*, 75 Ind. 378, appeals to the supreme court from judgments in actions originating in justice's courts must involve \$50. Ia.—*Henry v. Chicago, R. I. & P. R. Co.*, 127 Iowa 577, 103 N. W. 793 (\$25); *Knox v. Nicoli*, 97 Iowa 687, 66 N. W. 876; *Young v. McWaid*, 57 Iowa 101, 10 N. W. 291. Ky.—*Donahue v. Murray*, 2 Bush. 194, \$50. See *Searcy v. Switzer*, 13 B. Mon. 352 (applying an early statute); *Cradock v. Patterson*, 1 Mon. 8. Minn.—*Getty v. Village of Alpha*, 115 Minn. 500, 133 N. W. 159 (\$50); *Koetke v.*

before the justice of the peace, a specified amount must be involved in order to warrant an appeal.¹⁹

b. *Effect of Want of Jurisdiction in the Justice's Court.*—In most jurisdictions the appellate court has jurisdiction of cases appealed from a justice court only when the amount involved was originally within the jurisdiction of that court,²⁰ and this rule applies to a counterclaim

Ringer, 46 Minn. 259, 48 N. W. 917, the amount was \$30 under an earlier statute. And see *Shunk v. Hellmiller*, 11 Minn. 164. Neb.—*Bates v. Phoenix Pub. Co.*, 50 Neb. 79, 69 N. W. 305, \$20. N. Y.—*Fuller v. Brierley*, 36 How. Pr. 47; *Matter of Marsh*, 19 Johns. 171. Okla.—*St. Louis & S. F. R. Co. v. Tolbert*, 148 Pac. 128, \$20. And see *St. Louis & S. F. R. Co. v. Couch*, 28 Okla. 331, 114 Pac. 694; *Maer Mfg. Co. v. Cox*, 21 Okla. 846, 97 Pac. 649; *Chicago, R. I. & P. Ry. Co. v. Tompkins*, 15 Okla. 595, 82 Pac. 832. Ore. *Troy v. Hallgarth*, 35 Ore. 162, 57 Pac. 374. Pa.—See *Cook v. Dunkle*, 25 Pa. 340; *Marks v. Swearingen*, 3 Pa. 454; *McCloskey v. McConnell*, 9 Watts 17; *Ellis v. Brewster*, 6 Watts 277; *McGonnagal v. Hopper*, 1 Ashm. 195; *Scoop v. Coats*, 12 Serg. & R. 388; *Stoy v. Yost*, 12 Serg. & R. 385; *Ulrick v. Larkey*, 6 Serg. & R. 285; *Stewart v. Keemle*, 4 Serg. & R. 72; *McKim v. Bryson*, 2 Serg. & R. 463; *Rafferty v. Clark*, 2 Pa. Co. Ct. 301; *Schineller v. Herrman*, 1 Pa. Co. Ct. 145. Tex. *Galveston, H. & S. A. Ry. Co. v. Dowe*, 70 Tex. 1, 3, 6 S. W. 790; *Brazoria v. Calhoun*, 61 Tex. 223; *Galveston, H. & S. A. Ry. Co. v. Brown* (Tex. Civ. App.), 175 S. W. 749; *Gulf, T. & W. Ry. Co. v. Lunn* (Tex. Civ. App.), 141 S. W. 538; *Hudson v. Smith* (Tex. Civ. App.), 133 S. W. 486; *Galveston, H. & S. A. Ry. Co. v. Schlather* (Tex. Civ. App.), 78 S. W. 953, no jurisdiction exists where exactly \$20 is involved. Vt.—*Chase v. Bernier*, 73 Vt. 307, 50 Atl. 1056 (\$20); *Scott v. Darling*, 66 Vt. 510, 29 Atl. 993; *Cooper v. Miles*, 16 Vt. 642. Va.—*Norfolk & W. R. Co. v. Clark*, 92 Va. 118, 22 S. E. 867, \$10. Wis.—*Berray v. Woodruff*, 6 Wis. 202. And see *Cavanaugh v. Titus*, 5 Wis. 143.

[a] *Appeal to Court of Civil Appeals.*—*Western Union Tel. Co. v. Fricke* (Tex. Civ. App.), 167 S. W. 6. And see *Green v. Warren*, 18 Tex. Civ. App. 548, 45 S. W. 608.

[b] Whether the justice decides the case upon questions of law alone or

upon the merits is immaterial. *Getty v. Village of Alpha*, 115 Minn. 500, 133 N. W. 159. But see *Cauble v. Boyden*, 69 N. C. 434, the defendant cannot appeal from findings of fact where less than a specified amount is involved.

[c] *Smallness of the Amount of Excess Is Immaterial.*—“It is manifest that on the face of the pleadings the amount did exceed \$25 by a few cents of interest. It is urged that this amount is so small that it should be disregarded. But the dividing line between the appealable and the non-appealable case is fixed by the statute, and is necessarily arbitrary. Being arbitrary and fixed, it is always certain and ascertainable in advance, and in its practical application is quite as equitable, if not more so, than if it were elastic. The fact that the excess over \$25 is only a few cents in this case is quite immaterial; a few cents being as effectual as a few dollars to confer the right of appeal.” *Noland v. Siekler*, 149 Iowa 193, 128 N. W. 340. And see *Finch v. Hartpence*, 29 Neb. 368, 45 N. W. 684.

19. Kan.—*Nordmark v. Nystrom*, 46 Kan. 117, 26 Pac. 449. Neb.—See *Moise v. Powell*, 40 Neb. 671, 59 N. W. 79. N. J.—*Cruser v. Duryea*, 9 N. J. L. 15. Ohio.—*Vogel v. Haffy*, 29 Ohio St. 439. And see *Perkins v. White*, 36 Ohio St. 530 (applying the law which controls where the trial was before a justice of the peace without a jury); *Ohio & T. R. Co. v. Bates*, 26 Ohio St. 32; *Martin v. Armstrong*, 12 Ohio St. 548; *Bethel v. Woodworth*, 11 Ohio St. 393; *Glover v. Moses*, 13 Ohio 321.

[a] Where the court renders judgment after failure of the jury to agree the statute has no application. *Moore v. Toennisson*, 28 Kan. 608.

20. Cal.—*Shealor v. Amador County Superior Court*, 70 Cal. 564, 11 Pac. 653; *Ford v. Smith*, 5 Cal. 331. Ga.—*Searey v. Tillman*, 75 Ga. 504. Ill.—*Nigh v. Dovel*, 84 Ill. App. 228. Ind.—*Second Nat. Bank v. Hutton*, 81 Ind. 101; *Mays v. Dooley*, 59 Ind. 287;

or set-off,²¹ and the fact that the trial on appeal is *de novo*²² does not

Pritchard v. Bartholomew, 45 Ind. 219; *Ward v. Perry*, 60 Ind. App. 1, 109 N. E. 936; *Elgin v. Mathis*, 9 Ind. App. 277, 36 N. E. 650. **Ia.**—*Wedge-wood v. Parr*, 112 Iowa 514, 84 N. W. 528. **Kan.**—*Parker v. Dobson*, 78 Kan. 62, 97 Pac. 472; *Bail v. Biggam*, 43 Kan. 327, 23 Pac. 565; *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631. **Ky.** *Burbage v. Squires*, 3 Mete. 77; *Fidler v. Hall*, 2 Mete. 461; *Fleming v. Limebaugh*, 2 Mete. 265. **Mass.**—*Hall v. Hall*, 200 Mass. 194, 86 N. E. 363; *Ashuelot Bank v. Pearson*, 14 Gray 521. **Mich.**—*Cross v. Eaton*, 48 Mich. 184, 12 N. W. 35. **Miss.**—*Louisville & N. R. Co. v. McCollister*, 66 Miss. 106, 5 So. 695; *Askew v. Askew*, 49 Miss. 301. **Mo.**—*Webb v. Tweedie*, 30 Mo. 488; *Guhman v. Dunaway*, 183 Mo. App. 659, 167 S. W. 598; *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612; *Buchholz v. Metropolitan Life Ins. Co.*, 176 Mo. App. 464, 158 S. W. 451; *Saunders v. Scott*, 132 Mo. App. 209, 111 S. W. 874; *Mitchell Planing-Mill Co. v. Short*, 58 Mo. App. 320. *Compare State v. Mosman*, 112 Mo. App. 540, 87 S. W. 75. **Mont.**—*Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695. **Nev.** *Fitchett v. Henley*, 31 Nev. 326, 102 Pac. 865, 104 Pac. 1060. **N. C.**—*Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442, 37 L. R. A. (N. S.) 606; *Ijames v. McClamroch*, 92 N. C. 362. **Okla.**—*Hesser v. Johnson*, 13 Okla. 53, 74 Pac. 320. **Pa.**—*McFarland v. O'Neil*, 155 Pa. 260, 25 Atl. 756; *Collins v. Collins*, 37 Pa. 387. **S. D.**—*Plunket v. Evans*, 2 S. D. 434, 50 N. W. 961. **Tenn.** *White v. Buchanan*, 6 Coldw. 32; *Gray v. Jones*, 1 Head 542. **Tex.**—*Pecos & N. T. Ry. Co. v. Canyon Coal Co.*, 102 Tex. 478, 119 S. W. 294; *St. Louis S. W. Ry. Co. v. Berry* (Tex. Civ. App.), 177 S. W. 1187; *Vicars v. Thorp* (Tex. Civ. App.), 174 S. W. 949; *Willett v. Herrin* (Tex. Civ. App.), 161 S. W. 26; *Smith Premier Sales Co. v. Connellee* (Tex. Civ. App.), 147 S. W. 1197; *W. R. Kelley & Co. v. J. E. Stevens & Sons* (Tex. Civ. App.), 136 S. W. 94; *Texas & P. Ry. Co. v. Hood*, 59 Tex. Civ. App. 363, 125 S. W. 982; *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806; *Waters v. Walker* (Tex. App.), 17 S. W. 1085. **Wash.**—*State v. Superior Court*, 9 Wash. 369, 37 Pac. 489. **W. Va.**—*Rich-*

mond v. Henderson, 48 W. Va. 389, 37 S. E. 653. **Wis.**—*Martin v. Eastman*, 109 Wis. 286, 85 N. W. 359; *Henckel v. Wheeler & Wilson Mfg. Co.*, 51 Wis. 363, 7 N. W. 780; *Butler v. Wagner*, 35 Wis. 54; *Barker v. Baxter*, 1 Pin. 407.

[a] Consolidation of several cases on appeal is allowed in a proper case, although the aggregate amount demanded is in excess of the jurisdiction of the lower court. "When the jurisdiction has been properly exercised by the justice of the peace and the cases are duly taken to the circuit court by appeal, they become subject to the common-law powers of that court, except so far as they may be restrained by express statutory provisions." *Ammons v. Whitehead*, 31 Miss. 99, 103.

Waiver of objection to lack of jurisdiction below, where appellate court would have had original jurisdiction, see *infra*, XII, D, 2, c.

21. **Ark.**—*Bunch v. Potts*, 57 Ark. 257, 21 S. W. 437. **Conn.**—*Finch v. Ives*, 28 Conn. 115. **Dak.**—*Purcell v. Booth*, 6 Dak. 17, 50 N. W. 196. **Ill.** *Turgrinson v. Meyer*, 155 Ill. App. 553. **Ind.**—*Gharkey v. Halstead*, 1 Ind. 389. **Miss.**—*Glass v. Moss*, 1 How. 519. **Mo.** *Vance v. McHugh*, 187 Mo. App. 708, 173 S. W. 80. **N. C.**—*Raisin & Co. v. Thomas*, 88 N. C. 148. **Ohio.**—*Woollever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569. **Pa.**—*Hinds v. Willis*, 13 Serg. & R. 213. **Tex.**—*Dromgoole Bros. v. L. A. Epstein & Co.* (Tex. Civ. App.), 173 S. W. 1006; *Cable Co. v. Rogers*, 44 Tex. Civ. App. 620, 99 S. W. 736; *Hall v. McGill* (Tex. Civ. App.), 38 S. W. 828 (cross-bill); *Cain v. Culbreath* (Tex. Civ. App.), 35 S. W. 809. **Vt.**—*Temple v. Bradley*, 14 Vt. 254.

Jurisdiction of counterclaim interposed for first time on appeal, see *supra*, XII, C.

22. *Vance v. McHugh*, 187 Mo. App. 708, 173 S. W. 80.

[a] Reason for the Rule.—"It must be the same identical case which was tried by the justice and not a new case. Upon the trial of the appeal no new cause of action can be relied upon. The same action may be tried anew, but no new action is to be tried. Nor can the demand be increased by pleading or otherwise beyond the jurisdic-

change the rule. It has authority, however, to determine the jurisdictional question involved.²³

c. *Waiver*.—On appeal the defeated party may challenge the jurisdiction of the court to try the action upon its merits for want of jurisdiction of the lower court over the subject-matter, appearing on the face of the record,²⁴ even though no objection was made by him during the trial in the lower court.²⁵ No action taken by a party during the trial can estop him from raising the question of want of jurisdiction in this respect,²⁶ and, on appeal, the court may of its own motion and in the absence of a plea, where the matter appears on the face of the pleadings, declare that the lower court acted without jurisdiction.²⁷ It has been held in some jurisdictions, however, that if the court hearing the appeal would have had original jurisdiction of the cause of action the defendant may waive all objection to the lack of jurisdiction below.²⁸

E. DETERMINATION OF THE AMOUNT.—1. In Contract Actions.

a. *In General*.—The amount in controversy is considered by most courts, for the purpose of determining the matter of jurisdiction, to be the amount claimed by plaintiff in his complaint,²⁹ unless bad faith

tion of the justice." *Burbage v. Squires*, 3 Mete. (Ky.) 77, 79.

23. *De Jarnatt v. Marquez*, 127 Cal. 558, 60 Pac. 45, 78 Am. St. Rep. 90; *Sanborn v. Contra Costa County*, 60 Cal. 425. See generally *supra*, III, B.

24. *Cal.*—*Bartnett v. Hull*, 19 Cal. App. 91, 124 Pac. 885. *Ga.*—*Johnson v. Johnson*, 113 Ga. 942, 39 S. E. 311. *Mo.*—*Webb v. Tweedie*, 30 Mo. 488. *S. C.*—*Compare Varney v. Vosch*, 3 Hill 237, want of jurisdiction not appearing on the face of the record. *S. D.* *Plunket v. Evans*, 2 S. D. 434, 50 N. W. 961. *Va.*—*Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. 431.

25. *Ia.*—*Leathers v. Geitz*, 135 Iowa 145, 112 N. W. 191. *N. Y.*—*Bellinger v. Ford*, 14 Barb. 250. *N. C.*—*Tillery v. Royal Benefit Soc.*, 165 N. C. 262, 80 S. E. 1068. *Pa.*—*Peter v. Schlosser*, 81 Pa. 439; *Collins v. Collins*, 37 Pa. 387. *Tex.*—*Cable Co. v. Rogers*, 44 Tex. Civ. App. 620, 99 S. W. 736.

26. *Gillin v. Canary*, 19 Misc. 594, 44 N. Y. Supp. 313, 26 Civ. Proc. 230, 4 N. Y. Ann. Cas. 200.

[a] A consolidation of actions at the request of a party does not estop him. *Gillin v. Canary*, 19 Misc. 594, 599, 44 N. Y. Supp. 313, 26 Civ. Proc. 230, 4 N. Y. Ann. Cas. 200.

Raising and waiving objections to jurisdiction generally, see *infra*, XIII.

27. *Ala.*—*Crabtree v. Clhatt*, 22 Ala. 181. *Ill.*—*Nigh v. Dovel*, 84 Ill. App.

228. *Ind.*—*Everett Piano Co. v. Bash*, 31 Ind. App. 498, 68 N. E. 329. *N. C.* *Smaw v. Cohen*, 95 N. C. 85.

And see the article "Justices of the Peace."

28. *Ala.*—*Burns v. Henry*, 67 Ala. 209; *House v. Lassiter*, 49 Ala. 307; *Vaughan v. Robinson*, 20 Ala. 229; *Pruitt v. Stuart*, 5 Ala. 112. *Conn.* *Fowler v. Bishop*, 32 Conn. 199. *Minn.* *Lee v. Parrett*, 25 Minn. 128. But see *Dodd v. Cady*, 1 Minn. 289.

See generally the title "Justices of the Peace."

29. *Ala.*—*Black v. Ryan*, 194 Ala. 667, 69 So. 633; *Reese v. Bessemer Plumbing & Mfg. Co.*, 42 So. 56; *Crossthwaite v. Caldwell*, 106 Ala. 295, 18 So. 47; *Haws v. Morgan*, 59 Ala. 508. *Ariz.*—*Miami Copper Co. v. State*, 17 Ariz. 179, 149 Pac. 758, Ann. Cas. 1916E, 494 (action to recover statutory penalty); *Brown v. Braun*, 9 Ariz. 254, 80 Pac. 323; *Burmister & Sons Co. v. Empire Gold Min. & Mill. Co.*, 8 Ariz. 158, 71 Pac. 961. *Ark.*—*Turner v. Cotton*, 123 Ark. 40, 184 S. W. 415; *Stroud v. Conine*, 114 Ark. 304, 169 S. W. 959; *Lafferty v. Day*, 7 Ark. 258. *Conn.* *Prince v. Takash*, 75 Conn. 616, 54 Atl. 1003; *Rockwell v. Taylor*, 41 Conn. 55; *Grather v. Klock*, 39 Conn. 133; *Nichols v. Hastings*, 35 Conn. 546; *Newtown v. Danbury*, 3 Conn. 553. *Fla.*—*Livingston v. L'Engle*, 27 Fla. 502; *Wilson v. Sparkman*, 17 Fla. 871,

on the part of the plaintiff in making his claim, is shown;⁶⁰ and this is also the rule where jurisdiction of the various courts is apportioned according to the amount of the plaintiff's "demand."⁶¹ It is the

35 Am. Rep. 110. **Ga.**—*Browne v. Edwards*, 122 Ga. 277, 50 S. E. 110; *Dowdle v. Stein*, 103 Ga. 94, 29 S. E. 595; *Giles v. Spinks*, 64 Ga. 205; *Reeves v. Gower*, 14 Ga. App. 293, 80 S. E. 699. **Ill.**—*Wilson v. McKenna*, 52 Ill. 43; *Ellis v. Snider*, 1 Ill. 336; *Kieper v. American Coal & S. Co.*, 187 Ill. App. 131; *Young v. Mueller Bros. A. & Mfg. Co.*, 124 Ill. App. 94; *Hull v. Webb*, 78 Ill. App. 617. **Ind.**—*Calloway v. Byram*, 95 Ind. 423; *Pate v. Shafer*, 19 Ind. 173; *Guard v. Circle*, 16 Ind. 401; *Murphy v. Evans*, 11 Ind. 517; *Culley v. Laybrook*, 8 Ind. 285. **Ia.**—*Evans v. Murphy*, 133 Iowa 550, 110 N. W. 1025; *Wedgewood v. Parr*, 112 Iowa 514, 84 N. W. 528; *McVey v. Johnson*, 75 Iowa 165, 39 N. W. 249; *Moran v. Murphy*, 49 Iowa 68; *Cochran v. Glover*, 1 Morris 151. **Kan.** *St. Louis & S. F. Ry. Co. v. Brown*, 10 Kan. App. 401, 61 Pac. 457. **La.** *Taenzer v. Judge Third Dist. Court*, 15 La. Ann. 120; *Perry v. Oubre*, Man. Unrep. Cas. 231. **Me.**—*Smith v. Hunt*, 91 Me. 572, 40 Atl. 698; *Cole v. Hayes*, 78 Me. 539, 7 Atl. 391. **Mass.**—*Clay v. Barlow*, 123 Mass. 378. **Mich.**—*Inkster v. Carver*, 16 Mich. 484. **Minn.** *Duresen v. Blackmarr*, 117 Minn. 206, 135 N. W. 530, Ann. Cas. 1913D, 158; *Wagner v. Nagel*, 33 Minn. 348, 23 N. W. 308. **Mo.**—*Joyce v. Moore*, 10 Mo. 271; *Buckner v. Armour*, 1 Mo. 534. **Nev.**—*Klein v. Allenbach*, 6 Nev. 159. **N. Y.**—*People ex rel. Evarts v. Municipal Court*, 162 App. Div. 477, 147 N. Y. Supp. 615. **N. C.**—*Petree v. Savage*, 171 N. C. 437, 88 S. E. 725; *Fairecloth v. Kenlaw*, 165 N. C. 228, 81 S. E. 299; *Tillery v. Royal Benefit Soc.*, 165 N. C. 262, 80 S. E. 1068; *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724. **Ohio.**—*Brunaugh v. Worley*, 6 Ohio St. 597. **Okl.**—*Albaugh Bros. Dover Co. v. White*, 26 Okla. 24, 108 Pac. 360; *Farmers' & Merchants' Nat. Bank v. School Dist.* No. 56, 25 Okla. 284, 105 Pac. 641. **Ore.**—*Ferguson v. Reiger*, 43 Ore. 505, 73 Pac. 1040. **Pa.**—*Peter v. Schlosser*, 81 Pa. 439; *Odell v. Culbert*, 9 Watts & S. 66, 42 Am. Dec. 317. **R. I.** *Ryder v. Brennan*, 28 R. I. 538, 68 Atl. 477; *Edwards v. Hopkins*, 5 R. I. 138. **S. C.**—*Brunson v. Furtick*, 72 S.

C. 579, 52 S. E. 424; *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803; *Catawba Mills v. Hood*, 42 S. C. 203, 20 S. E. 91; *Cavender v. Ward*, 28 S. C. 470, 6 S. E. 302. *Compare* *Vaughan v. Cade*, 2 Rich. L. 49; *Caldwell v. Garmany*, 3 Hill 202. **S. D.**—*Plunket v. Evans*, 2 S. D. 434, 50 N. W. 961. **Tex.**—*Ratigan v. Holloway*, 69 Tex. 468, 6 S. W. 785; *Tidball v. Eichoff*, 66 Tex. 58, 17 S. W. 263; *Graham v. Roder*, 5 Tex. 141; *C. M. Conover & Co. v. Maverick-Clarke Lith. Co. (Tex. Civ. App.)*, 115 S. W. 313. **Utah.**—*M'Cormick Harv. Mach. Co. v. Marchant*, 11 Utah 68, 39 Pac. 483. **Wash.**—*Ebey v. Engle*, 1 Wash. Ter. 72. **Wis.**—*Keegan v. Singleton*, 5 Wis. 115.

[a] "Any other rule would be fraught with uncertainties and mischiefs beyond the power of anticipation." *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999.

[b] In Louisiana (1) in a revocatory action the court's jurisdiction is tested by the amount of the plaintiff's claim. *Hopkins v. Crow*, 136 La. 409, 67 So. 197. (2) In an action en declaration de simulation it is tested by the value of the property whereof the transfer is sought to be set aside and not by the amount claimed. *Hopkins v. Crow*, 136 La. 409, 67 So. 197; *Cusachs v. Dugue*, 113 La. 261, 36 So. 960.

[c] Statement of amount demanded in notice of motion for recovery against a constable for failure to return an execution, is the test of jurisdiction. *Howard v. Jones*, 2 B. Mon. (Ky.) 526. And see *Gentry v. Gilkey*, 1 J. J. Marsh. (Ky.) 372.

30. *Drown v. Forrest*, 63 Vt. 557, 22 Atl. 612, 14 L. R. A. 80.

[a] "A probable consciousness on his part that he was not entitled to recover more than a justice could award," must be shown to oust the jurisdiction of the higher court where the proof showed plaintiff entitled to an amount below its jurisdiction. *Drown v. Forrest*, 63 Vt. 557, 22 Atl. 612, 14 L. R. A. 80.

Claims made in fraud of the court's jurisdiction, see *infra*, XII, E, 7.

31. Cal.—*Becker v. Superior Court*,

amount sought to be recovered, and not the amount actually due which is the test of jurisdiction.³² The amount of the judgment or recovery does not determine the jurisdiction;³³ hence the fact that the amount recovered falls below the minimum jurisdictional sum does not render the judgment void for want of jurisdiction,³⁴ nor may the court validate

151 Cal. 313, 90 Pac. 689; *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530; *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999; *Welch v. Santa Cruz County*, 30 Cal. App. 123, 156 Pac. 1003; *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067. **N. Y.**—*Halpern v. Langrock Bros. Co.*, 169 App. Div. 464, 155 N. Y. Supp. 167; *Hamburger v. Hellman*, 103 App. Div. 263, 92 N. Y. Supp. 1067 (in the municipal court); *Heffron v. Jennings*, 66 App. Div. 443, 73 N. Y. Supp. 410; *Owen v. Brown*, 78 Misc. 273, 139 N. Y. Supp. 451; *Pierson v. Hughes*, 88 N. Y. Supp. 1059. **N. C.** *Riddle v. Bridgewater Milling Co.*, 150 N. C. 689, 64 S. E. 782; *Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537; *Brickell v. Bell*, 84 N. C. 82. **Vt.** *Berry Shoe Co. v. Dechenes*, 68 Vt. 387, 35 Atl. 335; *Hair v. Bell*, 6 Vt. 35.

[a] "A demand supposes a tribunal or person on whom it is made; the demand spoken of in the constitution is a demand for judgment, evidenced by the prayer of a complaint and a statement of facts which can uphold the judgment prayed for." *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820.

[b] An amendment by which the word "demanded" is eliminated from the statute does not change the rule. *Strong v. Daniels*, 3 Mich. 466.

32. **Ia.**—*Evans v. Murphy*, 133 Iowa 550, 110 N. W. 1025; *McVey v. Johnson*, 75 Iowa 165, 39 N. W. 249 ("the amount claimed necessarily limits the amount of the recovery"); *Stone v. Murphy*, 2 Iowa 35. **N. C.**—*Knight v. Taylor*, 131 N. C. 84, 42 S. E. 537; *Brantley v. Finch*, 97 N. C. 91, 1 S. E. 535. **Okla.**—*Albaugh Bros. Dover Co. v. White*, 26 Okla. 24, 108 Pac. 360, Ann. Cas. 1912A, 1283. **S. C.**—*Catawba Mills v. Hood*, 42 S. C. 203, 20 S. E. 91.

Filing suit for a specified sum as a waiver of the balance due, see *infra*, XII, E, 10, b.

33. **Ala.**—*Rodgers v. Gaines*, 73 Ala. 218. **Cal.**—*De Jarnatt v. Marquez*, 127 Cal. 558, 60 Pac. 45, 78 Am. St. Rep. 90; *Ballerino v. Bigelow*, 90 Cal. 500, 27 Pac. 372; *Bailey v. Sloan*, 65 Cal.

387, 4 Pac. 349. **Colo.**—*McKnight v. McKnight*, 49 Colo. 60, 111 Pac. 583; *Denver, W. & P. Ry. Co. v. Church*, 7 Colo. 143, 2 Pac. 218; *Cramer v. McDowell*, 6 Colo. 369. **Ga.**—*Hamilton v. Rogers*, 126 Ga. 27, 54 S. E. 926. **Ky.**—*Florrence v. Goodin*, 5 B. Mon. 111. **Tex.**—*Moore v. Snell* (Tex. Civ. App.), 88 S. W. 270. **Va.**—*Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. 431.

[a] No merger of the cause of action in the judgment takes place. *Florrence v. Goodin*, 5 B. Mon. (Ky.) 111.

[b] Judgment in action where several causes of action have been properly joined, may be in an amount exceeding the jurisdiction of the court over single causes of actions, in those jurisdictions in which the demands on the several causes of action are the test of jurisdiction. *Collins v. Woodruff*, 9 Ark. 463. And see *infra*, XII, E, 9.

34. **Ala.**—*Black v. Ryan*, 69 So. 633; *Crossthwaite v. Caldwell*, 106 Ala. 295, 18 So. 47. **Ark.**—*Heilman v. Martin*, 2 Ark. 158. **Cal.**—*Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Jackson v. Whartenby*, 5 Cal. 94; *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067. **Conn.**—*Prince v. Takash*, 75 Conn. 616, 54 Atl. 1003; *Stone v. Hawkins*, 56 Conn. 111, 14 Atl. 297. **Ia.**—*Bush v. Elson*, Morris 316. **Ky.** *Hambell v. Hamilton*, 3 Dana 501; *Mills v. Couchman*, 4 J. J. Marsh. 242; *Whitecotton v. Simpson*, 4 J. J. Marsh. 11; *Craig v. Street*, 2 Bibb 265; *Singleton v. Madison*, 1 Bibb 342; *Hume v. Ben*, 1 Bibb 402. **Me.**—See *Cole v. Hayes*, 78 Me. 539, 7 Atl. 391. **Miss.** *Griffin v. Lower*, 37 Miss. 458. **Mo.** *Funk v. Funk*, 35 Mo. App. 246. **N. C.** *Tillery v. Royal Benefit Soc.*, 165 N. C. 262, 80 S. E. 1068; *Boyd v. Roanoke, R. & Lumb. Co.*, 132 N. C. 184, 43 S. E. 631; *Usry v. Suit*, 91 N. C. 406. **Ohio.**—*Brunaugh v. Worley*, 6 Ohio St. 597. **Tex.**—*Nashville, C. & St. L. Ry. Co. v. Grayson County Nat. Bank*, 100 Tex. 17, 93 S. W. 431; *Dwyer v. Bren-*

the judgment by allowing the successful litigant to remit that portion of the recovery which is in excess of the jurisdiction,³⁵ and if the claim made is in excess of the court's jurisdiction, the fact that the recovery obtained was within the jurisdictional amount does not render the judgment valid.³⁶ On the other hand, if the court has acquired jurisdiction of the action, the amount claimed being one within its jurisdiction, the fact that the recovery was for an excessive amount does not prevent the plaintiff from remitting the excess and taking a valid judgment for an amount within the jurisdiction of the court.³⁷ It has been held, however, in some cases, that the amount finally recovered,

ham, 70 Tex. 30, 7 S. W. 598; *Ellett v. Powers*, 8 Tex. 113; *Sherwood v. Douthitt*, 6 Tex. 224; *Austin v. Jordan*, 5 Tex. 130; *Tarbox v. Kennon*, 3 Tex. 7; *Commonwealth Bonding & Cas. Co. v. Meeks* (Tex. Civ. App.), 187 S. W. 681; *Texas & N. O. R. Co. v. Marshall* (Tex. Civ. App.), 184 S. W. 643; *Brunson v. Dawson State Bank* (Tex. Civ. App.), 175 S. W. 438; *Granger v. Kishi* (Tex. Civ. App.), 139 S. W. 1002; *Freeman v. Collier Racket Co.* (Tex. Civ. App.), 105 S. W. 1129; *Braun & Ferguson Co. v. Paulson* (Tex. Civ. App.), 95 S. W. 617; *Western Union Tel. Co. v. Siddall* (Tex. Civ. App.), 86 S. W. 343; *Bates v. Van Pelt*, 1 Tex. Civ. App. 185, 20 S. W. 949. **Vt.**—*Drown v. Forrest*, 63 Vt. 557, 560, 22 Atl. 612, 14 L. R. A. 80; *Scott v. Moore*, 41 Vt. 205, 98 Am. Dec. 581; *Clark v. Crosby*, 37 Vt. 188; *Powers v. Thayer*, 30 Vt. 361; *Henry v. Tilson*, 17 Vt. 479; *Spafford v. Richardson*, 13 Vt. 224.

[a] Two reasons have been advanced as the foundation of the rule: (1) If the verdict were the test a verdict for less than the jurisdictional amount or for the defendant would never be conclusive on the parties, who could relitigate the issues at will; (2) "it would be a very inconvenient, uncertain and unsatisfactory rule because the parties would, in many cases, be subjected to all the trouble, expense, and anxiety incident to a vexatious and protracted litigation before they could, by possibility, know whether the court had jurisdiction of the controversy or not," and then if they were mistaken, would be forced to again resort to another tribunal. *Heilman v. Martin*, 2 Ark. 158, 171.

35. *Ind.*—*Pritchard v. Bartholomew*, 45 Ind. 219. **N. Y.**—*Halpern v. Lang-*

rock Bros. Co., 169 App. Div. 464, 155 N. Y. Supp. 167; *Smith v. Dunn*, 46 Misc. 475, 92 N. Y. Supp. 300. **Ore.** *Ferguson v. Byers*, 40 Ore. 468, 67 Pac. 1115, 69 Pac. 32.

As to remission of part of demand, see *infra*, XII, E, 10.

[a] Amendment of Judgment.—"If the court was without jurisdiction to enter the judgment in the first instance, it was equally without jurisdiction to amend it." *Juster v. Court of Honor*, 120 Minn. 325, 139 N. W. 701.

36. *Rimes v. Williams*, 99 Ga. 281, 25 S. E. 685; *Gillett v. Richards*, 46 Iowa 652.

37. **Ga.**—*Giles v. Spinks*, 64 Ga. 205; *Garfield Oil Mills v. Stephens*, 16 Ga. App. 655, 85 S. E. 983. **Ia.**—*Reed v. Shum*, 63 Iowa 378, 19 N. W. 254. **N. Y.**—*Hamburger v. Hellman*, 103 App. Div. 263, 92 N. Y. Supp. 1067; *Spitzer v. Korminsky*, 49 Misc. 466, 97 N. Y. Supp. 1030. **N. C.**—*Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419.

[a] A judgment for an excessive amount is erroneous but not void, in such a case. *Freeman v. W. B. Walker & Sons* (Tex. Civ. App.), 175 S. W. 1133.

[b] Where interest, which has accumulated since the institution of the action operates to entitle the plaintiff to recover a total amount which would be in excess of the original jurisdiction of the court, judgment for such amount may properly be rendered. *J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co.* (Tex. Civ. App.), 157 S. W. 228. But see *Sulzberger & Sons Co. v. Hille* (Tex. Civ. App.), 187 S. W. 992; *McCormick Harvest. Mach. Co. v. Marchant*, 11 Utah 68, 39 Pac. 483. Adding interest to a demand to determine the amount in controversy, see *infra*, XII, E, 9, g.

rather than the amount claimed, is the test of jurisdiction,³⁸ but even in such case, if an excessive amount is recovered, the trial court has jurisdiction to award a new trial and, if it does, the case stands as though no trial had ever been had.³⁹

b. *Ascertainment of the Amount Claimed.*—In most jurisdictions it is the claim made in the *ad damnum* clause of the complaint which is looked to in order to determine the extent of the plaintiff's claim;⁴⁰ though in some states, the amount sought to be recovered is to be ascertained from the facts alleged in the body of the complaint, rather than from the *ad damnum* clause,⁴¹ jurisdiction being determined by the amount for which, in the aspect of the case most favorable to the

38. *Legum v. Blank*, 105 Md. 126, 65 Atl. 1071; *Reese v. Hawks*, 63 Md. 130; *Rohr v. Anderson*, 51 Md. 205; *Orme v. Williams*, 47 Md. 552; *Bushey v. Culler*, 26 Md. 534 (circuit court); *Ott v. Dill*, 7 Md. 251; *Carter v. Tuck*, 3 Gill (Md.) 248; *Baltimore & H. de G. Tpk. Co. v. Barnes*, 6 Har. & J. (Md.) 57.

[a] Rule is not applicable to all courts in Maryland. *Baltimore Cannel Coal & Iron Co. v. Steuart*, 28 Md. 365 (does not apply to the superior court); *Reidel v. Turner*, 28 Md. 362; *Abbott v. Gateh*, 13 Md. 314, 315, 71 Am. Dec. 635.

[b] In tort actions the damages claimed sometimes govern. See *Bushey v. Culler*, 26 Md. 534.

[c] Effect of verdict for an amount below the court's jurisdiction is to require the entry of a judgment of non prosequitur; but a copy of the verdict is made conclusive evidence of the debt, to the amount therein stated, and an action may be brought upon it in a court having jurisdiction of the amount. *Leviness v. Kaplan*, 99 Md. 683, 692, 59 Atl. 127; *Williams v. Fredlock Mfg. & B. Co.*, 94 Md. 108, 50 Atl. 421.

39. *Kirk v. Grant*, 67 Md. 418, 10 Atl. 230.

40. Ill.—*Kieper v. American Coal & S. Co.*, 187 Ill. App. 131. Me.—*Smith v. Hunt*, 91 Me. 572, 40 Atl. 698; *Cole v. Hayes*, 78 Me. 539, 541, 7 Atl. 391. Mass.—*Hall v. Hall*, 200 Mass. 194, 86 N. E. 363; *Wright v. Potomski Mills Corp.*, 138 Mass. 328; *Clay v. Barlow*, 123 Mass. 378; *President, etc. Ashuelot Bank v. Pearson*, 14 Gray 521. Mich.—*Cilley v. Van Patten*, 68 Mich. 80, 35 N. W. 831. Minn.—*Barber v. Kennedy*, 18 Minn. 216. Nev.—*Klein v. Allenbach*, 6 Nev. 159. R. I.—*Ryder v.*

Brennan, 28 R. I. 538, 68 Atl. 477, *distinguishing Edwards v. Hopkins*, 5 R. I. 138, decided under an earlier statute. Vt.—*Stevens v. Pearson*, 5 Vt. 503.

41. Colo.—*Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642; *Bloomer v. Jones*, 22 Colo. App. 404, 125 Pac. 541. Ia.—*Chicago & N. W. Ry. Co. v. Weaver*, 112 Iowa 101, 83 N. W. 795. Tex.—*Pecos & N. T. Ry. Co. v. Canyon Coal Co.*, 102 Tex. 478, 119 S. W. 294; *Bridge v. Ballew*, 11 Tex. 269; *Swigley v. Dickson*, 2 Tex. 192; *Chicago, R. I. & G. Ry. Co. v. Gladish* (Tex. Civ. App.), 175 S. W. 863; *Ft. Worth & R. G. Ry. Co. v. Mathews* (Tex. Civ. App.), 169 S. W. 1052; *Red Deer Oil Develop. Co. v. Huggins* (Tex. Civ. App.), 155 S. W. 949; *Allemania Fire Ins. Co. v. Fordtran* (Tex. Civ. App.), 128 S. W. 692; *Ainsa v. Moses* (Tex. Civ. App.), 100 S. W. 791; *Atchison, T. & S. F. Ry. Co. v. Waddell Bros.*, 40 Tex. Civ. App. 110, 88 S. W. 390; *Western Union Tel. Co. v. Hawkins* (Tex. Civ. App.), 85 S. W. 847; *Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806. But see *Foster v. Roseberry*, 98 Tex. 138, 81 S. W. 521; *Home Benefit Assn. v. Wester* (Tex. Civ. App.), 146 S. W. 1022.

[a] Rule Stated.—“It has been generally held that the amount shown in the statement of the cause of action, and not the amount for which recovery is sought in the prayer of the petition, must be looked to in determining the amount in controversy in a suit and that the sum of the items shown in the statement of the cause of action, and not the general statement of the amount claimed to be due will determine the question of what is the amount in controversy.” Willett

plaintiff, judgment could be rendered on the facts set out.⁴² In still other jurisdictions the amount claimed in the ad damnum clause controls except where it clearly appears on the face of the complaint that the amount which can be recovered in any event either is,⁴³ or is not,⁴⁴ within the jurisdiction of the court. It has been held that a bill of particulars may be consulted in this connection.⁴⁵

In a justice's court, the general rules heretofore stated apply where the plaintiff files a written pleading; if the pleadings are oral, the test of jurisdiction is usually the amount stated in the summons.⁴⁶

v. Herrin (Tex. Civ. App.), 161 S. W. 26.

[b] "The correct sum of the items set out in the body" of the petition controls the formal statement by plaintiff of the extent of his damages. *Texas & P. Ry. Co. v. Hood*, 59 Tex. Civ. App. 363, 125 S. W. 982.

[c] Mistake apparent on the face of the complaint may be ascertained and corrected by reference to the general prayer. *Fort Worth & D. C. Ry. Co. v. Dysart* (Tex. Civ. App.), 136 S. W. 1117.

42. *Lenoir Realty & Ins. Co. v. Corpening*, 147 N. C. 613, 61 S. E. 528. But see *Froelich v. Southern Exp. Co.*, 67 N. C. 1.

[a] Even Where the Action Is for Unliquidated Damages.—*Times Pub. Co. v. Hill*, 36 Tex. Civ. App. 389, 81 S. W. 806, criticizing *Alexander v. Thompson*, 38 Tex. 533; *Scott v. Mexican Nat. Ry. Co.*, 4 Wills. Civ. Cas. (Tex.), §287; *Mulhaul v. Feller*, 1 White & W. Civ. Cas. (Tex.), §1162.

43. *Cal.—Howe v. Halsey*, 122 Cal. xviii, 54 Pac. 748; *Lehnhardt v. Jennings*, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195. *Colo.—Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642, ad damnum held in such case superfluous. *Ga.—Wilhelm v. Noble Bros. & Co.*, 36 Ga. 599. *Ia.—Redfield v. Stocker*, 91 Iowa 383, 59 N. W. 270. *N. Y.—Spencer v. Hall*, 30 Misc. 75, 62 N. Y. Supp. 826. *N. C.* See *Thompson v. Southern Exp. Co.*, 144 N. C. 389, 57 S. E. 18. *Tex.—Ainsa v. Moses* (Tex. Civ. App.), 100 S. W. 791.

44. *U. S.—North American, etc. Co. v. Morrison*, 178 U. S. 262, 20 Sup. Ct. 869, 44 L. ed. 1061 (reversing 85 Fed. 802); *Bergman v. Inman, Poulsen & Co.*, 91 Fed. 293 (action on note); *Culver v. Crawford County*, 4 Dill. 239, 6 Fed. Cas. No. 3,468. *Cal.—Howe v. Halsey*, 122 Cal. xviii, 54 Pac. 748.

Conn.—Hannon v. Bramley, 65 Conn. 193, 32 Atl. 336; *Hunt v. Rockwell*, 41 Conn. 51; *Grether v. Klock*, 39 Conn. 133. *Ind.—Collins v. Shaw*, 8 Ind. 516; *Williamson v. Brandenburg*, 133 Ind. 594, 32 N. E. 834; *Murphy v. Evans*, 11 Ind. 517. *Ky.—Grant v. Tams & Co.*, 7 T. B. Mon. 218 (action in debt). *Miss.—Mobile, J. & K. C. R. Co. v. Hitt*, 99 Miss. 679, 55 So. 484; *Griffin v. McDaniel*, 63 Miss. 121. *Mo.—Stephenson v. Porter*, 45 Mo. 358. See *Anchor Milling Co. v. Walsh*, 97 Mo. 287, 11 S. W. 217. *N. Y.—See Shotwell v. Daniels*, 8 Johns. 341. *Pa.—Kline v. Wood*, 9 Serg. & R. 294. *R. I.—Edwards v. Hopkins*, 5 R. I. 138. *Tex.* *Foster v. Roseberry*, 98 Tex. 138, 81 S. W. 521. *Vt.—Luce v. Minard*, 87 Vt. 177, 88 Atl. 728.

[a] In an action of debt, the damages laid, beyond the legal fixed standard of damages, cannot confer a jurisdiction. *Grant v. Tams & Co.*, 7 Mon. (Ky.) 218.

45. *Hunt v. Rockwell*, 41 Conn. 51 (bill of particulars controls the ad damnum clause); *Grether v. Klock*, 39 Conn. 133; *Guile v. Brown*, 38 Conn. 237. But see *Hoey v. Hoey*, 36 Conn. 386.

[a] "The effect of a bill of particulars may be very important in determining that question [of jurisdiction]; at least so far as to prevent the court from exercising jurisdiction when the bill shows a demand below the minimum limit, because a party will be presumed to so frame his bill of particulars as to embrace his whole claim." *Hunt v. Rockwell*, 41 Conn. 51, 53.

[b] Amendment of bill of particulars to make it conform to the declaration in respect to the amount demanded, is properly allowed. *Grether v. Klock*, 39 Conn. 133.

46. *Teal v. Templeton*, 149 N. C. 32, 62 S. E. 737; *Cromer v. Marsha*, 122

citation,⁴⁷ warrant,⁴⁸ or writ,⁴⁹ as the amount claimed by the plaintiff; sometimes the statement of the amount claimed in the process issued by the justice is controlled by the written notice of the amount for which plaintiff will take judgment if the defendant does not answer,⁵⁰ or by the amount appearing on the face of the instrument filed as the basis of the action,⁵¹ or the amount appearing to be due from a bill of particulars filed by the plaintiff.⁵²

N. C. 563, 29 S. E. 836; *Mitchell v. Davis*, 73 W. Va. 352, 80 S. E. 491; *Pocahontas Wholesale Groc. Co. v. Gillespie*, 63 W. Va. 578, 60 S. E. 597; *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Stewart v. Baltimore & O. R. R. Co.*, 33 W. Va. 88, 10 S. E. 26; *Todd v. Gates*, 20 W. Va. 464.

[a] **Statement of amount due in plaintiff's account** which is filed, is disregarded. *Mitchell v. Davis*, 73 W. Va. 352, 80 S. E. 491.

[b] **Bills of particulars** do not control the amount claimed in the summons. *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Kyle v. Ohio River R. Co.*, 49 W. Va. 296, 38 S. E. 489.

[c] **Docket entry** does not control the claim stated in the summons. *Teal v. Templeton*, 149 N. C. 32, 62 S. E. 737.

47. *Lucas v. Harrison* (Tex. Civ. App.), 182 S. W. 74; *Western Union Tel. Co. v. Garner* (Tex. Civ. App.), 83 S. W. 433. See *Freeman v. W. B. Walker & Sons* (Tex. Civ. App.), 175 S. W. 1133.

[a] **Entries in justice's docket** are controlled by statement in the citation. *Lucas v. Harrison* (Tex. Civ. App.), 182 S. W. 74.

48. *Burbage v. Squires*, 3 Mete. (Ky.) 77; *Williams v. Wilson*, 5 Dana (Ky.) 596; *Mills v. Couchman*, 4 J. J. Marsh. (Ky.) 242.

[a] **Written statement filed by the plaintiff** is controlled by the statement in the warrant. *Burbage v. Squires*, 3 Mete. (Ky.) 77.

49. Neb.—*Adams v. Nebraska Sav. & Exch. Bank*, 56 Neb. 121, 76 N. W. 421; *Brondberg v. Babbott*, 14 Neb. 517, 16 N. W. 845. N. Y.—*Frenchi v. New York City Ry. Co.*, 46 Misc. 612, 92 N. Y. Supp. 771, in the municipal court. Okla.—*Albaugh Bros. Dover Co. v. White*, 26 Okla. 24, 108 Pac. 360, Ann. Cas. 1912A, 1283.

[a] **"When there is a variance as to the amount demanded** between the prayer of the bill of particulars and the writ, the writ governs." *Adams v. Nebraska Sav. & Exch. Bank*, 56 Neb. 121, 125, 76 N. W. 421.

50. *Evans v. Murphy*, 133 Iowa 550, 110 N. W. 1025; *Hynds v. Fay*, 70 Iowa 433, 30 N. W. 683; *Galley v. Tama County*, 40 Iowa 49. See *Long v. Loughran*, 41 Iowa 543.

51. *Guhman v. Dunaway*, 183 Mo. App. 659, 167 S. W. 598 (an account); *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612, promissory note.

[a] **The amount stated in the instrument** controls a statement made in the summons and a docket entry by the justice. *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612.

[b] **A statement of the cause of action** filed with the instrument should be ignored. *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612.

52. *Second Nat. Bank v. Hutton*, 81 Ind. 101 (bill of particulars controls ad damnum clause of complaint); *Decker v. Graves*, 10 Ind. App. 25, 37 S. E. 550; *Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565; *Wooster v. McKinley*, 1 Kan. 317. See *Parker v. Dobson*, 78 Kan. 62, 96 Pac. 472.

[a] **"The office of a bill of particulars**, in such a case as this, is to make the plaintiff's precise cause of action more certain, definite and specific than the same has been stated in the common counts. In such a case without regard to what may have been stated in general terms in the complaint, the plaintiff's evidence and right of recovery are limited, under the law, strictly and precisely, to the exact claim or cause of action shown or set forth in the bill of particulars. Possibly the plaintiff may recover less, but in no event more, than the amount of the demand as stated in the bill of particulars." *Second Nat. Bank v. Hutton*, 81 Ind. 101, 104.

[b] **Ad damnum clause controls bill**

2. In Tort Actions.—The general rule is that the amount claimed by the plaintiff determines the amount in controversy,⁵³ and a recovery of less than the jurisdictional amount does not render the judgment void.⁵⁴ If it appear on the face of the complaint that the plaintiff cannot recover all the damages laid in the ad damnum clause of the complaint then the amount in controversy or the demand, is the highest

of particulars where its claim is within the court's jurisdiction: "In an action on an account, brought before a justice of the peace, where the only complaint is the account itself, which shows on its face, that the amount due exceeds the jurisdiction of such justice, and the demand is in no way limited, the court should sustain a motion to dismiss for want of jurisdiction. But when a complaint is filed to recover upon an account and a bill of particulars, giving the items of the account, is filed with the complaint and the amount shown to be due by the bill of particulars exceeds the jurisdiction, while the demand in the complaint is within the jurisdiction of the justice, the amount demanded in the complaint controls and determines the question of jurisdiction." *Elgin v. Mathis*, 9 Ind. App. 277, 36 N. E. 650.

[c] Specific facts stated in defendant's bill of particulars control his prayer for relief. *Jennings v. Johnston* (Okla.), 152 Pac. 606. But see *Albaugh Bros. Dover Co. v. White*, 26 Okla. 24, 108 Pac. 360, Ann. Cas. 1912A, 1283.

53. *Ala.*—*Sharpe v. Barney*, 114 Ala. 361, 21 So. 490 (trover); *Memphis & C. R. R. Co. v. Hembree*, 84 Ala. 182, 4 So. 392 (action for negligent killing of animal); *Burns v. Henry*, 67 Ala. 209. *Ark.*—*Storm v. Montgomery*, 79 Ark. 172, 95 S. W. 149; *Rose v. Christinett*, 77 Ark. 582, 92 S. W. 866; *Thompson v. Willard*, 66 Ark. 346, 50 S. W. 870; *Little Rock, M. R. & T. Ry. Co. v. Manees*, 44 Ark. 100. *Cal.*—*Hoban v. Ryan*, 130 Cal. 96, 62 Pac. 296 (unlawful detainer); *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *Dashell v. Slingerland*, 60 Cal. 653 (trespass); *Sanborn v. Contra Costa County*, 60 Cal. 425 (trover); *Pennybecker v. McDougal*, 48 Cal. 160. *Fla.*—*Sumner Lumb. Co. v. Mills*, 64 Fla. 513, 60 So. 757; *Louisville & N. R. Co. v. Sutton*, 54 Fla. 247, 44 So. 946; *Seaboard Air Line Ry. Co. v. Ray*, 52 Fla. 634, 42 So. 714; *Florida Cent. & P. R. Co. v. Seymour*, 44 Fla. 557, 33

So. 424. *Ga.*—*Velvin v. Hall*, 78 Ga. 136. *Ky.*—*Montgomery v. Glasscock*, 121 S. W. 668; *Pharis v. Carver*, 13 B. Mon. 236; *Aulick v. Adams*, 12 B. Mon. 104; *Singleton v. Madison*, 1 Bibb 342. *Md.*—*Beall v. Black*, 1 Gill 203; *O'Reilly v. Murdoch*, 1 Gill 32. *Mass.*—*Ladd v. Kimball*, 12 Gray 139. *Mich.*—*Merrill v. Butler*, 18 Mich. 294; *Strong v. Daniels*, 3 Mich. 466. *Minn.*—*Turner v. Holleran*, 8 Minn. 451. *Miss.*—*Ross v. Natchez, J. & C. R. R. Co.*, 61 Miss. 12. *Mo.*—*Vineyard v. Lynch*, 86 Mo. 684; *Acks v. Ball*, 14 Mo. 396. *Mont.*—*Reynolds v. Smith*, 48 Mont. 149, 135 Pac. 1190. *N. H.*—*Hoit v. Molony*, 2 N. H. 322. *N. Y.*—*Covey v. Noggle*, 13 Barb. 330; *Yager v. Hannah*, 6 Hill 631. *N. C.*—*Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419. *Ohio.*—*Linduff v. Steubenville & R. P. Co.*, 14 Ohio St. 336; *Jenney v. Gray*, 5 Ohio St. 45; *Van Buskirk v. Dunlap*, 2 Ohio Dec. (Reprint) 233. *Okla.*—*St. Louis & S. F. R. Co. v. Egbert*, 27 Okla. 168, 111 Pac. 202. *Pa.*—*Burr v. Bayne*, 10 Watts 299; *Hancock v. Barton*, 1 Serg. & R. 269. *S. C.*—See *Huff v. Huff*, 1 Bailey 456. *Tex.*—*Dwyer v. Bassett*, 63 Tex. 274; *Texas & N. O. R. Co. v. Coleman* (Tex. Civ. App.), 185 S. W. 1053; *Allison v. Haney* (Tex. Civ. App.), 62 S. W. 933; *Euless v. Russell* (Tex. Civ. App.), 34 S. W. 176; *Sozaya v. Patterson* (Tex. Civ. App.), 23 S. W. 745. *Vt.*—*Smith v. Fitzgerald*, 59 Vt. 451, 9 Atl. 604; *Montgomery v. Edwards*, 45 Vt. 75; *Doubleday v. Marstin*, 27 Vt. 488.

[a] If a plaintiff claims only to be a part owner of the property converted, the amount of his partial interest is considered. *California Cured Fruit Assn. v. Ainsworth*, 134 Cal. 461, 66 Pac. 586.

54. *Cal.*—*Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500. *La.*—*Daigle v. Lirette*, 23 La. Ann. 34. *Mich.*—*Strong v. Daniels*, 3 Mich. 466. *Miss.*—*Fenn v. Harrington*, 54 Miss. 733. *Ohio.*—*Linduff v. Steubenville & R. P. Co.*, 14 Ohio St. 336. *Okla.*—See *St. Louis & S. F. Ry. Co. v. Egbert*, 27 Okla. 168,

amount which the plaintiff could recover on the facts as stated.⁵⁵ In actions of a penal character where presentation of a claim is a condition precedent to the maintenance of the action, the amount stated in the claim has been held to be the test of the amount in controversy.⁵⁶ If the claim made is for an amount not within the court's jurisdiction the fact that the court renders judgment for an amount within its jurisdiction, is immaterial; the judgment is void for want of power in the court to render it.⁵⁷ But if the case is one within the court's jurisdiction the successful party may remit the excess of a judgment which exceeds the jurisdictional amount.⁵⁸

3. In Suits in Equity.—The amount claimed in the bill is the test of jurisdiction;⁵⁹ the fact that less than the jurisdictional amount is found to be due does not oust the court of jurisdiction.⁶⁰ Where an equitable remedy is sought, the value of the subject-matter of the suit is sometimes made the test of jurisdiction.⁶¹

4. Counterclaims and Set-Offs.—The general rule that the amount claimed in the pleading is the test of jurisdiction applies to counterclaims,⁶² and set-offs, where affirmative relief is claimed.⁶³ The several claims of the plaintiff in the complaint and the defendant in a counterclaim, are not to be considered as together constituting the amount in controversy.⁶⁴

111 Pac. 202. **Pa.**—*Matlack v. Brown*, 2 Miles 15. **Vt.**—*Doubleday v. Marstin*, 27 Vt. 488; *Waters v. Langdon*, 16 Vt. 570.

55. **Conn.**—*Hannon v. Bramley*, 65 Conn. 193, 32 Atl. 336. **Fla.**—*Seaboard Air Line Ry. v. Maxey*, 64 Fla. 487, 60 So. 353. **Ia.**—*Redfield v. Stocker*, 91 Iowa 383, 59 N. W. 270. **Tex.**—*Martin v. Goodman* (Tex. Civ. App.), 187 S. W. 689.

Where punitive damages improperly claimed, see *infra*, XII, E, 9, h.

56. *Sumner Lumb. Co. v. Mills*, 64 Fla. 513, 60 So. 757, action to recover double damages for negligent killing of animals.

57. **Ark.**—*Rose v. Christinett*, 77 Ark. 582, 92 S. W. 866. **Fla.**—*Seaboard Air L. Ry. Co. v. Ray*, 52 Fla. 634, 42 So. 714. **N. Y.**—*Yager v. Hannah*, 6 Hill 631.

58. *Velvin v. Hall*, 78 Ga. 136; *Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419. See *Noville v. Dew*, 94 N. C. 43.

59. **Conn.**—*Starr Cash & Package Car. Co. v. Starr*, 69 Conn. 440, 37 Atl. 1057; *Skinner v. Bailey*, 7 Conn. 496; *Judd v. Bushnell*, 7 Conn. 204; *Pitkin v. Flowers*, 2 Root 42. **Mass.**—See *Stockbridge Iron Co. v. Cone Iron Works*, 99 Mass. 468. **Miss.**—*Champe- nois v. Fort*, 45 Miss. 355. **N. Y.**—*Smets v. Williams*, 4 Paige 364.

[a] **Motion to dismiss bill for want of equity**, admits the value of the property or the amount in controversy to be as alleged in the bill. *Bell v. Montgomery Light Co.*, 103 Ala. 275, 15 Pac. 569.

60. **N. Y.**—*Smets v. Williams*, 4 Paige 364, costs will be awarded the defendant. **Tenn.**—*Wagstaff v. Braden*, 1 Baxt. 304; *Spurlock v. Fuls*, 1 Swan 289. **Vt.**—*Washburn v. Washburn*, 23 Vt. 576.

61. *Skinner v. Bailey*, 7 Conn. 496 (suit for reconveyance of land); *Judd v. Bushnell*, 7 Conn. 204 (suit to recover money due under a will); *Griswold v. Mather*, 5 Conn. 435.

62. **Ark.**—*Kilgore Lumb. Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62. **Ind.**—*Regina Co. v. Galloway*, 50 Ind. App. 92, 98 N. E. 81. **N. J.**—*Clancy v. Neumeyer*, 51 N. J. L. 299, 17 Atl. 154.

[a] **The pleading may be examined by the court**, though claiming an amount in excess of its jurisdiction, in order to ascertain whether it is sufficient as the statement of a proper counterclaim. *Jourdain v. Luchsinger*, 91 Minn. 111, 97 N. W. 740.

63. *Pate v. Shafer*, 19 Ind. 173. But see *M'Clain v. Kincaid*, 5 Yerg. (Tenn.) 232.

64. *Rhodes Haverty Furn. Co. v. Henry* (Tex. Civ. App.), 67 S. W. 340.

5. Appeals From Justice's Courts.⁶⁵ — a. *Amount in Controversy as a Test.* — In most states the amount claimed by the plaintiff is the test of appellate jurisdiction when an appeal is taken from the judgment of a justice of the peace.⁶⁶ The claim made in the complaint as amended controls.⁶⁷ An admission by defendant of the correctness and

[a] **Illustrations.**—In *Madison v. Spitsnogle*, 58 Iowa 369, 12 N. W. 317, the plaintiff sued on a contract to pay money for medicines furnished defendant; the defendant denied performance and by way of counterclaim alleged that he had been treated in an unskillful manner: "In a certain sense there was [a controversy involving more than \$100]. That is, by combining the claims of both parties there was one hundred and ten dollars in controversy. But both parties do not invoke the jurisdiction of this court, and we think the true construction of the statute is, that it must appear from the pleadings that it was possible for the justice, consistent with the pleadings, to render judgment against one of the parties to the action for more than one hundred dollars. It is certain this could not have been done."

[b] **Plaintiff's offset to defendant's offset** is not to be considered. *Talbot v. Robinson*, 42 Vt. 698.

[c] **Want or failure of consideration** may be pleaded in connection with a counterclaim. Where a counterclaim to the full limit of the court's jurisdiction is interposed, the fact that want or failure of consideration is pleaded as a defense to plaintiff's cause of action does not operate to increase the defendant's claim above the jurisdictional amount. *Broderick v. Andrews*, 135 Mo. App. 57, 115 S. W. 519.

65. See generally *supra*, XII, D, 2.

66. **Ala.**—*Crabtree v. Cliatt*, 22 Ala. 181. *Compare* *Rose v. Thompson*, 17 Ala. 628. **Conn.**—*Parrott v. Stevens*, 37 Conn. 93; *Fowler v. Stocking*, 5 Day 539. But see *Curtis v. Gill*, 34 Conn. 49, applying an earlier statute. **Ga.** *Humphrey v. Johnson*, 13 Ga. App. 557, 79 S. E. 530; *Southern Ry. Co. v. Gordon*, 9 Ga. App. 469, 71 S. E. 763. See *Bell v. Davis*, 93 Ga. 233, 18 S. E. 647; *Humphrey v. Johnson*, 13 Ga. App. 557, 79 S. E. 530. **Ind.**—*Penn-*

sylvania Co. v. Trimble, 75 Ind. 378; *Halleck v. Weller*, 72 Ind. 342. **Ia.** *Nichols v. Wood*, 66 Iowa 225, 23 N. W. 641; *Perry v. Conger*, 65 Iowa 588, 22 N. W. 688; *Lundak v. Chicago & N. W. Ry. Co.*, 65 Iowa 473, 21 N. W. 783; *Curran v. Excelsior Coal Co.*, 63 Iowa 94, 18 N. W. 698. **Kan.**—*Moore v. Toennisson*, 28 Kan. 608, counterclaim. **Ky.**—*Donahue v. Murray*, 2 Bush 194; *Mills v. Couchman*, 4 J. J. Marsh. 242. But see *Parks v. Hulme*, 3 Dana 499. **Minn.**—*Getty v. Village of Alpha*, 115 Minn. 500, 133 N. W. 159; *Koetke v. Ringer*, 46 Minn. 259, 48 N. W. 917 (construing the peculiar Minnesota statute). And see *Shunk v. Hellmiller*, 11 Minn. 164. **Mo.** *Batchelor v. Bess*, 22 Mo. 402, amount for which plaintiff accepts a judgment will be taken as the amount claimed by him where this does not otherwise appear. **Neb.**—*Bates v. Phoenix Pub. Co.*, 50 Neb. 79, 69 N. W. 305 (counterclaim); *Moise v. Powell*, 40 Neb. 671, 59 N. W. 79. **N. Y.**—*Fuller v. Brierley*, 36 How. Pr. 47. But see *Matter of Marsh*, 19 Johns. 171. **Ohio.**—See *Perkins v. White*, 36 Ohio St. 530. **Ore.** *Troy v. Hallgarth*, 35 Ore. 162, 57 Pac. 374. But see *Stoll v. Hoback*, 2 Ore. 225. **Pa.**—*Collins v. Collins*, 37 Pa. 387; *Stollars v. East Finley*, 3 Pa. Co. Ct. 209. **Tex.**—*Smith v. Giles*, 65 Tex. 341; *Brazoria County v. Calhoun*, 61 Tex. 223; *Western Union Tel. Co. v. Fricke* (Tex. Civ. App.), 167 S. W. 6; *Grooms v. Atascosa County* (Tex. Civ. App.), 29 S. W. 73. **Vt.**—*Chase v. Bernier*, 73 Vt. 307, 50 Atl. 1056; *Fisk v. Wallace*, 51 Vt. 418 (replevin); *Cole v. Goodall*, 39 Vt. 400, 94 Am. Dec. 334, trover.

[a] **Several counts stating the same cause of action** are to be treated as involving but one amount as the subject-matter of the controversy. *Persons v. Centre Turnpike Co.*, 20 Vt. 170. See *infra*, XII, E, 9.

67. *Atlanta & W. P. R. Co. v. Georgia Ry. & Elec. Co.*, 125 Ga. 798, 54 S. E. 753.

legality of plaintiff's claim in part, operates to reduce the amount in controversy, to that extent, so far as the appeal is concerned,⁶⁸ but the action of the appellate court in eliminating from further consideration a part of the claim in suit does not oust it of jurisdiction, even though the amount remaining in controversy is less than that over which appellate jurisdiction is conferred.⁶⁹ In those cases in which the original jurisdiction of a justice of the peace depends upon the value of the property rather than the amount in controversy, the jurisdiction of an appellate court ordinarily is determined by reference to such value;⁷⁰ in actions for the recovery of personal property, the value of the property and the damages claimed for its detention are to be considered together.⁷¹ Appeals in garnishment cases are governed by the amount of the principal debt rather than that of the garnishee.⁷² In claim cases, growing out of the levy of an execution an appeal lies if either the amount of the execution or the value of the property levied upon is within the jurisdictional amount.⁷³

b. *Amount of the Judgment.*—In a few states the amount of the judgment rendered by the justice of the peace is made the test of the appellate court's jurisdiction.⁷⁴

As to amendments affecting the amount in controversy, see *infra*, XII, E, 8.

[a] Amendment increasing the amount claimed cannot be made for the first time on appeal in order to confer jurisdiction on the appellate court. *Barnes v. Feagon* (Tex. Civ. App.), 74 S. W. 329.

[b] Time at which justice's judgment is rendered is the point of time to be considered in determining the amount in controversy. *Barnes v. Feagon* (Tex. Civ. App.), 74 S. W. 329. Compare *infra*, XII, I.

68. Ia.—*Siver & Co. v. Mulligan*, 94 N. W. 491; *Young v. McWaid*, 57 Iowa 101, 10 N. W. 291, where a tender was made. Kan.—See *Brooks v. Wright*, 19 Kan. 501. La.—*State v. Boone*, 42 La. Ann. 982, 8 So. 468.

[a] "Defendant's tender admitted plaintiff's claim to the amount of the money paid into court. There is no controversy as to this sum. . . . But there is a controversy whether plaintiff shall recover the part of his claim not tendered. The amount of the claim not tendered is, therefore, the amount in controversy in this action." *Young v. McWaid*, 57 Iowa 101, 10 N. W. 291.

69. *Kingsbury v. Franz*, 40 Neb. 400, 58 N. W. 936.

70. *Smith v. Giles & Sheppard*, 65

Tex. 341, an action to enforce a lien on personal property.

71. Kan.—*Nordmark v. Nystrom*, 46 Kan. 117, 26 Pac. 449. Vt.—*Andrews v. Baker*, 59 Vt. 656, 10 Atl. 465; *Fisk v. Wallace*, 51 Vt. 418. Wis.—*Inman v. Gower*, 3 Pin. 152.

Rule for determining original jurisdiction where dependent on value of property, see *infra*, XII, F, 2.

72. See *infra*, XII, G, 2.

73. *Adkins v. Bennett*, 138 Ga. 118, 74 S. E. 838; *Napier Bros. v. Woodall*, 118 Ga. 830, 45 S. E. 684; *Turman v. Cargill*, 54 Ga. 663.

74. Del.—*Fanning v. Miller*, 4 Boyce 527, 89 Atl. 737; *Armstrong v. Brockson*, 3 Penne. 587, 53 Atl. 53. Fla.—*Ex parte Henderson*, 6 Fla. 279. Va.—See *Shafer v. Chesapeake & O. R. Co.*, 23 S. E. 221; *Norfolk & W. R. Co. v. Clark*, 92 Va. 118, 22 S. E. 867. W. Va.—*Lee v. Moss*, 68 W. Va. 664, 70 S. E. 555, rule applies only to appeals by defendant.

[a] *Distinction Between Appeal by Plaintiff and One by Defendant.*—"If the plaintiff takes an appeal from the justice, the amount claimed in his summons or complaint will test the right to an appeal; but if the defendant asks an appeal, the test is the amount of the principal of the judgment, unless the defendant filed an offset or counterclaim and was defeated as to it. Why is the test as to the defend-

c. *Costs*.⁷⁵—Where appellate jurisdiction is determined by the amount of the judgment rendered, costs are not to be included,⁷⁶ and the same rule applies where the amount of the claim made by plaintiff is regarded as the test of appellate jurisdiction.⁷⁷

d. *Interest*.⁷⁸—Where the cause of action bears interest, the interest accruing from the date of institution of the suit to the date of judgment is to be included in determining appellate jurisdiction;⁷⁹ though in some states interest is, by statute, expressly excluded from consideration.⁸⁰ Judgment may be rendered by the appellate court for such an amount in excess of the jurisdiction of the justice's court as was occasioned by interest accruing after the taking of the appeal.⁸¹

e. *Effect of a Counterclaim or Set-Off*.—If a counterclaim or set-off has been interposed by the defendant and passed upon by the court, and disallowed, in whole or in part, the defendant may appeal from the judgment, if a sufficient amount be involved in his claim to confer jurisdiction on the appellate court,⁸² and he may also appeal if the jurisdictional amount was involved in plaintiff's case, irrespective of the amount of his counterclaim or set-off.⁸³ So, too, the plaintiff may appeal, where the amount of defendant's counterclaim is sufficient to

ant the amount of the recovery against him? Because that is the extent of his loss or grievance." *Lee v. Moss*, 68 W. Va. 664, 70 S. E. 555.

75. See generally *infra*, XII, E, 9, k.

76. *Conn.*—*Curtis v. Gill*, 34 Conn. 49. *Del.*—But see *Ringgold v. Griffin*, 1 Har. 224. *N. Y.*—*Matter of Marsh*, 19 Johns. 171. *Va.*—*Shafer v. Chesapeake & O. R. Co.*, 23 S. E. 221; *Norfolk & W. R. Co. v. Clark*, 92 Va. 118, 22 S. E. 867.

77. *Nichols v. Wood*, 66 Iowa 225, 23 N. W. 641; *Curran v. Excelsior Coal Co.*, 63 Iowa 94, 18 N. W. 698; *Dodd v. Cady*, 1 Minn. 289.

78. See generally *infra*, XII, E, 9, g.

79. *Ga.*—*Magarahan v. Wright*, '83 Ga. 773, 10 S. E. 584; *Dykes v. Woolsey*, 62 Ga. 608. *Ia.*—*Noland v. Sickler*, 149 Iowa 193, 128 N. W. 340. *Neb.* *Finch v. Hartpence*, 29 Neb. 368, 45 N. W. 684. *Compare* *Moise v. Powell*, 40 Neb. 671, 59 N. W. 79, interest is not to be considered where no prayer for its recovery was interposed. *Vt.*—*Smith v. Smith*, 15 Vt. 620.

[a] The fact that by reason of postponements trial of the case was delayed so that when judgment was finally rendered the interest made its amount barely such as to authorize an appeal by defendants, does not affect

such right. *Noland v. Sickler*, 149 Iowa 193, 128 N. W. 340.

80. *Ft. Worth State Bank v. Little* (Tex. Civ. App.), 168 S. W. 55 (interest which is allowed as damages); *Norfolk & W. R. Co. v. Clark*, 92 Va. 118, 22 S. E. 867.

81. *Hemmingway Co. v. Keagle*, 181 Ill. App. 5, the record must affirmatively show that the excess was due to such interest.

82. *Del.*—See *Fanning v. Miller*, 4 Boyce 527, 89 Atl. 737. *Ga.*—*Reedy v. Helms*, 54 Ga. 121; *Croft v. Broxton Artificial Stone Wks.*, 4 Ga. App. 92, 60 S. E. 1015. *Ind.*—*Hutts v. Williams*, 55 Ind. 237. *Kan.*—*Moore v. Toennisson*, 28 Kan. 608. See *Brooks v. Wright*, 19 Kan. 501. *Minn.*—*Contra*, *Ross v. Evans*, 30 Minn. 206, 14 N. W. 897, where the statute referred expressly to "amount claimed in the complaint." *Tex.*—*Texas & P. Ry. Co. v. Hayes*, 4 Tex. Civ. App. 88, 23 S. W. 443. *Vt.*—*Sherwin v. Colburn, Davis & Co.*, 25 Vt. 613.

But see *Fowler v. Stocking*, 5 Day (Conn.) 539.

[a] Amount of plaintiff's claim and of defendant's counterclaim cannot be added together to confer appellate jurisdiction. *Tucker v. Williams* (Tex. Civ. App.), 56 S. W. 585.

83. See *Dyar v. Scott*, 99 Ga. 96, 24 S. E. 855.

authorize an appeal though his own claim is insufficient in amount.⁸⁴ A fictitious counterclaim, interposed for the purpose of insuring an appeal, will not operate to confer appellate jurisdiction,⁸⁵ and an appeal from a judgment in favor of the plaintiff will be dismissed where the amount of plaintiff's claim was not appealable and defendant's counterclaim shows on its face that no cause of action is stated therein.⁸⁶ If the counterclaim has been abandoned,⁸⁷ as by failure to offer evidence in support of it,⁸⁸ its averments cannot operate to confer appellate jurisdiction, but the fact that the appellate court determines that the counterclaim does not state a cause of action, does not oust it of jurisdiction of the appeal.⁸⁹

f. *Remission of Excessive Claim or Verdict.*⁹⁰ — The plaintiff may remit a portion of his judgment in the justice's court and thus reduce it to such an amount as will not authorize the defendant to appeal,⁹¹ and a defendant who has interposed a counterclaim or set-off may also make a remission.⁹² The remission is effective even though the justice enters judgment for more than is claimed.⁹³ The remittitur may be made at any time before the judgment is rendered,⁹⁴ or the appeal

84. *Perry v. Conger*, 65 Iowa 588, 22 N. W. 688 (where the judgment was against plaintiff for the costs); *Schneider v. Luckie* (Tex. Civ. App.), 47 S. W. 685, plea in reconvention.

[a] Pleading denominated a counterclaim but which is in reality merely an affirmative defense, does not furnish the basis of an appeal to the plaintiff. *Boyle v. Wilcox*, 59 Iowa 466, 13 N. W. 428.

85. 1a.—*Chicago & N. W. Ry. Co. v. Weaver*, 112 Iowa 101, 83 N. W. 795. N. Y.—See *Fuller v. Brierley*, 36 How. Pr. 47. Vt.—*Brush v. Hurlburt*, 2 Vt. 46. W. Va.—*Rose v. O'Brien*, 87 S. E. 378; *McDonald Colliery Co. v. Crotty*, 69 W. Va. 407, 71 S. E. 568.

[a] Good faith is to be determined by the appellate court. *Chicago & N. W. Ry. Co. v. Weaver*, 112 Iowa 101, 83 N. W. 795.

86. *Campbell v. Lewis Bros.*, 83 Iowa 583, 50 N. W. 208.

87. *Fanning v. Miller*, 4 Boyce (Del.) 527, 89 Atl. 737; *McQueen v. McDaniel* (Tex. Civ. App.), 109 S. W. 219; *Galveston, H. & S. A. R. Co. v. Schlather* (Tex. Civ. App.), 78 S. W. 953; *Texas & N. O. Ry. Co. v. Hooks*, 30 Tex. Civ. App. 325, 70 S. W. 233.

[a] Failure of defendant to appeal is not an abandonment of his counterclaim so as to deprive the court of jurisdiction of an appeal by plaintiff. *Schneider v. Luckie* (Tex. Civ. App.), 47 S. W. 685.

88. *Fanning v. Miller*, 4 Boyce (Del.) 527, 89 Atl. 737; *Texas & N. O. Ry. Co. v. Hooks*, 30 Tex. Civ. App. 325, 70 S. W. 233. And see *McDonald Colliery Co. v. Crotty*, 69 W. Va. 407, 71 S. E. 568.

89. *Bates v. Phoenix Pub. Co.*, 50 Neb. 79, 69 N. W. 305.

90. See generally *infra*, XII, E, 10, b.

91. *Henry v. Chicago, R. I. & P. R. Co.*, 127 Iowa 577, 103 N. W. 793; *Rust v. Olson*, 113 Iowa 571, 85 N. W. 799; *Young v. Stuart*, 104 Iowa 597, 73 N. W. 1045; *Lynch v. Bruner*, 199 Iowa 669, 68 N. W. 908; *Knox v. Nicoli*, 97 Iowa 687, 66 N. W. 876; *Vorwald v. Marshall*, 71 Iowa 576, 32 N. W. 510; *Milner v. Gross*, 66 Iowa 252, 23 N. W. 654.

[a] In actions of replevin, where the successful party has the option of recovering the property or its value, he may elect to take its value and may remit any excess over the amount necessary to authorize an appeal by defendant. *Rust v. Olson*, 113 Iowa 571, 85 N. W. 799.

92. See *Bell v. Hartwig* (Iowa), 105 N. W. 833.

93. *Henry v. Chicago, R. I. & P. R. Co.*, 127 Iowa 577, 103 N. W. 793 (omission or mistake of justice may be corrected by appellate court); *Young v. Stuart*, 104 Iowa 597, 73 N. W. 1045.

94. *Schultz v. Chicago, R. I. & P. R. Co.*, 75 Iowa 240, 39 N. W. 289.

perfected.⁹⁵ A plaintiff may bring his action for and claim an amount less than the facts would entitle him to recover, though his action operates to prevent an appeal from being taken from the judgment, without working a fraud on the appellate court.⁹⁶

Excessive Verdict. — The successful party may cure a verdict in excess of the jurisdictional amount by remitting the excess, if the amount in controversy be within the jurisdiction,⁹⁷ but he cannot thus confer jurisdiction where the amount in controversy was too much or too little.⁹⁸

g. Method of Determining Jurisdiction. — The amount of a party's claim and its subsequent disallowance are matters which must affirmatively appear from the record.⁹⁹ The appellate court can, under the practice in some states, look only to the transcript certified to it by the justice of the peace;¹ in other states resort may be had not only to the transcript but to oral testimony.² In some states, the fact that the requisite amount is involved is to be determined from the summons and the cause of action attached,³ from the pleadings or respective oral

[a] **May be made after appeal bond** has been filed if no judgment has been entered at the time. *Rust v. Olson*, 113 Iowa 571, 85 N. W. 799; *Knox v. Nicoli*, 97 Iowa 687, 66 N. W. 876.

95. *Lynch v. Bruner*, 99 Iowa 669, 68 N. W. 908.

96. *Texas & N. O. Ry. Co. v. Jones* (Tex. Civ. App.), 95 S. W. 746; *Ward v. Evans*, 49 W. Va. 184, 38 S. E. 524.

[a] **A plaintiff whose claim is in an appealable amount** (1) but whose recovery is for an amount which is insufficient to warrant an appeal, may likewise reduce the amount of his claim and thus defeat defendant's right of appeal. *Vorwald v. Marshall*, 71 Iowa 576, 32 N. W. 510; *Bateman v. Sisson*, 70 Iowa 518, 30 N. W. 870; *Leighow v. Northumberland Bridge Co.*, 2 Pa. Co. Ct. 622. (2) But the claim cannot be reduced after a jury has been empaneled and before the trial (*Barrackman v. Girard*, 26 Kan. 284), (3) or after the testimony is closed. *Evans v. Head*, 7 Wis. 399.

97. *Morgan v. St. Louis, I. M. & S. Ry. Co.*, 106 Ark. 74, 152 S. W. 1023.

98. *People v. Skinner*, 13 Ill. 287, 54 Am. Dec. 432; *Hemmingway Co. v. Keagle*, 181 Ill. App. 5.

99. *Fanning v. Miller*, 4 Boyce (Del.) 527, 89 Atl. 737 (counterclaim); *Pepper v. Warren*, 2 Marv. (Del.) 225, 43 Atl. 91.

1. *Neb.*—*Bates v. Phoenix Pub. Co.*, 50 Neb. 79, 69 N. W. 305. *Tex.*—*Maass v. Solingsky*, 67 Tex. 290, 3 S. W. 289; *Spencer v. Nugent* (Tex. Civ. App.),

68 S. W. 729. *Vt.*—*Porter v. Bishop*, 77 Vt. 163, 59 Atl. 176.

[a] **Statement in the petition of the amount in controversy controls the entry by the justice in the docket**, where both are a part of and appear in the transcript. *Texas & P. Ry. Co. v. Hood*, 59 Tex. Civ. App. 363, 125 S. W. 982.

[b] **Where the pleadings are oral**, see *Maass v. Solingsky*, 67 Tex. 290, 3 S. W. 289; *Galveston, H. & S. A. Ry. Co. v. Brown* (Tex. Civ. App.), 175 S. W. 749; *Texas & P. Ry. Co. v. Hayes*, 4 Tex. Civ. App. 88, 23 S. W. 443. But see *Atchison, T. & S. F. Ry. Co. v. Moore* (Tex. Civ. App.), 139 S. W. 608.

2. *Collins v. Collins*, 37 Pa. 387. And see *Givens v. Ledebrink*, 31 Pa. Super. 298; *Stollars v. East Finley*, 3 Pa. Co. Ct. 209.

3. *Humphrey v. Johnson*, 13 Ga. App. 557, 79 S. E. 530.

[a] **Copy of the account sued upon attached to the summons, controls the amount of plaintiff's claim as stated in the summons.** *Griffin v. Bradley*, 110 Ga. 327, 35 S. E. 344.

[b] **In a suit on a bond in the penal sum of \$100, defective as a forthcoming bond but good as a common-law bond, there being nothing to indicate that the recovery could be limited to \$50, the amount necessary to give appellate jurisdiction, it sufficiently appears that more than that amount was claimed and involved.** *Wall v. Mount*, 121 Ga. 831, 49 S. E. 778.

claims of the parties,⁴ or from the bill of particulars.⁵ When the plaintiff's specifications exceed a named sum or when, to recover he must introduce an exhibit in writing exceeding that sum the case is appealable, in some states.⁶ The determination on appeal, of the question whether the justice had jurisdiction of the action, is to be made from the evidence and not from the face of the record.⁷

6. **In Case of an Election of Remedies.**—If a tort be waived and an action is brought on the implied contract, jurisdiction is to be determined as in ordinary contract actions,⁸ though there is authority to the contrary.⁹ If a breach of contract also involves a tort, the contract may be waived and the claim for damages for the tort, made in good faith, is the test of jurisdiction.¹⁰

7. **Fictitious Demands.**—For a party knowingly and intentionally to allege a fictitious amount as the sum in controversy, for the purpose of conferring jurisdiction upon a particular court, constitutes a fraud upon the court,¹¹ and the court will, on motion, dismiss the action.¹² The presumption is that the claim set forth was made in good faith.¹³

4. *Henry v. Chicago*, R. I. & P. R. Co., 127 Iowa 577, 103 N. W. 793; *Stern v. Wilson*, 68 Iowa 714, 28 N. W. 34 (and not from the evidence in the appellate court); *Nichols v. Wood*, 66 Iowa 225, 23 N. W. 641; *Lundak v. Chicago & N. W. Ry. Co.*, 65 Iowa 473, 21 N. W. 783.

5. *Bates v. Phoenix Pub. Co.*, 50 Neb. 79, 69 N. W. 305; *Moise v. Powell*, 40 Neb. 671, 59 N. W. 79; *Kingsbury v. Franz*, 40 Neb. 400, 58 N. W. 936.

6. *Perry v. Gay*, 52 Vt. 615; *Concord v. National Bank*, 51 Vt. 144; *Williams v. Mason*, 45 Vt. 372; *Connecticut & P. R. R. Co. v. Bates*, 32 Vt. 420.

[a] The word "exhibit" means "a writing offered as the basis of recovery." *Fisher v. Tupper*, 73 Vt. 352, 50 Atl. 1106. And see *Crosby v. Enterprise Cheese Co.*, 67 Vt. 638, 32 Atl. 494; *Concord v. National Bank*, 51 Vt. 144; *Williams v. Mason*, 45 Vt. 372; *Warren v. Newfane*, 25 Vt. 250; *Town of Weston v. Marsh*, 12 Vt. 420.

[b] In an action on an account, defendant, to be entitled to appeal must file an affidavit stating he has a good defense to more than \$20 of the plaintiff's account. *Scott v. Darling*, 66 Vt. 510, 29 Atl. 993.

7. *Happel v. Brethauer*, 70 Ill. 166, 22 Am. Rep. 70; *Swingley v. Haynes*, 22 Ill. 214; *Clark v. Whitbeck*, 14 Ill. 393; *Hough v. Leonard*, 12 Ill. 456; *Ballard*

v. McCarty, 11 Ill. 501; *Rogers v. Blanchard*, 7 Ill. 335.

8. *Stroud v. Life Ins. Co.*, 148 N. C. 54, 61 S. E. 626; *Scottish Carolina T. & L. Co. v. Brooks*, 109 N. C. 698; 14 S. E. 315. See *Manning v. Fountain*, 147 N. C. 18, 60 S. E. 645; *Parker v. Southern Exp. Co.*, 132 N. C. 128, 43 S. E. 603.

9. *Edwards v. Cowper*, 99 N. C. 421, 424, 6 S. E. 792. See *Dunn v. French*, 2 Binn. (Pa.) 173.

10. *Bowers v. Richmond & D. R. Co.*, 107 N. C. 721, 12 S. E. 452, action against carrier for failure to deliver goods shipped.

11. *Burmister & Sons Co. v. Empire Gold M. & M. Co.*, 8 Ariz. 158, 71 Pac. 961.

12. Cal.—See *Becker v. Superior Court*, 151 Cal. 313, 318, 90 Pac. 689. La.—*Nick v. Bensberg*, 123 La. 351, 48 So. 986. See *State v. Judge of the Third Judicial Dist.*, 47 La. Ann. 1022, 17 So. 479. Md.—*Darrell v. Bischoe*, 94 Md. 684, 51 Atl. 410, fictitious valuation by appraisers in a replevin action. Mich.—*Fix v. Sissung*, 83 Mich. 561, 47 N. W. 340, 21 Am. St. Rep. 616. N. C.—*Froelich v. Southern Exp. Co.*, 67 N. C. 1.

13. Fla.—*Seaboard Air Line Ry. Co. v. Ray*, 52 Fla. 634, 42 So. 714. Ga.—*Browne v. Edwards*, 122 Ga. 277, 50 S. E. 110. Okla.—*St. Louis & S. F. Ry. Co. v. Egbert*, 27 Okla. 168, 111 Pac. 202. Tex.—*Western Union Tel. Co. v. Siddall* (Tex. Civ. App.), 86 S. W. 343. Vt.—*Bickford v. Travelers'*

The fictitious nature of the demand may appear from the face of the complaint,¹⁴ or from the evidence taken at the trial.¹⁵ Any act evidencing an intention improperly to invoke the court's jurisdiction will be regarded as fraudulent.¹⁶ And in some jurisdictions a claim or demand is not considered to have been in good faith unless it is so related to the facts alleged that it follows as a natural and reasonable conclusion from

Ins. Co., 67 Vt. 418, 32 Atl. 230; Worcester v. Lampson, 55 Vt. 350; Joyal v. Barney, 20 Vt. 154.

14. Lehnhardt v. Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac. 195 (where it was obvious that a fictitious amount was prayed for in order to obtain a judicial construction of a statute by a higher court); Wiseman v. Witherow, 90 N. C. 140.

[a] **Prayer Is Not Conclusive.**—"It has never been held that the prayer of the complaint should conclude the question of jurisdiction, regardless of the allegations on which it is founded." Lehnhardt v. Jennings, 119 Cal. 192, 199, 48 Pac. 56, 51 Pac. 195. Where pleading shows impossibility of recovery of the amount claimed in prayer, see *supra*, XII, E, 1, b.

15. Mobile, J. & K. C. R. Co. v. Hitt, 99 Miss. 679, 55 So. 484 (where plaintiff after payment in part by one defendant, still claimed in an amended complaint, the right to recover from another jointly liable, the full amount of his damages); Miller v. Livingston, 37 Vt. 467; Town of Putney v. Bellows, 8 Vt. 272; Southwick v. Merrill, 3 Vt. 320.

[a] "While values of property depend in a large measure upon opinion and this court, when the value is near the limit, will not declare, in all cases a want of jurisdiction, if, in good faith the declaration alleges the value within the jurisdiction of the circuit court, nevertheless it will not hold that jurisdiction is obtained when the fraud upon the court is apparent, as it is in this case." Fix v. Sissung, 83 Mich. 561, 47 N. W. 340, 21 Am. St. Rep. 616, property alleged to be worth \$200 shown to be of the value of \$9.

[b] "Because appellee swore to a sum less than that for which he had sued, and less than the jurisdiction of the court, was not conclusive that fraud had been committed on the jurisdiction by the allegations in the petition." Johnson v. Borden (Tex. Civ. App.),

25 S. W. 1131. And see Potts v. Hines, 57 Miss. 735.

[c] "Jurisdiction is not sustained by the mere sworn opinion of the litigant as to the amount involved where the circumstances of the case show differently." Nick v. Bensberg, 123 La. 351, 48 So. 986.

[d] A fictitious value placed on the property by appraisers, for the sole purpose of conferring jurisdiction may be shown by testimony, and when established the action should be dismissed. Darrell v. Biscoe, 94 Md. 684, 51 Atl. 410.

16. See cases *infra*, this note.

[a] Antedating a credit entered on a note in order to reduce the amount due to a sum within the court's jurisdiction, is fraudulent. Ramsour & Co. v. Barrett, 50 N. C. 409.

[b] Failure to give credit for a payment proved to have been made is not necessarily proof of a fraudulent intent to confer jurisdiction. Oliver v. Edward Weil Co. (Tex. Civ. App.), 138 S. W. 1109. But see Miller v. Livingston, 37 Vt. 467.

[c] **Voluntary Dismissal of One of Several Causes of Action.**—"It would amount to a fraud on the jurisdiction of the court for a plaintiff to use an alleged cause of action for the sole purpose of bringing another within the jurisdiction of the court and, after that purpose had been accomplished, on his own motion to abandon the cause so employed." Barnes v. Metropolitan St. Ry. Co., 119 Mo. App. 303, 306, 95 S. W. 971.

[d] Failure to establish one of several causes of actions pleaded "was of itself no indication of bad faith in its prosecution and consequently was without effect on the subject of jurisdiction." Barnes v. Metropolitan St. Ry. Co., 119 Mo. App. 303, 306, 95 S. W. 971.

[e] **Claiming an attorney's fee** where neither the contract nor any statute authorizes its recovery, will be treated as a fictitious claim. St. Paul

them.¹⁷ But the mere fact of recovery of less than the jurisdictional amount, on a claim which was within the court's jurisdiction, does not establish bad faith.¹⁸ In one state, at least, the alleged bad faith of a claim, sufficient on its face, must be raised by a plea to the jurisdiction filed prior to the commencement of the trial.¹⁹ The appellate court will review the action of the trial court in determining the question of good faith where such decision is based on the pleadings and the facts appear in the record on appeal.²⁰

Fire & Mar. Ins. Co. v. Peck, 37 Okla. 85, 130 Pac. 805.

[f] Substitution of several smaller notes for the original note, by act of the parties, so that a justice of the peace may have jurisdiction, is not a fraudulent act. Fortescue v. Spencer, 24 N. C. 63.

[g] Admissions of plaintiff adversely affecting the amount he believed himself entitled to recover are not conclusive unless clearly shown to have referred to his belief at the time of instituting his action. Bickford v. Travelers' Ins. Co., 67 Vt. 418, 32 Atl. 230.

17. Wooten v. S. R. Biggs Drug Co., 169 N. C. 64, 85 S. E. 140; Bowers v. Richmond & D. R. Co., 107 N. C. 721, 12 S. E. 452.

[a] "The term 'good faith' may be found in many of the opinions of this court dealing with the question of jurisdiction, but it means more than an honest purpose. It implies that the demand shall be related to the facts alleged and shall follow as a natural and reasonable conclusion from them." Wooten v. Biggs Drug Co., 169 N. C. 64, 85 S. E. 140.

18. St. Louis & S. F. Ry. Co. v. Egbert, 27 Okla. 168, 111 Pac. 202.

19. Nashville C. & St. L. Ry. Co. v. Grayson County Nat. Bank, 100 Tex. 17, 93 S. W. 431; Hoffman v. Cleburne Bldg. & L. Assn., 85 Tex. 409, 22 S. W. 154; Carter v. Hubbard, 79 Tex. 356, 15 S. W. 392; Tidball v. Eichoff, 66 Tex. 58, 17 S. W. 263; Dwyer v. Bassett, 63 Tex. 274; Cisco Oil Mill v. Van Geem (Tex. Civ. App.), 166 S. W. 439; Barnes v. Bryce (Tex. Civ. App.), 140 S. W. 240; Lane v. General Acc. Ins. Co. (Tex. Civ. App.), 113 S. W. 324; McDaniel v. Staples (Tex. Civ. App.), 113 S. W. 596; Groesbeck v. T. H. Thompson Milling Co. (Tex. Civ. App.), 86 S. W. 346; Hamilton v. Peck (Tex. Civ. App.), 38 S. W. 403.

Compare Grief v. Texas Cent. R. Co. (Tex. Civ. App.), 163 S. W. 345.

[a] "The test by which to determine the sufficiency of a plea of this character is, whether the averments, on their face showing jurisdiction, were yet fraudulently made, that is, in bad faith and for the purpose of deceiving." Gulf, C. & S. F. Ry. Co. v. Wilm, 9 Tex. Civ. App. 161, 28 S. W. 925.

[b] Plea filed after plaintiff's evidence (1) is all in comes too late and an allegation that the facts were not known to defendant at any earlier time does not aid the plea. Levy v. Lupton (Tex. Civ. App.), 156 S. W. 362; Johnson v. Borden (Tex. Civ. App.), 25 S. W. 1131. (2) It should be filed prior to answering on the merits. O'Neil v. Murray (Tex. Civ. App.), 94 S. W. 1090.

[c] Issues of fact (1) as to plaintiff's good faith must be determined by proof, as any other fact. Houston Oil Co. v. Davis (Tex. Civ. App.), 154 S. W. 337. (2) Jury should pass on the issue where a question of fact is involved. Levy v. Lupton (Tex. Civ. App.), 156 S. W. 362; Heierman v. Robinson, 26 Tex. Civ. App. 491, 63 S. W. 657; Sozaya v. Patterson (Tex. Civ. App.), 23 S. W. 745.

[d] Submission to the court bars the right of defendant to afterwards submit the plea to the jury. Connellee v. Drake, 4 Wills. Civ. Cas. §98 (Tex. App.), 16 S. W. 175.

[e] Such a plea is waived by failure to promptly call it up for determination. Watson v. Mirike, 25 Tex. Civ. App. 527, 61 S. W. 538.

[f] Judgment should be one of dismissal, and not on the merits, if the plea is sustained. Strickland v. Sloon (Tex. Civ. App.), 50 S. W. 622.

20. Field v. Randall, 51 Vt. 33; Joyal v. Barney, 20 Vt. 154.

[a] Where the damages claimed are unliquidated there will be no review on

8. Amended Pleadings.—In jurisdictions in which the claim in the ad damnum clause of the complaint is the test of jurisdiction, it is commonly held that the claim there made may be increased,²¹ or diminished²² by amendment, where the court has jurisdiction of the subject matter, in order to bring the action within the jurisdiction of the court, provided the cause of action in such cases is not changed.²³ And it has been held that since an amendment is substituted for and speaks from the date of the original pleading, the amended pleading is the test of jurisdiction so far as the amount in controversy is concerned.²⁴ But in some states a complaint cannot be amended so as to bring the cause of action within the jurisdiction of the court, either by increasing²⁵ or diminishing²⁶ the amount claimed; though even in such states, where a

appeal. *Clark v. Crosby*, 37 Vt. 188; *McGray v. Wheeler*, 18 Vt. 502.

21. *Merrill v. Curtis*, 57 Me. 152. *Contra*, *Sanders v. Pierce*, 68 Vt. 468, 35 Atl. 377, even though the statement be a clerical error.

22. *Ind.*—*Epperly v. Little*, 6 Ind. 344. *Mass.*—*Hall v. Hall*, 200 Mass. 194, 86 N. E. 363; *Hart v. Waitt*, 3 Allen 532. *Mo.*—*Burden v. Hornsby*, 50 Mo. 238; *Denny v. Eckelkamp*, 30 Mo. 140; *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612. *Vt.*—*Compare Chadwick v. Batchelder*, 46 Vt. 724.

[a] **Court Cannot Compel Plaintiff To File Amendment Reducing the Amount Claimed.**—*Wright v. Potomaska Mills Corp.*, 138 Mass. 328.

23. *Knight v. Quincy, O. & K. C. Ry. Co.*, 120 Mo. App. 311, 96 S. W. 716. See generally the title "**New Cause of Action or Defense.**"

[a] **Rule Stated.**—"It may be conceded that when the facts pleaded in the petition disclose a cause of action of a nature or class without the jurisdiction of the court in which the action is brought, no amendment should be permitted to confer jurisdiction since such amendment to state a jurisdictional cause would necessarily state one of an entirely different nature from that amended and therefore would not be an amendment but a substitution of one cause for another. But where the facts pleaded present a cause of a nature belonging to the jurisdiction of the court and the lack of jurisdiction over the particular action results solely from the insufficiency of the amount of the relief demanded and the facts pleaded would sustain a money recovery in an amount falling within the jurisdiction, an amendment of the petition that merely so expands the amount

of the recovery sought is not a change of the cause of action and should be permitted." *Knight v. Quincy, O. & K. C. R. R. Co.*, 120 Mo. App. 311, 322, 96 S. W. 716.

24. *Grief v. Texas Cent. R. Co.* (Tex. Civ. App.), 163 S. W. 345; *Edwards v. Dennington* (Tex. Civ. App.), 161 S. W. 929; *Ford v. Mitchell* (Tex. Civ. App.), 146 S. W. 361 ("the latest pleading in the justice's court determines jurisdiction"); *Mecca Fire Ins. Co. v. Blohopolo* (Tex. Civ. App.), 141 S. W. 358; *Peeples v. Slayden-Kirksey Woolen Mills* (Tex. Civ. App.), 90 S. W. 61 (oral amendment in justice's court); *Wisley v. Houston Nat. Bank*, 28 Tex. Civ. App. 268, 67 S. W. 195; *Watson v. Mirike*, 25 Tex. Civ. App. 527, 61 S. W. 538.

25. *Ga.*—*Gleaton v. Cothran*, 16 Ga. App. 35, 84 S. E. 486. *Okla.*—*St. Louis & S. F. Ry. Co. v. Egbert*, 27 Okla. 168, 111 Pac. 202. *Vt.*—*Sanders v. Pierce*, 68 Vt. 468, 35 Atl. 377.

26. *Rose v. Christinett*, 77 Ark. 582, 92 S. W. 866; *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642.

[a] **Basis of the Rule.**—"The jurisdiction of the court to proceed to a hearing is tested in advance from the pleadings, and where they affirmatively show that the alleged cause of action is beyond the jurisdiction of the court, another cause of action within the jurisdiction of the court cannot be supplied by amendment." *Modern Laundry v. Dilley*, 111 Ark. 350, 163 S. W. 1197, 1198.

[b] "Any order of the court except that of dismissal would be wholly void and ineffectual." *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 134, 54 Pac. 642.

claim is apparently for an amount exceeding the jurisdiction of the court, if it is not so in fact, this may be set forth by an amendment.²⁷ An amended complaint made and filed with the consent of both parties, in which a cause of action within the jurisdiction of the court is stated, confers jurisdiction upon the court.²⁸

In jurisdictions in which actions are commenced by service of a summons, which does not of itself disclose the nature of the action or the amount or value in controversy, the court acquires jurisdiction by such service and has power to amend the complaint, if it demands judgment for an excessive amount;²⁹ but if the complaint is served with the summons jurisdiction is acquired, if at all, upon the demand made in the complaint and this cannot be amended to confer jurisdiction.³⁰

If the action is commenced in a court of unlimited jurisdiction and for any reason is transferred to a court whose jurisdiction is limited in amount, the complaint may there be allowed to be amended, if necessary, to make such jurisdictional averments as the facts involved justify.³¹

The allowance of an amendment increasing the amount in controversy beyond the jurisdiction of the court, though an error, does not destroy the jurisdiction of the court, and may be corrected and the proceedings continued.³²

27. *Johnson v. Johnson*, 113 Ga. 942, 39 S. E. 311. See *Delamater v. Martin*, 117 Ga. 139, 43 S. E. 459.

[a] If the prayer for relief or ad damnum clause be entirely omitted, (1) the complaint may be amended, even after verdict, so as to state a claim within the jurisdiction of the court. *Boyd v. Roanoke R. & Lumb. Co.*, 152 N. C. 184, 43 S. E. 631; *McPhail v. Johnson*, 115 N. C. 298, 20 S. E. 373; *Lamphere v. Cowen*, 42 Vt. 175. Compare *Hoit v. Molony*, 2 N. H. 322, total omission of ad damnum clause cannot be remedied. (2) The purpose of such an amendment is not to confer jurisdiction but to show that the court had jurisdiction when the action was commenced. *Boyd v. Roanoke R. & Lumb. Co.*, 132 N. C. 184, 43 S. E. 631.

28. *Charlotte Planing Mills v. McNinch*, 99 N. C. 517, 6 S. E. 386.

[a] Effect of Proceeding With the Case.—An amendment reducing the claim made to one within the court's jurisdiction was made during the trial and after the defendant had moved to dismiss for want of jurisdiction. "The subject matter of the action, both as respects its nature and the amount claimed, as disclosed by the amended complaint was clearly within the jurisdictional limits of the justice. Both parties thereafter, without objection,

litigated it before the court by the introduction of testimony on each side, and the submission of the same upon argument to the jury. This was equivalent to the institution and litigation of an action over which the justice had undoubted jurisdiction by the voluntary appearance and argument of the parties." *Lamberton v. Raymond*, 22 Minn. 129.

29. *Van Clief v. Van Vechten*, 130 N. Y. 571, 29 N. E. 1017 (*distinguishing McIntyre v. Carriere*, 17 Hun [N. Y.] 64, which was based on the earlier practice); *National Surety Co. v. Rosenberg*, 158 App. Div. 896, 142 N. Y. Supp. 1043; *Owen v. Brown*, 78 Misc. 273, 139 N. Y. Supp. 451; *McDonald v. Truesdail*, 17 Hun (N. Y.) 65.

30. *Halpern v. Langrock Bros. Co.*, 169 App. Div. 464, 155 N. Y. Supp. 167; *Heffron v. Jennings*, 66 App. Div. 443, 73 N. Y. Supp. 410.

[a] Proof is required to show that the complaint was not served with the summons, in order to uphold an order allowing an amendment. *National Surety Co. v. Rosenberg*, 158 App. Div. 896, 142 N. Y. Supp. 1043.

31. *McNab v. Noonan*, 28 Wis. 434.

32. *Rose v. Christinett*, 77 Ark. 582, 586, 92 S. W. 866. See *Nashville, C. & St. L. Ry. Co. v. Grayson Co. Nat. Bank*, 100 Tex. 17, 93 S. W. 431; *Wood*

An appellate court cannot allow an amendment in an appealed case which will increase the amount claimed above that amount of which the trial court would have had jurisdiction,³³ nor can it, by allowing an amendment, cure a defect of jurisdiction in the trial court of either an insufficient or excessive claim.³⁴ If an amendment could have properly been allowed in the lower court it may be made on appeal.³⁵ A court to which an appeal has been taken cannot acquire original jurisdiction by allowing an amendment which will bring the action within its jurisdiction.³⁶

9. **Aggregate Demands.** — a. *In General.* — The various elements of damage set forth and sought to be recovered are to be treated as together constituting the amount in controversy.³⁷

b. *Claims and Obligations of More Than One Party.* — (I.) **Several Plaintiffs.** — (A.) **GENERALLY.** — Several plaintiffs, holding distinct claims against a defendant and having no joint interest cannot unite their claims in one action and thus give jurisdiction to a court;³⁸ and although the joinder of such persons as plaintiffs is permitted by an express statutory provision, it is the separate demand of each plaintiff which determines the court's jurisdiction over each claim.³⁹

v. J. M. Radford Groc. Co. (Tex. Civ. App.), 164 S. W. 1070.

33. Ind.—Pritchard v. Bartholomew, 45 Ind. 219. Mass.—Hall v. Hall, 200 Mass. 194, 86 N. E. 363. Neb.—Union Pac. Ry. Co. v. Ogilvy, 18 Neb. 638, 26 N. W. 464. Ohio.—Bickett v. Garner, 21 Ohio St. 659. Tex.—Boudon v. Gilbert, 67 Tex. 689, 4 S. W. 578; Vicars v. Tharp (Tex. Civ. App.), 174 S. W. 949; Chicago, R. I. & G. R. Co. v. Crenshaw, 51 Tex. Civ. App. 198, 112 S. W. 117. Wis.—Felt v. Felt, 19 Wis. 193.

[a] "The power of amendment of the appellate court is limited to the highest sum which the court from which the appeal was taken was authorized to render judgment, and accrued interest." Union Pac. Ry. Co. v. Ogilvy, 18 Neb. 638, 26 N. W. 464.

[b] The error will be cured by a subsequent amendment reducing the amount claimed to one within the court's appellate jurisdiction. Miller v. Newbauer (Tex. Civ. App.), 61 S. W. 974.

34. Mass.—Ladd v. Kimball, 12 Gray 139. N. C.—James v. McClamroch, 92 N. C. 362. Tex.—Brigman v. Aultman, Miller & Co. (Tex. Civ. App.), 55 S. W. 509.

35. Johnson v. Johnson, 113 Ga. 942, 39 S. E. 311; Miller v. Burrow (Tex. Civ. App.), 146 S. W. 958, cross-complaint.

36. Denton v. Town of Danbury, 48 Conn. 368.

[a] "The court of common pleas, having no jurisdiction of the cause by the appeal, had no jurisdiction to allow the amendment, or to make any order except to dismiss the appeal and erase the cause from the docket as soon as the want of jurisdiction came to its knowledge." Denton v. Town of Danbury, 48 Conn. 368, 372.

37. Parlin & Orendorff Imp. Co. v. Clements, 54 Tex. Civ. App. 356, 117 S. W. 495.

[a] Damages for conversion and for the wrongful detention (1) of property (Thompson v. Willard, 66 Ark. 346, 50 S. W. 870; Sanborn v. Contra Costa County, 60 Cal. 425), (2) or for its conversion and the cost of recovering its possession. Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12.

38. Cal.—Winrod v. Wolters, 141 Cal. 399, 74 Pac. 1037. La.—Larrieux v. Crescent City L. S., etc. Co., 30 La. Ann. 609; Stevenson v. Weber, 29 La. Ann. 105. Mass.—Chapman v. Banker & T. Pub. Co., 128 Mass. 478.

[a] Creditors' bills seem to form an exception to the rule stated in the text. Sizer v. Miller, 9 Paige (N. Y.) 605; Dix v. Briggs, 9 Paige (N. Y.) 595.

39. Piper v. Jacobson, 98 Ill. 389, corporation creditors.

(B.) **SUIT BY ONE ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED.** In an action brought by one or more persons as representative of a large number of persons similarly situated, and in order to prevent a multiplicity of suits, the amount in controversy is the entire fund sued for and not the plaintiff's interest or share in such fund;⁴⁰ and the same principle has been applied to actions by taxpayers.⁴¹

(II.) **Several Defendants.**—Where the amounts due from different defendants are based on a several, as distinct from a joint, liability, it is the amount claimed to be due from each individual which determines the jurisdiction of the court,⁴² even though by statute, several persons may properly be joined as parties defendant,⁴³ though it is sometimes

[a] **Mechanics' Liens.**—Creditors holding mechanics' liens are, under many statutes, authorized to bring a single action to enforce their claims, and in such cases, a several decree is rendered, and the claim of each lienholder is the test of jurisdiction. *Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785; *Keystone Min. Co. v. Gallagher*, 5 Colo. 23.

40. *Gorley v. City of Louisville*, 23 Ky. L. Rep. 1782, 65 S. W. 844; *Gonce-lier v. Foret*, 4 Minn. 13.

[a] **Claims of creditors of a corporation**, some of which claims are large enough to confer jurisdiction, although the claims of others are insufficient for that purpose, may all be determined in the same action. *Williams' Exr. v. Chamberlain*, 123 Ky. 150, 94 S. W. 29. Compare *Piper v. Jacobson*, 98 Ill. 339.

41. *Com. v. Scott*, 112 Ky. 252, 255, 65 S. W. 596, an action to recover an illegal tax.

[a] **In actions by a taxpayer to test the validity of a statute or ordinance** the effect of which will be to increase the burden of taxation, generally, the test of jurisdiction is the amount involved to the public, rather than that which the taxpayer individually may have at stake. *Fontenot v. Young*, 128 La. 20, 54 So. 408; *Sentell v. Avoyelles*, 48 La. Ann. 96, 18 So. 910; *Conery v. New Orleans W. W. Co.*, 39 La. Ann. 770, 2 So. 555; *Handy v. City of New Orleans*, 39 La. Ann. 107, 1 So. 593.

[b] **In an action to enjoin the collection of taxes**, the aggregate amount of the taxes payable by all the plaintiffs is the test of jurisdiction. *Girardin v. Dean*, 49 Tex. 243.

42. *Thomas v. Anderson*, 58 Cal. 99, action to recover a reward offered by several persons. See *Dake Adv. Agency*

v. Fielding J. Stilson Co., 22 Cal. App. 31, 133 Pac. 327.

[a] **Exception Where Liability May Be Enforced as an Incident to Another Action.**—Where a motion for a judgment against several sureties on an indemnity bond is made in a case in which the court has jurisdiction, the fact that the liability of each surety is below the jurisdictional amount, does not deprive the court of jurisdiction over the motion, which is considered merely as a proceeding in the main case. *Moore v. McSleeper*, 102 Cal. 277, 36 Pac. 593.

43. See *Texas & Pac. Ry. Co. v. Smith*, 34 Tex. Civ. App. 571, 79 S. W. 614, involving the liability of connecting carriers.

[a] **In actions by creditors of a corporation to enforce the statutory liability of stockholders for the debts of the corporation**, it is the several obligation of each stockholder which is involved and the claim made against each individual stockholder which is the test of jurisdiction as to such individual. *Myers v. Sierra Valley, etc. Assn.*, 122 Cal. 669, 55 Pac. 689; *Hyman v. Coleman*, 82 Cal. 650, 23 Pac. 62, 16 Am. St. Rep. 178; *Evans v. Bailey*, 66 Cal. xvii, 6 Pac. 424; *Derby v. Stevens*, 64 Cal. 287, 30 Pac. 820; *Johnson v. Hinkel*, 29 Cal. App. 78, 154 Pac. 487.

[b] **In an action involving title to land where plaintiff claims an entire tract, held under separate titles by several defendants claiming under a common grantor**, the value of the property claimed rather than the value of the interests of the defendants is the test of jurisdiction. *Derbes v. Romero*, 28 La. Ann. 644.

[c] **In creditors' bills in equity**, several debtors may be joined, and if

held that where persons severally liable upon the same contract may be sued in one action, the whole amount claimed is the test of jurisdiction.⁴⁴ If one of several defendants be a proper party, the fact that his individual pecuniary interest in the subject matter in issue does not amount in value to a sum within the court's jurisdiction is immaterial.⁴⁵ On the other hand in eminent domain proceedings in which various property owners with independent rights are made defendants, it has been held that the separate interests of each party governs the jurisdiction, rather than the aggregate amount involved.⁴⁶

c. *Several Obligations Constituting One Cause of Action.*—In jurisdictions in which it is permissible to unite in a single cause of action claims dependent upon different obligations, the aggregate amount claimed by the plaintiff is the test of jurisdiction.⁴⁷

d. *Uniting Causes of Action.*—(I.) *In General.*—Where several causes of action are united in a single action in determining the amount in controversy, the courts are not agreed as to whether the test is the total amount demanded or whether each count must be treated separately. In some cases the latter rule has been followed; hence the uniting of several causes of action, so that the total amount demanded is brought within the jurisdictional limit, does not confer jurisdiction

the amount due from all is within the jurisdiction of the court, it may act. *Van Cleef v. Sickles*, 5 Paige (N. Y.) 505.

44. *Clarey v. Marshall's Heirs*, 4 Dana (Ky.) 95; *State v. Cousin*, 31 La. Ann. 297; *Lartigue v. White*, 25 La. Ann. 291.

[a] *Basis for the Rule.*—"As for the purpose of a joint action, a several is treated as a joint contract, we presume that it was intended to be so considered for the purpose also of jurisdiction; and, consequently, the whole amount claimed in the action, however distributable should determine the question of jurisdiction." *Wilde & Co. v. Hayercraft*, 2 Duv. (Ky.) 309, 311, an action against several guarantors.

45. See case cited below.

[a] *In an action to enjoin payment of interest on municipal bonds*, their legality being attacked, the holder of a single coupon is a proper party defendant and necessarily interested in the determination of the question. *Keehn v. Wooster*, 13 Ohio Cir. Ct. 270.

46. *Louisiana Western R. Co. v. Hopkins*, 33 La. Ann. 806.

47. *Conn.*—*New London City Nat. Bank v. Ware R. R. Co.*, 41 Conn. 542; *Main v. First School District*, 18 Conn. 214. *Fla.*—See *Livingston v.*

L'Engle, 27 Fla. 502, 8 So. 723. *Ga.* *Green v. Lester*, 78 Ga. 86. *Ind.*—*Mays v. Dooley*, 59 Ind. 287; *State Bank v. Brooks*, 4 Blackf. 485; *Everett Piano Co. v. Bash*, 31 Ind. App. 498, 68 N. E. 329. *Ky.*—*Bakewell v. Howell*, 2 Metc. 268, several notes. *Md.*—See *Reese v. Hawks*, 63 Md. 130.

[a] *Rule Where Several Obligations Constitute but a Single Consideration.* Where "the consideration is stated, indeed, to consist of several debts due by the defendants to the plaintiff; but they are stated, not as considerations respectively for several promises, but as constituting together only one consideration for a single promise," the aggregate amount claimed may properly be considered. *Main v. First School Dist.*, 18 Conn. 214, 218.

[b] *In assumpsit*, (1) originally, the practice was "to make each demand to which the indebitatus count was applicable the subject of a separate indebitatus count. Subsequently, the mode used in the present case was adopted of combining several such demands in one such count and treating them all as forming the consideration of a single promise, and no objection appears to have been made to this course." *Main v. First School Dist.*, 18 Conn. 214, 219. (2) The earlier rule was applied in *Kline v. Wood*, 9 Serg. & R. (Pa.) 294.

over claims which would otherwise be too small;⁴⁸ and if the several causes of action are separately within the jurisdiction of the court it retains jurisdiction of each, although the aggregate amount demanded is too large.⁴⁹ So also if some of the causes of action are within its jurisdiction, but others are either below or above the specified amount, the court retains jurisdiction of the former but not of the latter.⁵⁰

Many courts, however, look solely to the general claim of the complaint, irrespective of the number of causes of action which may be stated, therein,⁵¹ or the number of counts employed,⁵² and especially is

48. *Ark.*—*Paris Mercantile Co. v. Hunter*, 74 Ark. 615, 86 S. W. 808; *Uptmoor v. Young*, 57 Ark. 528, 22 S. W. 169; *Manning v. Young*, 35 Ark. 287; *Wilson v. Mason*, 3 Ark. 494; *Berry v. Linton*, 1 Ark. 252. See *St. Louis, I. M. & S. Ry. Co. v. Edwards*, 94 Ark. 394, 127 S. W. 713. *Conn.* *Davis v. Seymour*, 59 Conn. 531, 21 Atl. 1004, 13 L. R. A. 210; *Camp v. Stevens*, 45 Conn. 92; *Nichols v. Hastings*, 35 Conn. 546. But see *Brennan v. Berlin Iron Bridge Co.*, 75 Conn. 393, 53 Atl. 779, applying a different rule to certain inferior courts. *Ind.*—*Jeffersonville, M. & I. R. Co. v. Brevoort*, 30 Ind. 324; *Indianapolis & C. R. Co. v. Elliott*, 20 Ind. 430. *Ky.*—*Harris v. Smith*, 7 Mon. 310; *Grant v. Tams & Co.*, 7 Mon. 218; *Lightfoot v. Payton*, Hard. 3. *N. Y.*—*People ex rel. Georner v. Crosby*, 1 How. Pr. 243.

49. *Ark.*—*Ft. Smith Paper Co. v. Templeton*, 113 Ark. 490, 168 S. W. 1092; *Little Rock & Ft. S. Ry. Co. v. Smith*, 66 Ark. 278, 50 S. W. 502; *Collins v. Woodruff*, 9 Ark. 463. *Conn.* *Johnson v. Cooke*, 85 Conn. 679, 84 Atl. 97, Ann. Cas. 1913C, 275; *Brennan v. Berlin Iron Bridge Co.*, 75 Conn. 393, 53 Atl. 779 (*construing* §811, Gen. Sts.); *Hoey v. Hoey*, 38 Conn. 386. *Miss.* *Drysdale v. Biloxi Canning Co.*, 67 Miss. 534, 7 So. 541.

50. *Wilson v. Mason*, 3 Ark. 494; *Cook v. Porter*, 1 Tyler (Vt.) 450.

51. *Cal.*—*Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21; *Lord v. Thomas*, 27 Pac. 410; *Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349; *Calloway v. Oro Min. Co.*, 5 Cal. App. 191, 89 Pac. 1070. *Colo.* See *Sams Automatic Car Coupler Co. v. League*, 25 Colo. 129, 54 Pac. 642, the facts stated in the complaint and not the ad damnum clause control. *Ia.* *Wedgewood & Co. v. Parr*, 112 Iowa 514, 84 N. W. 528. *La.*—*Learned v. Texas & P. R. Co.*, 128 La. 430, 54 So.

931, causes of action for animals killed at different times. *Mont.*—See *Reynolds v. Smith*, 48 Mont. 149, 135 Pac. 1190. *N. C.*—*Teal v. Templeton*, 149 N. C. 32, 62 S. E. 737; *Sloan v. Carolina Cent. R. R. Co.*, 126 N. C. 487, 36 S. E. 21; *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971; *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890; *Moore v. Nowell*, 94 N. C. 265. *Tex.*—*Smith Premier Sales Co. v. Connellee* (Tex. Civ. App.), 147 S. W. 1197.

[a] Where separate causes of action arise out of one wrongful act, the aggregate demand is to be considered in determining jurisdiction. *Waterman v. Glisson*, 115 Ga. 773, 42 S. E. 95, a count for breach of warranty and one alleging that defendant had acted in bad faith.

[b] Failure of One of Several Counts To State a Cause of Action. The aggregate demand made in the other counts becomes the test of jurisdiction. *Reeg v. McArthur*, 17 Cal. App. 203, 119 Pac. 105.

[c] Statute requiring a plaintiff having several demands to bring his action for the whole amount due applies only where in the aggregate, the amount claimed is not beyond the court's jurisdiction. *McDowell County Bank v. Wood*, 60 W. Va. 617, 55 S. E. 753; *Flat Top Groc. Co. v. McClaugherty*, 46 W. Va. 419, 33 S. E. 252.

52. *Vineyard v. Lynch*, 86 Mo. 684; *Hunt v. Hopkins*, 66 Mo. 98 (forty-two counts involving separate tax bills); *Fickle v. St. Louis, K. C. & N. R. R. Co.*, 54 Mo. 219 (four counts to recover damages for different animals killed); *Smith v. Clark*, 54 Mo. 58 (seven counts based on different bond coupons); *Barnes v. Metropolitan St. R. Co.*, 119 Mo. App. 303, 95 S. W. 971.

this the rule where the amount "demanded" is made the test of jurisdiction.⁵³ But it has been held that jurisdiction cannot be conferred by the attempted joinder of causes of action which are not legally capable of being united in the same complaint.⁵⁴

The fact that the total amount involved exceeds the jurisdiction, is immaterial if the excess is due to the joinder of a cause of action over which the court has jurisdiction independently of the amount in controversy;⁵⁵ and the same is true if the right to recover the excess is waived by the prayer of the complaint.⁵⁶

(II.) On Several Notes. — The conflict in authority as to the test of jurisdiction where several causes of action are united⁵⁷ exists in the case of action on several promissory notes constituting separate causes of action, some courts looking to the amount of each note,⁵⁸ others to the aggregate amount.⁵⁹ Where the former rule prevails, it has been held that the fact that the notes are all of one series,⁶⁰ representing one

53. *Dashiell v. Slingerland*, 60 Cal. 653; *Moore v. Nowell*, 94 N. C. 265.

[a] "The phrase 'sum demanded,' implies the whole sum due to the plaintiff or plaintiffs from the defendant or defendants in the action for the same, like and kindred accounts in nature as if the whole sum demanded is \$600, \$100 of it due by open account, \$200 by promissory note and \$300 by judgment. All these sums may be consolidated and sued for in the same action, and thus consolidated they would constitute the plaintiff's 'sum demanded.' . . . There is no statute that forbids this in terms or by reasonable implication, and we can see no just reason why it may not be done. Such practice would be convenient and economize cost and time in many cases." *Moore v. Nowell*, 94 N. C. 265, 671.

54. *Barnes v. Metropolitan St. R. Co.*, 119 Mo. App. 303, 95 S. W. 971.

[a] Failure to demur for misjoinder is without effect on the matter of jurisdiction since jurisdiction cannot be acquired by consent or conferred by a waiver on the part of the defendant. *Barnes v. Metropolitan St. R. Co.*, 119 Mo. App. 303, 95 S. W. 971, where tort and contract causes of action were improperly joined.

55. *Fenton v. St. Louis, K. C. & N. R. Co.*, 72 Mo. 259.

56. *Congressional Tp. v. Weir*, 9 Ind. 224; *Culley v. Laybrook*, 8 Ind. 285; *Short v. Scott*, 6 Ind. 430. See also *infra*, XII, E, 10, b.

57. See *supra*, XII, E, 9, d, (I).

58. *Modern Laundry v. Dilley*, 111

Ark. 350, 163 S. W. 1197; *Skilern v. Baker*, 82 Ark. 86, 100 S. W. 764; *Brooks v. Hornberger*, 78 Ark. 595, 94 S. W. 708; *Humphrey v. McCauley*, 55 Ark. 143, 17 S. W. 713; *Martin v. Foreman*, 18 Ark. 249; *Fenter v. Andrews*, 5 Ark. 34; *Berry v. Linton*, 1 Ark. 252. See *Howard v. Mansfield*, 30 Wis. 75.

[a] Pledge of Several Notes.—An action on five several notes, each for \$100, transferred as collateral security for a debt of \$604, is properly brought in a court, the jurisdiction of which is limited to \$300. *Winer v. Bank of Blytheville*, 89 Ark. 435, 117 S. W. 232, 131 Am. St. Rep. 102.

59. Cal.—*Bailey v. Sloan*, 65 Cal. 387, 4 Pac. 349. Ky.—*Bakewell v. Howell*, 2 Mete. 268. Mo.—*Langham v. Boggs*, 1 Mo. 476. N. C.—*McCasten v. Quinn's Admr.*, 26 N. C. 43. Tenn.—*Nashville Bank v. Henderson*, 5 Yerg. 104, 26 Am. Dec. 257. Tex.—*Lott v. Adams*, 4 Tex. 426; *Mays v. Lewis*, 4 Tex. 38. See *Middlebrook v. David Bradley Mfg. Co.*, 86 Tex. 706, 26 S. W. 935.

60. Ala.—*Herrin v. Buckelew*, 37 Ala. 585. See *Nibbs v. Moody*, 5 Stew. & P. 198. Ark.—*American Soda Fountain Co. v. Battle*, 85 Ark. 213, 107 S. W. 672, 108 S. W. 508; *Smith v. Davis*, 83 Ark. 372, 103 S. W. 746. Ind.—See *Luce v. Shoff*, 70 Ind. 152.

[a] Although Secured by a Single Mortgage.—*Brooks v. Hornberger*, 78 Ark. 595, 94 S. W. 708; *Starnes v. Mutual L. & B. Co.*, 102 Ga. 597, 29 S. E. 452.

[b] "The fact that there is a clause

original obligation, does not alter the rule, though there is authority to the contrary.⁶¹

(III.) **For Recovery of Several Penalties.**—The same conflict exists as to actions for penalties.⁶² But where the wrongful act is continuing in its nature, and the penalty incurred, cumulates as time passes, there is but one violation of law and the amount of the penalty due at the time suit is instituted, controls.⁶³

(IV.) **Statement of Same Cause of Action in Different Counts.**—The statement of the same cause of action in different counts, does not operate to increase the amount in controversy above the sum claimed in a single count.⁶⁴

(V.) **Entire and Separable Contracts.**—Where a single obligation constitutes an entire contract, though payable in installments, jurisdiction is not necessarily to be determined by the amount of each installment.⁶⁵ If one installment only is due and the amount is within the jurisdiction of the court, an action may be maintained upon it,⁶⁶ but if all or several installments are due, the test of jurisdiction is the aggregate sum

in each note showing that they are of a series and providing that nonpayment of any one note at maturity operates to mature them all, does not alter this rule so as to make the aggregate amount of all the notes the test of the jurisdiction." *Modern Laundry v. Dilley*, 111 Ark. 350, 163 S. W. 1197.

61. *James v. Stokes*, 77 Va. 225; *Hutson v. Lowry*, 2 Va. Cas. (4 Va.) 42.

62. As to the general rules, see *supra*, XII, E, 9, d, (I).

[a] Several counts based on different violations of the same statute and seeking to recover several distinct penalties may properly be joined and the total amount sought to be recovered is the test of the court's jurisdiction. *Ariz.*—*Miami Copper Co. v. State*, 17 Ariz. 179, 149 Pac. 758. *Ind.*—See *Jones v. Buntin*, 1 Blackf. 322. *N. C.* *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971; *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890. *Pa.*—*Gibson v. Gault*, 33 Pa. 44. Compare *Gault v. Vinyard*, 26 Pa. 282.

[b] Where several penalties incurred by a single act, are sought to be recovered in one action, the aggregate amount governs the jurisdiction. *Barkhamsted v. Parsons*, 3 Conn. 1.

[c] Each penalty considered separately in determining jurisdiction. *Blackwood v. Tanner*, 112 Ky. 672, 66 S. W. 500; *Louisville & N. R. Co. v. Com.*, 102 Ky. 300, 43 S. W. 458, 53 L. R. A. 149.

[d] Statement of several wrongful acts in a single cause of action, which if relied upon separately would have entitled plaintiff to a recovery of distinct penalties, does not create a claim for more than one penalty. *Fields v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.), 30 S. W. 255.

63. *Com. v. Mills*, 6 Bush (Ky.) 296, unlawful maintenance of fence across a road.

64. *Ala.*—*Central of Georgia R. Co. v. Williams*, 163 Ala. 119, 50 So. 328. *Conn.*—See *Guile v. Brown*, 38 Conn. 237. *Ind.*—*Ward v. Perry*, 60 Ind. App. 1, 109 N. E. 936. *Ky.*—*Grant v. Tams & Co.*, 7 Mon. 218. *Mo.*—*Colvin v. Sutherland*, 32 Mo. App. 77. *N. J.* *Sayres v. Ward*, 3 N. J. L. 1007. *S. C.* *Lee v. Foot*, 2 Bailey 112. *Tex.*—*Houston Ice & Brew. Co. v. Edgewood D. Co.* (Tex. Civ. App.), 63 S. W. 1075. *Vt.*—*Bell v. Mason*, 10 Vt. 509. *W. Va.* *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653, in a justice's court.

65. *State v. Scoggin*, 10 Ark. 326. As to several notes, see *supra*, XII, E, 9, d, (II).

66. *State v. Scoggin*, 10 Ark. 326; *Luce v. Minard*, 87 Vt. 177, 88 Atl. 728.

[a] Instalments falling due during the pendency of the action, may be considered, and if they constitute an amount within the court's jurisdiction it may render its decree thereon. *Smalley v. Martin*, 1 Clarke Ch. (N. Y.) 293.

of all the installments so due.⁶⁷ A running book account is an entire and not a separable obligation.⁶⁸

(VI.) Consolidating Actions.—Where the aggregate amount demanded is the test, two or more actions cannot be consolidated into one if the total amount in controversy would thereby exceed the jurisdictional limit, since but one judgment is ordinarily rendered after consolidation.⁶⁹ But where several judgments may be rendered even when actions have been consolidated for the purpose of trial, each judgment is valid if within the jurisdictional amount.⁷⁰

e. *Splitting Causes of Action*.—A single cause of action cannot be split into several parts for the purpose of conferring jurisdiction on a court.⁷¹ The only difficulty to be encountered in such cases arises in determining when distinct, separate causes of action are involved,⁷²

67. *Stroud v. Conine*, 114 Ark. 304, 169 S. W. 959; *Ft. Smith Paper Co. v. Templeton*, 113 Ark. 490, 168 S. W. 1092 (rental instalments); *State v. Scoggin*, 10 Ark. 326 (a bond); *McPhail v. Johnson*, 109 N. C. 571, 13 S. E. 799.

68. *Johnson v. Klassett*, 9 Ga. App. 733, 72 S. E. 174; *Williams-Abbott Electric Co. v. Model Elec. Co.*, 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529.

[a] *Separation by Agreement of the Parties*.—Where by agreement, an account for goods sold on the same day, was at the time, divided into four parts, payment on each of which was due on different days, the account was separable and suit could be brought on each part by itself, although all were then due. *Parris v. Hightower*, 76 Ga. 631.

69. *Ga.*—*Epstein v. Levenson*, 79 Ga. 718, 4 S. E. 328; *Gerding v. Anderson*, 64 Ga. 304; *Manufacturers' Bank v. Goolsby*, 35 Ga. 82. *N. Y.* *Gillin v. Canary*, 19 Misc. 594, 44 N. Y. Supp. 313, 26 Civ. Proc. 230, 4 N. Y. Ann. Cas. 200. *S. C.*—*Parrot v. Green*, 1 McCord 531. *W. Va.*—*McDowell County Bank v. Wood*, 60 W. Va. 617, 55 S. E. 753.

70. *La Due v. Forbes*, 19 Cal. App. 124, 124 Pac. 867; *Wisdom v. Bille*, 120 La. 700, 45 So. 554; *Louisiana W. R. Co. v. Hopkins*, 33 La. Ann. 806.

71. *Del.*—*Billingsley v. Wilckens*, *Staats & Co.*, 1 Boyce 60, 74 Atl. 366; *Messick v. Dawson*, 2 Har. 50. *Ill.* *Lucas v. Le Compte*, 42 Ill. 303. *La.* *State v. Newman*, 49 La. Ann. 52, 21 So. 189. *Miss.*—*Vicksburg Waterworks Co. v. Ford*, 97 Miss. 198, 52 So. 208. *Mo.*—*Dillard v. St. Louis,*

K. C. & N. R. Co., 58 Mo. 69; *Funk v. Funk*, 35 Mo. App. 246, 252. *N. Y.* *Willard v. Sperry*, 16 Johns. 121; *Barnard v. Devine*, 34 Misc. 182, 68 N. Y. Supp. 859. *N. C.*—*Norvell v. Meeke*, 127 N. C. 401, 37 S. E. 452; *Fort v. Penny*, 122 N. C. 230, 29 S. E. 362. *Okla.*—*Hesser v. Johnson*, 13 Okla. 53, 74 Pac. 320. *Vt.*—*Bullard v. Thorpe*, 66 Vt. 599, 30 Atl. 36, 44 Am. St. Rep. 867, 25 L. R. A. 605. *W. Va.*—*Mitchell v. Davis*, 73 W. Va. 352, 80 S. E. 491; *Hale v. Weston*, 40 W. Va. 313, 21 S. E. 742.

[a] *Concurrent injury to several articles of personalty* constitutes but one cause of action and the total amount of the damages is the test of jurisdiction. *Dillard v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 69.

[b] *Where several animals are killed at the same time* an action for their value states but a single cause of action, and the value of all the animals constitutes the amount in controversy. *Lafayette & I. R. Co. v. Ehman*, 30 Ind. 83; *Yazoo & M. V. R. Co. v. Payne*, 92 Miss. 126, 45 So. 705.

[c] *Where services have been rendered* "the plaintiff cannot convert his claim into two contracts by merely charging a different rate for different portions of the time of service." *Pittman v. Chrisman*, 59 Miss. 124.

[d] *Splitting a Running Book Account*.—See *Johnson v. Klassett*, 9 Ga. App. 733, 72 S. E. 174; *Robbins v. Conley*, 47 Mo. App. 502.

Promissory notes founded on single obligation, see *supra*, XII, E, 9, d, (II).

72. *As to what constitutes a split-*

for where this is the case separate actions may, of course, be maintained and jurisdiction is determined by the amount claimed in each of the actions.⁷³ The objection that the claim made arose out of an indivisible contract which was split by the plaintiff for the purpose of conferring jurisdiction upon the court, must be made by a plea to the jurisdiction or there will be an implied waiver of it.⁷⁴

f. *Accounts.*—For the purpose of determining jurisdiction so far as dependent upon the amount in controversy, a single account is to be treated as one cause of action, irrespective of the number or size of the various items going to make up the account,⁷⁵ but different ac-

ting of actions, see the titles "Joinder of Actions;" "Successive Suits."

73. *Carroll County Bank v. State*, 95 Ark. 194, 128 S. W. 1042; *McLendon v. Pass*, 66 Miss. 110, 5 So. 234 (*overruling* *Seofield v. Pensons*, 26 Miss. 402, and *Mobile & O. Ry. Co. v. State*, 51 Miss. 137); *Pittman v. Chrisman*, 59 Miss. 124; *Ash v. Lee*, 51 Miss. 101.

[a] "The rule that one having a single cause of action may not divide it and thereby confer upon a court of limited jurisdiction power to hear and determine the several suits, is well settled; but it does not follow that one who has two or more separate and distinct causes of action over which the inferior court has jurisdiction, must, in the interest of the defendant, combine them all in one suit in another court. The test is whether there is a single right of action, or more than one. One may have a single right of action embracing many items, or he may have a separate right to sue for each of several demands. In one case he must recover in one action; in the other he may sue in separate suits for each demand." *McLendon v. Pass*, 66 Miss. 110, 5 So. 234.

74. *Fort v. Penny*, 122 N. C. 230, 29 S. E. 362.

[a] *Before Answering to the Merits.* *Fort v. Penny*, 122 N. C. 230, 29 S. E. 362; *Blackwell v. Dibrell*, 103 N. C. 270, 9 S. E. 192.

75. *Ark.*—*Taylor v. Maloney*, 108 Ark. 539, 158 S. W. 486 (attorney's account for services rendered); *Hasty & Sons v. Hampton Stave Co.*, 80 Ark. 405, 97 S. W. 675; *St. Louis, S. W. Ry. Co. v. James*, 78 Ark. 490, 95 S. W. 804; *Gregory v. Williams*, 24 Ark. 177, 180; *State v. Scoggin*, 10 Ark. 326. *Ga.*—*Floyd v. Cox*, 72 Ga. 147 (running account which was balanced at the end of each year and the balance carried

forward); *Johnson v. Klassett*, 9 Ga. App. 733, 72 S. E. 174, running book account. *Ill.*—*Lucas v. Le Compte*, 42 Ill. 303; *The Cable Co. v. Elliott*, 122 Ill. App. 342. *Miss.*—*Grayson v. Williams*, Walk. 298, 12 Am. Dec. 568. *Mo.*—*Robbins v. Conley*, 47 Mo. App. 502. *N. C.*—*Magruder & Co. v. Randolph & Co.*, 77 N. C. 79. *Compare* *Boyle v. Robbins*, 71 N. C. 130; *Caldwell v. Beatty*, 69 N. C. 365. *Tex.* *Fuller v. Sparks*, 39 Tex. 136; *Maples v. MacNelly* (Tex. Civ. App.), 133 S. W. 893.

[a] *Effect of a Mistake.*—The total amount of the account as footed and appearing on its face is the test, although a mistake was made and the true amount was in excess of the court's jurisdiction. *Mitchell v. Smith*, 24 Ind. 252.

[b] *A continuous account* (1) is occasionally distinguished from one in which the dealings between the parties are intermittent and separated to a considerable degree in point of time and character. *Copland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501; *Simpson v. Elwood*, 114 N. C. 528, 19 S. E. 598; *Magruder & Co. v. Randolph & Co.*, 77 N. C. 79 (*distinguishing* *Caldwell v. Beatty*, 69 N. C. 365; *Waldo v. Jolly*, 49 N. C. 173). (2) The mere fact that a statement of the various amounts due is rendered by the creditor to the debtor does not affect the separate nature of the accounts. *Copland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501. (3) But if such statement is acquiesced in and accepted, the account becomes stated and cannot thereafter be split up. *Simpson v. Elwood*, 114 N. C. 528, 19 S. E. 598.

[c] *Setting forth items of one account in separate paragraphs of a complaint* does not affect the general rule.

counts between the same parties,⁷⁶ or held by the plaintiff by assignment from other persons, are to be treated as distinct causes of action.⁷⁷ It is the balance due on an account which ordinarily is to be considered as the amount in controversy,⁷⁸ though it has also been held that, where no balance has been stated or agreed upon between the parties, the entire account remains in controversy, requiring a judicial investigation of the mutual demands between the parties, and the amount involved in the entire account remains the test of jurisdiction.⁷⁹ In some jurisdictions, in actions on book accounts, the debtor side of the plaintiff's books constitutes the matter in demand, irrespective of the balance which may be actually due.⁸⁰ Jurisdiction in matters of account is made to depend in some states on the sum total of the accounts of both parties proved to the court,⁸¹ in such cases the claims of the

Buchanan v. Hicks, 98 Ark. 370, 136 S. W. 177, 181, 34 L. R. A. (N. S.) 1200.

[d] An item constituting statement of a balance settled and agreed upon and which therefore is not open to re-investigation, is not to be included in determining the jurisdiction of a court in an action on account, under some statutes. *Cuer v. Ross*, 49 Wis. 652, 6 N. W. 331.

76. *Johnson v. Pirtle*, 1 Swan (Tenn.) 262.

77. *Paris Mercantile Co. v. Hunter*, 74 Ark. 615, 86 S. W. 808. Compare *Calloway v. Oro Min. Co.*, 5 Cal. App. 191, 89 Pac. 1070.

78. Ala.—*Baird v. Nichols*, 2 Port. 186. Ark.—*Brinkley v. Barinds*, 7 Ark. 165; *Hempstead v. Collins*, 6 Ark. 533. Ill.—*Huginin v. Nicholson*, 2 Ill. 575, even though the account has not been liquidated between the parties. Tex.

Dalby v. Murphy, 25 Tex. 354; *Davis v. Pinckney*, 20 Tex. 340; *Swift v. Kelly* (Tex. Civ. App.), 133 S. W. 901. Wis. *Orr v. Le Clair*, 55 Wis. 93, 12 N. W. 356, where there has been an account stated.

79. *Henckel v. Wheeler & Wilson Mfg. Co.*, 51 Wis. 363, 7 N. W. 780; *Cooban v. Bryant*, 36 Wis. 605; *Nimmick v. Mathiesson*, 32 Wis. 324; *Woodward v. Garner*, 2 Pin. (Wis.) 28. See *Storm v. Adams*, 56 Wis. 137, 14 N. W. 69.

[a] The words "balance due" (1) as used in a statute have sometimes received a strict interpretation, being limited to a balance found to be due on a settlement of accounts between the parties (*Woodward v. Garner*, 2 Pin. [Wis.] 28; *Barker v. Baxter*, 1 Pin. [Wis.] 407), (2) but usually are

held to refer to any balance after partial payments have been made and credited. *Prairie Grove Cheese Co. v. Luder*, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085.

80. *Berry Shoe Co. v. Dechenes*, 68 Vt. 387, 35 Atl. 335 (*overruling Bates v. Downer*, 4 Vt. 178); *Abbott v. Chase*, 55 Vt. 466; *Scott v. McDonough*, 39 Vt. 203; *Hodges v. Fox*, 36 Vt. 74; *Eddy v. Horton*, 27 Vt. 285; *Stone v. Winslow*, 7 Vt. 338.

[a] A payment made and credited on account does not change the debtor side of the account unless the balance, by agreement of the parties, becomes a new account. *Willard v. Collamer*, 34 Vt. 594. See *Clark v. Edgell*, 26 Vt. 108; *Reed v. Talford*, 10 Vt. 568.

[b] Action in assumpsit may be brought instead of the action on account, and then the amount claimed is the test of jurisdiction. *Bank of Rutland v. Cramton*, 28 Vt. 330.

[c] Amount recovered is immaterial. *Eddy v. Horton*, 27 Vt. 285; *Mason v. Potter*, 26 Vt. 722.

[d] A balance struck and stated becomes the foundation of a new account. *Spear v. Peck*, 15 Vt. 566; *Gibson v. Sumner*, 6 Vt. 163.

[e] Interest on the account may be considered. *Blin v. Pierce*, 20 Vt. 25; *Nichols v. Packard*, 16 Vt. 91.

[f] Goods paid for at the time of purchase cannot be added to the account of other transactions between the parties. *Chandler v. Caswell*, 17 Vt. 580.

[g] Condition of the account at time suit is instituted controls. *Shepherd v. Beede*, 24 Vt. 40; *Fargo v. Remington*, 6 Vt. 131.

81. *Lamoure v. Caryl*, 4 Denio (N.

amount due made in the pleadings are not controlling,⁸² but proof must be heard,⁸³ and it is only when it is shown that more than the jurisdictional amount is involved that the court should dismiss the action.⁸⁴

g. Interest. — (I.) In General. —In determining the amount in controversy for jurisdictional purposes, the general rule is to consider and include interest on the sum involved and if the principal sum with the interest added constitutes an amount within the jurisdiction of the court, it has jurisdiction over the action.⁸⁵ In determining jurisdiction partial payments made by the debtor on account of his indebted-

Y.) 370; *Lund v. Broadhead*, 41 How. Pr. (N. Y.) 146; *Brady v. Durbrow*, 2 E. D. Smith (N. Y.) 78; *Stillwell v. Staples*, 5 Duer (N. Y.) 691; *Dale v. Prentice*, 126 App. Div. 137, 110 N. Y. Supp. 535; *Steele v. Macdonald*, 4 Civ. Proc. (N. Y.) 227.

[a] "The accounts intended by the statute must be subsisting, unliquidated accounts. So far as they have been settled and a balance struck upon them, that balance can alone be properly considered the account between the parties." *Abernathy v. Abernathy*, 2 Cow. (N. Y.) 413.

[b] The balance due on the accounts of each party is the amount to be considered in obtaining the sum total. *Crim v. Cronkhite*, 15 How. Pr. (N. Y.) 250; *Steele v. Macdonald*, 4 Civ. Proc. (N. Y.) 227.

[c] "Payments on a claim are not, in any proper sense, items of an 'account' in favor of the defendant. The account is on one side only, within the meaning of the statute, though it is reduced by payments." *Ward v. Ingraham*, 1 E. D. Smith (N. Y.) 538. And see *Ex parte Mills*, 10 Wend. (N. Y.) 557; *Bundick v. Hale*, 4 Civ. Proc. (N. Y.) 311; *Brisbane v. Bank of Batavia*, 36 Hun (N. Y.) 17.

82. *Bartlett v. Mugett*, 75 Hun 292, 27 N. Y. Supp. 56.

83. *Glackin v. Zeller*, 52 Barb. (N. Y.) 147; *Parker v. Eaton*, 25 Barb. (N. Y.) 122.

84. *Glackin v. Zeller*, 52 Barb. (N. Y.) 147; *Dale v. Prentice*, 126 App. Div. 137, 110 N. Y. Supp. 535; *Bartlett v. Mugett*, 75 Hun 292, 27 N. Y. Supp. 56.

85. **Ala.**—*Hogan v. Odam*, 3 Stew. 58. See *Reese v. Bessemer Plumbing & Mfg. Co.*, 42 So. 56; *Ledbetter v. Castles*, 11 Ala. 149. **Ariz.**—*Brown v. Braun*, 9 Ariz. 254, 80 Pac. 323, a ter-

ritorial statute in violation of an act of congress in this respect, is ineffective. **Colo.**—*Cramer v. McDowell*, 6 Colo. 369. **Conn.**—*Stone v. Hawkins*, 56 Conn. 111, 14 Atl. 297. But see *Boyle v. Rice*, 41 Conn. 418, applying a different rule to mortgage suits. **Fla.** *Ring v. Merchants' Broom Co.*, 68 Fla. 515, 67 So. 132; *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110. **Ga.** *Baxley Banking Co. v. Carter*, 112 Ga. 529, 37 S. E. 723. **Idaho.**—*Quayle v. Glenn*, 6 Idaho 549, 57 Pac. 308. **Ind.** *Gregg v. Wooden*, 7 Ind. 499. **Ia.** *Evans v. Murphy*, 133 Iowa 550, 110 N. W. 1025; *Galley v. Tama*, 40 Iowa 49. **Kan.**—*Ball v. Biggam*, 43 Kan. 327, 23 Pac. 565; *St. Louis & S. F. Ry. Co. v. Brown*, 10 Kan. App. 401, 61 Pac. 457. **Ky.**—*Bakewell v. Howell*, 2 Mete. 268; *Fidler v. Hall*, 2 Mete. 461; *Wiggenton v. Moss*, 2 Mete. 38; *Orth v. Clutz's Admr.*, 18 B. Mon. 223. But see *Sweeny v. Lowe*, 6 B. Mon. 214; *Hager v. Boswell*, 4 J. J. Marsh. (Ky.) 61, decided under an early statute. **Md.**—*Reese v. Hawks*, 63 Md. 130; *Barger v. Collins*, 7 Har. & J. 213. **Minn.**—*Juster v. Court of Honor*, 120 Minn. 325, 139 N. W. 701; *Crawford v. Hurd Refrigerator Co.*, 57 Minn. 187, 58 N. W. 985; *Cooper v. Reaney*, 4 Minn. 528. **Mont.**—*Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695. **Neb.** *Adams v. Nebraska Sav. & Exch. Bank*, 56 Neb. 121, 76 N. W. 421. **N. Y.** *Smith v. Dunn*, 46 Misc. 475, 92 N. Y. Supp. 300; *Pierson v. Hughes*, 88 N. Y. Supp. 1059. **Okla.**—*Thompson v. De Long*, 40 Okla. 718, 140 Pac. 421; *St. Paul Fire & M. Ins. Co. v. Peck*, 40 Okla. 396, 139 Pac. 117. **Ore.**—See *Ferguson v. Reiger*, 43 Ore. 505, 73 Pac. 1040. **S. C.**—See *St. Amand v. Gerry*, 2 Nott & McC. 487. **S. D.**—*Nelson v. Ladd*, 4 S. D. 1, 54 N. W. 809; *Plunkett v. Evans*, 2 S. D. 434, 50 N. W. 961.

edness will be applied first to the payment of accrued interest.⁸⁶ In many states, however, statutes expressly declare that their courts shall exercise jurisdiction over actions involving various specified sums "exclusive of interest," and where this is the case, interest is to be disregarded in determining jurisdiction,⁸⁷ except where the money sought

Tenn.—Wharton *v.* Thompson, 9 Yerg. 45; Dixon *v.* Caruthers, 9 Yerg. 30. **Vt.**—McK Ormsby *v.* Morris, 29 Vt. 417; Hall *v.* Wadsworth, 28 Vt. 410; Blin *v.* Pierce, 20 Vt. 25; Stevens *v.* Howe, 6 Vt. 572. **Wash.**—State *v.* Superior Court, 9 Wash. 369, 37 Pac. 489. **W. Va.**—Moore *v.* Harper, 42 W. Va. 39, 24 S. E. 633.

[a] **Rule Stated.**—"It cannot make any difference whether the sum claimed consists wholly of principal, or partly of principal and partly of accrued interest, or whether the pleader makes the computation of interest, or leaves it to be computed by the court or jury." Crawford *v.* Hurd Refrigerator Co., 57 Minn. 187, 58 N. W. 985.

[b] **Interest on unliquidated demands** is sometimes regarded as an incident to the damages and not as interest properly so called and is not to be considered in determining jurisdiction even though demanded in the complaint. Hamburger *v.* Hellman, 103 App. Div. 263, 92 N. Y. Supp. 1067; Spitzer *v.* Korminsky, 49 Misc. 466, 97 N. Y. Supp. 1030. And see Spencer *v.* Hall, 30 Misc. 75, 62 N. Y. Supp. 826. Compare Lewis *v.* Metropolitan St. Ry. Co., 35 Misc. 304, 71 N. Y. Supp. 948.

[c] **The maximum jurisdiction** is occasionally made to be exclusive of interest while minimum jurisdiction is made to include interest. Thompson *v.* De Long, 40 Okla. 718, 140 Pac. 421; St. Paul Fire & M. Ins. Co. *v.* Peck, 40 Okla. 396, 139 Pac. 117.

86. **Ky.**—Hoskins *v.* Roberts, 2 B. Mon. 263. **Miss.**—Best *v.* Pitts, 110 Miss. 541, 70 So. 700. And see Martin *v.* Harden, 52 Miss. 694. **Mo.**—James *v.* Hiatt, 80 Mo. App. 43. **N. C.**—Riddle *v.* Bridgewater Milling Co., 150 N. C. 689, 64 S. E. 782. **Tex.**—Clark *v.* Brown, 48 Tex. 212; Moseley *v.* Farrell, 31 Tex. 613; Hampton *v.* Dean, 4 Tex. 455.

87. **Ark.**—Adair *v.* Quincy Stove Mfg. Co., 119 Ark. 263, 177 S. W. 969; Sherrill *v.* Wilson, 29 Ark. 384; Chatten *v.* Hefley, 21 Ark. 313; Fisher

v. Hall, 1 Ark. 275. See Hunton *v.* Luce, 60 Ark. 146, 29 S. W. 151, 46 Am. St. Rep. 165, 28 L. R. A. 221. **Cal.**—Gallagher *v.* McGraw, 132 Cal. 601, 64 Pac. 1080; Dashiell *v.* Slingerland, 60 Cal. 653; Barnett *v.* Hull, 19 Cal. App. 91, 124 Pac. 885. **Ga.**—Southern Exp. Co. *v.* Hilton, 94 Ga. 450, 20 S. E. 126. **La.**—Turner *v.* Woods, 124 La. 675, 50 So. 649; State *v.* Fernandez, 49 La. Ann. 249, 21 So. 260; Breaux *v.* Recorder, 36 La. Ann. 742; Newman Bros. *v.* Cuney, 30 La. Ann. 1201; Deckler *v.* Frankenberger, 30 La. Ann. 410 (parish court); Badeaux *v.* Blake, 24 La. Ann. 184; Kahn *v.* Gay, 28 La. Ann. 240, district court. **Miss.**—Jackson *v.* Whitfield, 51 Miss. 202; Planters' Bank *v.* Coulson, 6 How. 395. **Mo.**—Hoppenbrock *v.* Dial, 137 Mo. App. 75, 119 S. W. 496; James *v.* Crown Cereal Co., 90 Mo. App. 227; Bradley, Wheeler & Co. *v.* Asher, 65 Mo. App. 589. **N. C.**—Riddle *v.* Bridgewater Milling Co., 150 N. C. 689, 64 S. E. 782; Hedgecock *v.* Davis, 64 N. C. 650. Compare Ausley *v.* Alderman, 61 N. C. 215; Birch *v.* Howell, 30 N. C. 468; McCastan *v.* Quinn's Admr., 26 N. C. 43; Griffin *v.* Ing, 14 N. C. 358. **Okla.**—St. Louis & S. F. R. R. Co. *v.* Wynn, 153 Pac. 1156, jurisdiction of the county court. **Tex.**—Robinson *v.* Lingner (Tex. Civ. App.), 183 S. W. 850; Le Master *v.* Lee (Tex. Civ. App.), 150 S. W. 315; Cooper Groc. Co. *v.* Gaddy (Tex. Civ. App.), 141 S. W. 825; Brandt *v.* Moore (Tex. Civ. App.), 65 S. W. 1124; Williams *v.* Harrison, 27 Tex. Civ. App. 179, 65 S. W. 884.

[a] Where the constitution provides that the "principal of the amount in controversy" shall determine jurisdiction, accrued interest is to be excluded. Jackson *v.* Whitfield, 51 Miss. 202.

[b] **Interest due when claim is presented to estate of deceased debtor** is not to be counted: "The action is upon the note. It is made necessary, under the statute, to present a claim of this kind to the representative of deceased before an action can be maintained upon it, but when the action is

to be recovered is itself interest.⁸⁸ Under such a statute, however, interest on the amount claimed which is recoverable as damages in actions of tort, must be included as part of the principal, in determining jurisdiction;⁸⁹ and in contract actions where interest is claimed as an element of damages arising from the breach of the contract, and is not specially recoverable under the contract itself, it must also be considered.⁹⁰ In-

brought, it is upon the original claim or note." *Gallagher v. McGraw*, 132 Cal. 601, 64 Pac. 1080.

[c] But in an action for breach of covenant the "interest" is considered as in the nature of damages, and must be considered in determining the amount in controversy. *Howell v. Milligan*, 13 Ark. 40.

88. *Turner v. Woods*, 124 La. 675, 50 So. 649.

89. *St. Paul Fire & M. Ins. Co. v. Peck*, 40 Okla. 396, 139 Pac. 117 (modifying former opinion, 37 Okla. 85, 130 Pac. 805); *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1031; *Baker v. Smelser*, 88 Tex. 26, 29 S. W. 377, 33 L. R. A. 163; *Freeman v. W. B. Walker & Sons* (Tex. Civ. App.), 175 S. W. 1133; *Jeans v. Liquid Carbonic Co.* (Tex. Civ. App.), 173 S. W. 643; *International & G. N. Ry. Co. v. Feldman* (Tex. Civ. App.), 170 S. W. 133; *Ft. Worth & R. G. Ry. Co. v. Mathews* (Tex. Civ. App.), 169 S. W. 1052; *Ft. Worth Stockyards Co. v. Witherspoon* (Tex. Civ. App.), 166 S. W. 502; *Young v. Bundy* (Tex. Civ. App.), 158 S. W. 566 (trover and conversion); *J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co.* (Tex. Civ. App.), 157 S. W. 228; *Carter Grocery Co. v. Day* (Tex. Civ. App.), 144 S. W. 365; *Rotan Groc. Co. v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 142 S. W. 623; *Herrington v. Gulf, C. & S. F. Ry. Co.* (Tex. Civ. App.), 142 S. W. 983; *Crowdus v. Kahn Tailoring Co.* (Tex. Civ. App.), 136 S. W. 1136; *International & G. N. R. Co. v. Flory* (Tex. Civ. App.), 118 S. W. 1116.

[a] Reason of the Rule.—"Our statutes make no provision for allowing interest in actions of this character [conversion]; but it belongs to a class of cases in which interest upon the amount of the pecuniary loss inflicted by the injury is allowed as a part of the damages. It is clear, that in a suit for the conversion of a specific sum of money, a recovery of that sum without an allowance for the use

of the money would not adequately compensate the loss. The rate of interest established by law being a fixed standard of the value of the use of money is adopted by the court as the measure of that damage in such a case. When the statute does not expressly provide for the recovery of the interest, it is allowed not eo nomine, that is, not as interest but merely as damages. It would probably be more correct to say that rate of interest is resorted to in order to measure the damages accruing from the loss of the use of the money. As in case of the conversion of money, so in the case of the conversion of goods, and in many others in which the statute does not expressly create a legal liability for interest." *Baker v. Smelser*, 88 Tex. 26, 28, 29 S. W. 377, 33 L. R. A. 163.

90. *Schulz v. Tessman*, 92 Tex. 488, 49 S. W. 1031; *McNeill v. Casey* (Tex. Civ. App.), 135 S. W. 1130; *Waller v. Gray*, 43 Tex. Civ. App. 405, 94 S. W. 1098.

[a] Unliquidated damages for breach of contract can only be the basis for the award of interest as damages, and therefore interest if claimed must be considered in determining jurisdiction. *McNeill v. Casey* (Tex. Civ. App.), 135 S. W. 1130.

[b] Where the sum due on a contract is ascertainable and a statute allows interest in such cases, the interest "is recoverable eo nomine and does not enter into consideration as a part of the amount in controversy affecting the jurisdiction of the court." *Ewalt v. Holmes* (Tex. Civ. App.), 165 S. W. 39. And see *Willett v. Herrin* (Tex. Civ. App.), 161 S. W. 26.

[c] Insurance policy on personal property is a contract which does not "ascertain the sum payable," and interest on the amount recoverable is to be treated as damages. *Allemania Fire Ins. Co. v. Fordtran* (Tex. Civ. App.), 128 S. W. 692.

terest as damages will only be considered in determining the amount in controversy when it is included in the prayer.⁹¹

A complaint which prays for an amount named, as damages, with interest thereon, brings the action within the application of this rule.⁹² A prayer for interest will be regarded as surplusage and disregarded where interest is not recoverable.⁹³ In the application of these general rules it is immaterial whether the interest be provided by law or contract,⁹⁴ or whether it be simple or compound interest.⁹⁵

(II.) **Computation.** — Interest is to be computed, in most jurisdictions, as of the date the suit is instituted;⁹⁶ and this rule applies to interest which is claimed as damages.⁹⁷ But it has been held that subsequently

91. *Gulf, C. & S. F. Ry. Co. v. White* (Tex. Civ. App.), 176 S. W. 790; *Western Union Tel. Co. v. Garner* (Tex. Civ. App.), 83 S. W. 433.

[a] A complaint which demands a specified amount of damages, and asks for general relief, is construed as including interest in the amount claimed, so that if such amount is within the court's jurisdiction it may hear the case. *Ft. Worth & R. G. Ry. Co. v. Brown*, 45 Tex. Civ. App. 376, 101 S. W. 266.

92. *Ft. Worth & D. C. Ry. Co. v. Everett* (Tex. Civ. App.), 95 S. W. 1085. See also *Halpern v. Langrock Bros. Co.*, 169 App. Div. 464, 155 N. Y. Supp. 167.

[a] An ambiguous prayer will be construed as not claiming interest where the effect of the claim of interest would be to oust the court of jurisdiction. *Pecos & N. T. Ry. Co. v. Rayzor*, 106 Tex. 544, 172 S. W. 1103.

[b] **Prayers Construed.**—(1) Prayer for "judgment against defendant for the sum of \$1000 [the jurisdictional amount], with interest thereon, as provided by law," is a prayer for interest on the judgment when rendered and not on the amount claimed as damages. *Chicago, R. I. & G. Ry. Co. v. Whaley* (Tex. Civ. App.), 177 S. W. 543. (2) Where a prayer is for "judgment for his damages, interest, and costs of suit," the prayer for interest is referable to interest on the judgment which might be rendered. *Atchison, T. & S. F. Ry. Co. v. Dawson* (Tex. Civ. App.), 90 S. W. 65. And see *Houston & T. C. R. Co. v. Lockhart* (Tex. Civ. App.), 39 S. W. 320.

93. *St. Louis, B. & M. Ry. Co. v. Knowles* (Tex. Civ. App.), 171 S. W. 245; *St. Louis, S. W. R. Co. v. Earl*,

43 Tex. Civ. App. 127, 95 S. W. 1086.

94. *Chatten v. Hefley*, 21 Ark. 313, 315.

95. *Christian v. Superior Court*, 122 Cal. 117, 54 Pac. 518; *Bradley, Wheeler & Co. v. Asher*, 65 Mo. App. 589. But see *Bloom & Co. v. Kern*, 30 La. Ann. 1263.

96. *Colo.*—*Martin v. Payne*, 50 Colo. 171, 114 Pac. 486; *Denver Brick Mfg. Co. v. McAllister*, 6 Colo. 326. *Ill.* *Welch v. Karstens*, 60 Ill. 118; *Dowling v. Stewart*, 4 Ill. 193. *Ind.*—*Gregg v. Wooden*, 7 Ind. 499. *Ia.*—*Galley v. Tama*, 40 Iowa 49. *Ky.*—*Wigginton v. Moss*, 2 Metc. 38; *Orth v. Clutz's Admr.*, 18 B. Mon. 223. *Minn.*—*Ormond v. Sage*, 69 Minn. 523, 72 N. W. 810. See *Conger v. Nesbitt*, 30 Minn. 436, 15 N. W. 875. *Neb.*—*Adams v. Nebraska Sav. & Exch. Bank*, 56 Neb. 121, 76 N. W. 421. *N. Y.*—*Halpern v. Langrock Bros. Co.*, 169 App. Div. 464, 155 N. Y. Supp. 167. *Tex.*—*Fort Worth & D. C. Ry. Co. v. Underwood*, 100 Tex. 284, 99 S. W. 92, 123 Am. St. Rep. 806. *Vt.*—*McDaniels v. Johnson*, 36 Vt. 687. But see *Hall v. Wadsworth*, 28 Vt. 410. *Wis.*—*Butler v. Wagner*, 35 Wis. 54.

[a] "The accumulation of interest during the pendency of the suit will not oust such jurisdiction." *Denver Brick Mfg. Co. v. McAllister*, 6 Colo. 326, 330.

[b] A contrary rule has been laid down in some cases, in which the interest was figured to the date of judgment. *Crabtree v. Clatt*, 22 Ala. 181; *J. I. Gracy & Co. v. Wright*, 2 McCord (S. C.) 278; *Melton v. Ellison's Admr.*, 2 Brev. (S. C.) 399.

97. *Adair v. Stallings* (Tex. Civ. App.), 165 S. W. 140; *J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co.* (Tex. Civ. App.), 157 S. W. 228; *St.*

accruing interest cannot be included in the judgment if the jurisdictional amount is thereby exceeded,⁹⁸ though there is authority to the contrary.⁹⁹ It is the interest claimed or due when the original complaint, and not an amended complaint, was filed which is considered.¹

h. Penalties and Punitive Damages.—If to the amount sought to be recovered a statute authorizes, under the existing circumstances, the infliction and addition of a penalty, this penalty is to be considered in determining the aggregate amount in controversy.² Double or treble damages, allowed by statute and claimed in good faith, are also to be considered,³ though in some jurisdictions such damages are regarded as merely incidental to the actual recovery and are not considered in determining the question of jurisdiction.⁴

Louis S. W. Ry. Co. v. Dolan (Tex. Civ. App.), 84 S. W. 393.

98. Parker v. Dobson, 78 Kan. 62, 96 Pac. 472; M'Cormick Harvesting Mach. Co. v. Marchant, 11 Utah 68, 39 Pac. 483.

99. Bell v. Ayres, 44 Conn. 35; Hunt v. Rockwell, 41 Conn. 51.

1. Ft. Worth & D. C. Ry. Co. v. Underwood, 100 Tex. 284, 99 S. W. 92, 123 Am. St. Rep. 806; J. F. Siensheimer & Co. v. Maryland Motor Car Ins. Co. (Tex. Civ. App.), 157 S. W. 228; Rotan Grocery Co. v. Missouri, K. & T. Ry. Co. (Tex. Civ. App.), 142 S. W. 623; Ft. Worth & D. C. Ry. Co. v. Dysart (Tex. Civ. App.), 136 S. W. 1117. See San Antonio & A. P. Ry. Co. v. Barnett, 27 Tex. Civ. App. 498, 66 S. W. 474.

[a] **On appeal an amendment** cannot be allowed setting up interest as damages which has accrued since the original institution of the action, where the total amount sought to be recovered would be above the jurisdiction of the lower court. Texas & P. Ry. Co. v. Walter Hunt & Co., 38 Tex. Civ. App. 460, 85 S. W. 1168.

2. Ala.—Ledbetter v. Castles, 11 Ala. 149. Miss.—Mobile & O. R. Co. v. Greenwald, 104 Miss. 417, 61 So. 426. Mo.—Bucholz v. Metropolitan Life Ins. Co., 176 Mo. App. 464, 158 S. W. 451, ten per cent on the amount of the loss, for vexatious delay in paying an insurance policy. Tex.—Gulf & I. Ry. Co. v. Gregory (Tex. Civ. App.), 59 S. W. 310. See Herrington v. Gulf, C. & S. F. Ry. Co. (Tex. Civ. App.), 142 S. W. 983.

[a] **Illustration.**—The amount of the damages demanded for injuries suffered by property while in the hands of a carrier and the penalty imposed

by a statute for failure to settle the claim for damages within a required time, are to be considered together. Mobile & O. R. Co. v. Greenwald, 104 Miss. 417, 61 So. 426.

[b] **Variable Penalty.**—Where a statute gives a penalty from \$2 to \$50, and the jurisdiction of the court is limited to \$20, an action may be maintained in such court where the plaintiff claims only \$20. Carroll v. Richardson, 9 Mass. 329.

3. Hoban v. Ryan, 130 Cal. 96, 62 Pac. 296; Campbell v. Conover, 26 Ill. 64; Casey v. Harvey, 14 Ill. 45.

[a] **In forcible entry and detainer proceedings,** double damages, when authorized by statute must be counted. Ala.—Lykes v. Schwarz, 91 Ala. 461, 8 So. 71. Cal.—Hoban v. Ryan, 130 Cal. 96, 62 Pac. 296. Nev.—Fitchett v. Henley, 31 Nev. 326, 102 Pac. 865, 104 Pac. 1060.

[b] **In actions for the negligent killing of animals by railroads** the general rule applies. Summer Lumb. Co. v. Mills, 64 Fla. 513, 60 So. 757; Georgia, F. & A. R. Co. v. Andrews, 61 Fla. 246, 54 So. 461; Louisville & N. R. Co. v. Sutton, 54 Fla. 247, 44 So. 946.

[c] **Remission of Part of Penalty.** Where the jurisdiction of the court was limited to \$500 and the jury returned a verdict for single damages amounting to \$379.16 in a case where the plaintiff was entitled to double damages, it was held that the court properly entered judgment for the sum of \$500, the limit of its jurisdiction. Hussey v. King, 83 Me. 568, 22 Atl. 476.

4. Rosevelt v. Hanold, 65 Mich. 414, 32 N. W. 443; Parish v. Missouri, K. & T. R. R. Co., 63 Mo. 284; Grau v.

Punitive or exemplary damages claimed in good faith also enter the determination of the jurisdictional question.⁵

i. *Attorney Fees.*—Where attorney's fees are provided for by the contract of the parties they are regarded as forming part of the damages and are for that reason considered in determining the amount in controversy.⁶ But where attorney fees are allowed by statute and are to be taxed as costs, they are regarded as an incident of the recovery and a claim for them is not to be considered in determining the question

St. Louis, K. C. & N. R. Co., 54 Mo. 240, double damages for failure of railroad to maintain fence.

5. St. Louis, I. M. & S. Ry. Co. v. Walsh, 86 Ark. 147, 110 S. W. 222; *McCutcheon v. Malin*, 37 Tex. Civ. App. 240, 83 S. W. 849; *Allison v. Haney* (Tex. Civ. App.), 62 S. W. 933; *Waugh v. Dabney*, 12 Tex. Civ. App. 290, 33 S. W. 753; *Connellee v. Drake* (Tex. App.), 16 S. W. 175. See *Western Cottage P. & O. Co. v. Anderson*, 45 Tex. Civ. App. 513, 101 S. W. 1061.

[a] If the facts pleaded do not show a basis for the recovery of exemplary damages, the claim therefor will be disregarded in determining jurisdiction. *Harmon v. Callahan* (Tex. Civ. App.), 35 S. W. 705; *Peterson v. Thomas* (Tex. Civ. App.), 24 S. W. 1124. Compare *supra*, XII, E, 1, b; XII, E, 2; XII, E, 7.

[b] *Penalty Construed as Provision for Damages.*—A statute authorized a discharged employe to recover a specified "penalty" if his wages were not paid with promptness. In *St. Louis, I. M. & S. Ry. Co. v. Walsh*, 86 Ark. 147, 110 S. W. 222, the court held that this was not a penalty but was "damages, both exemplary and compensatory, and not a penalty, although so nominated in the statute. It is an incident to the amount due for wages, an unearned increment, as it were, and may be added to the claim for wages in determining jurisdiction."

As to fictitious claims, see *supra*, XII, E, 7.

6. U. S.—*Springstead v. Crawfordsville State Bank*, 231 U. S. 541, 34 Sup. Ct. 195, 58 L. ed. 354; *Howard v. Carroll*, 195 Fed. 646; *Rogers v. Riley*, 80 Fed. 759. Cal.—*De Jarnatt v. Marquez*, 127 Cal. 558, 60 Pac. 45, 78 Am. St. Rep. 90. Colo.—See *Byers v. Bellan-Price Inv. Co.*, 10 Colo. App. 74, 50 Pac. 368. Ga.—*Godfree v. Brooks*, 126 Ga. 627, 55 S. E. 938;

De Lamater v. Martin, 117 Ga. 139, 43 S. E. 459; *Almand v. Almand*, 95 Ga. 204, 206, 22 S. E. 213; *Reeves v. Gower*, 14 Ga. App. 293, 80 S. E. 699. La. Succession of *Foster*, 51 La. Ann. 1670, 26 So. 568. Miss.—*Parks v. Granger*, 96 Miss. 503, 51 So. 716, Ann. Cas. 1912B, 232, 27 L. R. A. (N. S.) 157. Mo.—*Bay v. Trusdell*, 92 Mo. App. 377, attorney fees are not costs. Okla. *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 132 Pac. 899; *Miller v. Mills*, 32 Okla. 388, 122 Pac. 671. S. D.—*Warder, Bushnell & Glessner Co. v. Raymond*, 7 S. D. 451, 64 N. W. 525. Tex.—*Altgelt v. Harris*, 11 S. W. 857; *Horton v. Lee* (Tex. Civ. App.), 180 S. W. 1169; *St. Louis, B. & M. Ry. Co. v. Knowles* (Tex. Civ. App.), 180 S. W. 1146; *s. c.*, on former appeal (Tex. Civ. App.), 171 S. W. 245; *Houston Packing Co. v. McDonald* (Tex. Civ. App.), 175 S. W. 806; *St. Louis, B. & M. Ry. Co. v. Knowles* (Tex. Civ. App.), 171 S. W. 245; *Wilson v. Ware* (Tex. Civ. App.), 166 S. W. 705; *Cooper Groc. Co. v. Gaddy* (Tex. Civ. App.), 141 S. W. 825.

[a] *Attorney Fees Distinguished From Costs.*—*Blankenship v. Wartelsky* (Tex.), 6 S. W. 140, 143.

[b] *How Computed.*—Attorney fees based on amount due at date of institution of suit, are to be computed on the principal and accrued interest. *McRimmon & Co. v. Hart*, 39 Tex. Civ. App. 474, 87 S. W. 881; *Rainey v. Laudaudale* (Tex. Civ. App.), 30 S. W. 1084.

[c] *As to rule in Georgia* (1) prior to 1891, see *Ashworth v. Harper*, 95 Ga. 660, 22 S. E. 670; *Almand v. Almand*, 95 Ga. 204, 22 S. E. 213; *Beach v. Atkinson*, 87 Ga. 288, 13 S. E. 591. (2) As to rule between 1891 and 1900, see *Hamilton v. Rogers*, 126 Ga. 27, 54 S. E. 926; *Forbes Piano Co. v. Owens*, 120 Ga. 449, 47 S. E. 938; *Morgan v. Kiser*, 105 Ga. 104, 31 S. E. 45.

of jurisdiction,⁷ even though the complaint states that a specified sum constitutes a reasonable attorney's fee;⁸ and the same rule is applied where they are treated as a statutory penalty.⁹ In those jurisdictions where the claim made governs the amount in controversy,¹⁰ if attorney's fees are claimed they must be taken into consideration unless the complaint affirmatively shows as a matter of law that they are not recoverable;¹¹ and it has even been held that a good faith claim of such fees governs although it is apparent, as a matter of law, that the claim cannot be sustained¹² though the weight of authority is to the contrary.¹³ In other jurisdictions, however, the pleading must show that the party is entitled to such fees.¹⁴ But the fact that the pleadings show a proper case for the allowance of attorney's fees does not authorize the court to consider such fees in determining the jurisdiction, if no claim for them is made.¹⁵

j. *Protest Fees.*—Costs of protest are considered as mere incidents to a note and constituting no part of the principal, they are to be disregarded in determining jurisdiction.¹⁶

k. *Costs.*—The costs of an action are incidental matters which do

7. *Seaboard Air Line Ry. v. Maxey*, 64 Fla. 487, 60 So. 353; *Sumner Lumb. Co. v. Mills*, 64 Fla. 513, 60 So. 757; *Spiesberger Bros. v. Thomas*, 59 Iowa 606, 13 N. W. 745. But see *Ring v. Merchants' Broom Co.*, 68 Fla. 515, 67 So. 132; *Long v. Loughran*, 41 Iowa 543.

8. *Eagle G. M. Co. v. Bryarly*, 28 Colo. 262, 65 Pac. 52, a mechanic's lien case.

9. *Knight v. Quincy, O. & K. C. Ry. Co.*, 120 Mo. App. 311, 96 S. W. 716, *distinguishing* *Bay v. Trusdell*, 92 Mo. App. 377. See *Exchange Bank v. Apalachian L. & Lumb. Co.*, 128 N. C. 193, 38 S. E. 813.

10. See *supra*, XII, E, 1; XII, E, 7.

11. **U. S.**—*Howard v. Carroll*, 195 Fed. 646. **Fla.**—See *Florida, C. & P. R. Co. v. Seymour*, 44 Fla. 557, 33 So. 424. **Okla.**—*St. Paul Fire & M. Ins. Co. v. Peck*, 37 Okla. 85, 130 Pac. 805. **Tex.**—*Lane v. General Acc. Ins. Co.* (Tex. Civ. App.), 113 S. W. 324, where made in good faith and no plea to the jurisdiction is interposed. But see *Williams v. Harrison*, 27 Tex. Civ. App. 179, 65 S. W. 884.

[a] Though the complaint fails to show the necessary notice of intention to sue, the amount of attorney's fees claimed must be considered. *Howard v. Carroll*, 195 Fed. 646.

12. *Warder, Bushnell & Glessner Co. v. Raymond*, 7 S. D. 451, 64 N. W. 525.

13. *Davis v. Jones*, 109 Ala. 418, 19 So. 841 (where the holder was his own attorney and was not entitled to add attorney fees); *Le Master v. Lee* (Tex. Civ. App.), 150 S. W. 315, where the note in suit had not been placed in the hands of an attorney for collection.

[a] In suit to cancel a note and not enforce it, attorney fees are disregarded. *Howard v. Carroll*, 195 Fed. 646; *Hildebrand v. Walter A. Wood M. & R. Mach. Co.*, 8 Tex. Civ. App. 132, 27 S. W. 826.

14. See cases following, and *supra*, XII, E, 1, b; XII, E, 7.

[a] Where notice of intention to sue is a condition precedent to the recovery of attorney's fees, if the pleadings do not show such a notice the fees will not be considered in determining the amount in controversy. *Godfree v. Brooks*, 126 Ga. 627, 55 S. E. 938. And see *De Lamater v. Martin*, 117 Ga. 139, 43 S. E. 459 (plaintiff may amend and allege that he did not give the statutory notice); *MacDonald v. Ware*, 17 Ga. App. 450, 87 S. E. 679, silence of summons as to giving of notice controls averment in petition asking for attorney fees.

15. *Pickett v. Smith*, 95 Ga. 757, 22 S. E. 669.

16. *Cook v. Minick*, 1 Pa. Co. Ct. 603. And see *Modern Laundry v. Dilley*, 111 Ark. 350, 163 S. W. 1197.

not usually enter into a consideration of the question of the jurisdiction of the court.¹⁷ But whenever costs incurred have become an inherent part and part of the amount involved, they are to be considered.¹⁸

10. **Reduction of Original Demand.**—a. *By Partial Payments.* If a debt which was originally for an amount greater than that over which the court has jurisdiction, has been reduced by payments so that the amount still remaining due is an amount which is within the court's jurisdiction the court may entertain an action upon it.¹⁹

b. *By Remission of Excess Amount.*—(I.) **In General.**—If an amount above the jurisdiction of the court remains due and owing on an obligation or debt, a party may voluntarily remit and abandon all claim and right to recover the amount which thus exceeds the jurisdiction and may maintain his action for an amount within the jurisdiction of the court.²⁰ The defendant may, similarly, remit a portion of his

17. **Ala.**—See *Davis v. Bedsole*, 69 Ala. 362. **Cal.**—*Maxfield v. Johnson*, 30 Cal. 545; *Zabriskie v. Torrey*, 20 Cal. 173; *Bradley v. Kent*, 22 Cal. 169; *Votan v. Reese*, 20 Cal. 89. **Fla.**—*Seaboard Air Line Ry. v. Maxey*, 64 Fla. 487, 60 So. 353; *Louisville & N. R. Co. v. Sutton*, 54 Fla. 247, 44 So. 946. **Ia.**—*Gillett v. Richards*, 46 Iowa 652. **Minn.**—*Watson v. Ward*, 27 Minn. 29, 6 N. W. 407. **Miss.**—*Jackson v. Whitfield*, 51 Miss. 202; *N. O. J. & G. N. R. R. Co. v. Evans*, 49 Miss. 785. **Mo.**—*Bucholz v. Metropolitan Life Ins. Co.*, 176 Mo. App. 464, 158 S. W. 451. **Mont.**—*Payne v. Davis*, 2 Mont. 381. **N. Y.**—*Hamburger v. Hellman*, 103 App. Div. 263, 92 N. Y. Supp. 1067; *Rappaport v. Feder*, 50 Misc. 653, 99 N. Y. Supp. 385. But see *People ex rel. Evarts v. Municipal Court*, 162 App. Div. 477, 147 N. Y. Supp. 615. **Okla.**—See *Thompson v. De Long*, 40 Okla. 718, 140 Pac. 421. **Tex.**—See *Blankenship v. Wartelsky*, 6 S. W. 140.

18. *Spear v. Given*, 9 Paige (N. Y.) 362 (a creditor's bill); *Van Tyne v. Bunce*, 1 Edw. Ch. (N. Y.) 583.

[a] In a bill in equity in aid of a judgment at law, costs on such judgment are to be considered: "When the costs in the action at law are joined to the judgment, they become a part of the debt or demand." *Van Tyne v. Bunce*, 1 Edw. Ch. (N. Y.) 583.

19. **Ala.**—*Baird v. Nichols*, 2 Port. 186. **Ark.**—*Adair v. Quincy Stove Mfg. Co.*, 119 Ark. 263, 177 S. W. 909; *State v. Scoggins*, 10 Ark. 326. **Conn.**—See *Fowler v. Bishop*, 32 Conn. 199. **Ga.**—*Griffith v. Elder*, 110 Ga. 453, 35 S. E. 641; *Nichols v. McAbee*, 30 Ga.

8. **Ind.**—*Collins v. Shaw*, 8 Ind. 516; *Newland v. Nees*, 3 Blackf. 460. **Ia.**—*Hall v. Biever*, 1 Morris 113. **Kan.**—*Parker v. Dobson*, 78 Kan. 62, 97 Pac. 472, applying a special statute applicable to justice's court. **Mo.**—*Musick v. Chamlin*, 22 Mo. 175. **N. J.**—*Farley v. McIntire*, 13 N. J. L. 190. **N. C.**—*Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644; *Wiseman v. Witherow*, 90 N. C. 140; *Ausley v. Alderman*, 61 N. C. 215. **Pa.**—*McFarland v. O'Neil*, 155 Pa. 260, 25 Atl. 756; *Peter v. Schlosser*, 89 Pa. 439; *Bower v. McCormick*, 73 Pa. 427; *Collins v. Collins*, 37 Pa. 387; *Zimmerman v. Snyder*, 9 Pa. Super. 201. **Tenn.**—*Thompson v. Gibson*, 2 Overt. 235. **Tex.**—*Duer v. Seydell*, 20 Tex. 61; *Swigley v. Dickson*, 2 Tex. 192; *Watt v. Parlin & Orendorff Co.*, 44 Tex. Civ. App. 439, 98 S. W. 428; *Middlebrook v. David Bradley Mfg. Co.* (Tex. Civ. App.), 26 S. W. 113. Compare *Blankenship v. Adkins*, 12 Tex. 536. **Vt.**—*Page v. Warner*, 71 Vt. 180, 44 Atl. 67; *Miller v. Livingston*, 37 Vt. 467; *Bank of Middlebury v. Tucker*, 7 Vt. 144; *Southwick v. Merrill*, 3 Vt. 320. **Wis.**—*Prairie Grove Cheese Mfg. Co. v. Luder*, 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085; *Avery v. Rowell*, 59 Wis. 82, 17 N. W. 875.

[a] Assignee without knowledge of a payment may sue in court having apparent jurisdiction. *Bean v. Baxter*, 47 N. C. 356.

Accounts.—Determination of the amount in controversy, in general, see *supra*, XII, E, 9, f.

20. **Ala.**—*Central of Georgia R. Co. v. Williams*, 163 Ala. 119, 50 So. 328

set-off or counterclaim;²¹ in some jurisdictions a defendant may withhold from his counterclaim rather than remit the amount by which it is in excess of the court's jurisdiction,²² except where the demand is unliquidated, in which event the excess must be remitted.²³ The court has no power, by its own action to make such a remission and thus confer jurisdiction upon itself.²⁴ Not only may a portion of the original

("the law of remittitur . . . is common not statutory"); *Wharton v. King*, 69 Ala. 365; *Solomon v. Ross*, 49 Ala. 198; *Henderson v. Plumb*, 18 Ala. 74; *Nibbs v. Moody*, 5 Stew. & P. 198; *King v. Dougherty*, 2 Stew. 487. **Ark.**—*Adair v. Quincy Stove Mfg. Co.*, 119 Ark. 263, 177 S. W. 909; *Hunton v. Luce*, 60 Ark. 146, 29 S. W. 151, 46 Am. St. Rep. 165, 28 L. R. A. 221. **Colo.**—*Cramer v. McDowell*, 6 Colo. 369; *Litchfield v. Daniels*, 1 Colo. 268; *Byers v. Bellan-Price Inv. Co.*, 10 Colo. App. 74, 50 Pac. 368. **Ga.**—*Dowdle v. Stein*, 103 Ga. 94, 29 S. E. 595; *Stewart v. Thompson*, 85 Ga. 829, 11 S. E. 1030; *Wilhelms v. Noble Bros. & Co.*, 36 Ga. 599. **Ill.**—*Carpenter v. Wells*, 65 Ill. 451; *Ellis v. Snider*, 1 Ill. 336; *Kieper v. American Coal & S. Co.*, 187 Ill. App. 131; *The Cable Co. v. Elliott*, 122 Ill. App. 342; *Edward Hines Lumb. Co. v. Ream*, 64 Ill. App. 608. **Ia.**—*Hall v. Biever*, 1 Morris 113. **Kan.**—See *Wagstaff v. Challiss*, 31 Kan. 212, 1 Pac. 631. **Mass.**—*Hapgood v. Doherty*, 8 Gray 373. **Mich.**—*Cilley v. Van Patten*, 68 Mich. 80, 35 N. W. 831. **Minn.**—See *Poirier v. Martin*, 89 Minn. 346, 94 N. W. 865; *Barber v. Kennedy*, 18 Minn. 216. **Miss.**—*Kantrovitz v. McNeill*, 110 Miss. 873, 71 So. 13. **Mo.**—*Phillips v. Fitzpatrick*, 34 Mo. 276; *Matlack v. Lare*, 32 Mo. 262; *Denny v. Eckelkamp*, 30 Mo. 140; *Hempler v. Schneider*, 17 Mo. 258; *Best v. Best*, 16 Mo. 530. **Mont.**—See *Reynolds v. Smith*, 48 Mont. 149, 135 Pac. 1190. **Neb.**—See *Adams v. Nebraska Sav. & Exch. Bank*, 51 Neb. 121, 76 N. W. 421. **N. J.**—*Mooney v. Woolhouse*, 77 N. J. L. 325, 72 Atl. 53, applying a peculiar statute. **N. Y.**—*Bowditch v. Salisbury*, 9 Johns. 366; *People ex rel. Evarts v. Municipal Court*, 162 App. Div. 477, 147 N. Y. Supp. 615; *Globe v. Rauch*, 21 Misc. 48, 46 N. Y. Supp. 889, 26 Civ. Proc. 359. **N. C.**—*Brock v. Scott*, 159 N. C. 513, 75 S. E. 724. But see *Moore & Co. v. Thomson*, 44 N. C. 221, 59 Am. Dec. 550; *State v. Mangum*, 28 N. C.

369; *Fortescue v. Spencer*, 24 N. C. 63. **S. C.**—*Brunson v. Furtick*, 72 S. C. 579, 52 S. E. 424 (*distinguishing* *Ramsay v. Court of Wardens*, 2 Bay 180; and other early cases decided under a different statute); *Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803; *Catawba Mills v. Hood*, 42 S. C. 203, 20 S. E. 91; *Goldthwaite v. Dent*, 3 McCord 296, in quantum meruit for services rendered. **Tenn.**—*Carraway v. Burton*, 4 Humph. 108. **Vt.**—*Danforth v. Streeter*, 28 Vt. 490; *Warren v. Newfane*, 25 Vt. 250; *Herren v. Campbell*, 19 Vt. 23; *Boutwell v. Mason*, 12 Vt. 608. **W. Va.**—*Mitchell v. Davis*, 73 W. Va. 352, 80 S. E. 491; *Richmond v. Henderson*, 48 W. Va. 389, 37 S. E. 653; *Junkins v. Hamilton Lumb. Co.*, 44 W. Va. 641, 29 S. E. 1017; *Wells v. Michigan Mut. L. Ins. Co.*, 41 W. Va. 131, 23 S. E. 527, at least in actions for unliquidated damages. Compare *Todd v. Gates*, 20 W. Va. 464. **Wis.**—*McCormick v. Robinson*, 2 Pin. 276.

21. Ga.—*Bowers v. Williams*, 17 Ga. App. 779, 88 S. E. 703. **Mo.**—*Vance v. McHugh*, 187 Mo. App. 708, 173 S. W. 80; *Wells v. Gouveia*, 161 Mo. App. 563, 143 S. W. 517. **N. J.**—*Rosenkranz v. Wolf*, 87 N. J. L. 211, 93 Atl. 584; *Ward v. Hauck*, 87 N. J. L. 198, 93 Atl. 583 (*distinguishing* between set-off and recoupment in this respect); *Lochanowski v. McKeone*, 60 N. J. L. 118, 36 Atl. 882, *affirmed*, 61 N. J. L. 288, 41 Atl. 1117. **N. C.**—*Heyser v. Gunter*, 118 N. C. 964, 24 S. E. 712; *Derr v. Stubbs*, 83 N. C. 539. **S. C.**—*Haygood v. Boney*, 43 S. C. 63, 20 S. E. 803.

22. Wagstaff v. Challiss, 31 Kan. 212, 1 Pac. 631. See *Lancaster Mfg. Co. v. Colgate*, 12 Ohio St. 344.

23. Woolever v. Stewart, 36 Ohio St. 146, 38 Am. Rep. 569; *Lancaster Mfg. Co. v. Colgate*, 12 Ohio St. 344.

24. Crabtree v. Cliatt, 22 Ala. 181; *Thompson v. Kerr*, 17 Ind. 288.

debt be remitted, but a portion of the interest,²⁵ attorney's fees,²⁶ or statutory penalty,²⁷ may be abandoned in order to confer jurisdiction on the court.

In actions in which the value of the property is the test of jurisdiction and recovery of the property is sought or, in the alternative that possession of the property cannot be given, damages in a specified amount, a party cannot by remitting the excess amount claimed as an alternative remedy, confer jurisdiction upon the court,²⁸ because in such cases the value of the property remains the test of jurisdiction.²⁹ The remission, when made, is in effect a partial release, and discharges and destroys that portion of the debt or claim.³⁰

In a few jurisdictions the right of either party to remit a portion of the obligation without the consent of the other party, is denied,³¹ nor can the plaintiff credit on his demand a distinct and independent debt owing from him to the defendant.³² Even in these jurisdictions,

25. *Ala.*—*Bentley v. Wright*, 3 *Ala.* 607; *Murfs v. Harding*, 6 *Port.* 121. *Ill.*—*Wright v. Smith*, 76 *Ill.* 216; *Raymond v. Strobel*, 24 *Ill.* 114; *Bates v. Bulkley*, 7 *Ill.* 389; *Simpson v. Updegraff*, 2 *Ill.* 594. *Ind.*—See *Calloway v. Byram*, 95 *Ind.* 423; *Bozell v. Hauser*, 9 *Ind.* 522. *Ia.*—See *Moran v. Murphy*, 49 *Iowa* 68. *Md.*—*Kirk v. Grant*, 67 *Md.* 418, 10 *Atl.* 230. *N. J.* *De Camp v. Miller*, 44 *N. J. L.* 617; *Griffith v. Clute*, 9 *N. J. L.* 264. *N. Y.* See *National Surety Co. v. Rosenberg*, 158 *App. Div.* 896, 142 *N. Y. Supp.* 1043. *Vt.*—*Paige v. Morgan*, 28 *Vt.* 565; *Parkhurst v. Spalding*, 17 *Vt.* 527.
26. *Byers v. Bellan-Price Inv. Co.*, 16 *Colo. App.* 74, 50 *Pac.* 368.
27. *Henderson v. Plumb*, 18 *Ala.* 74.

28. *Davis v. Bedsole*, 69 *Ala.* 362; *Carter v. Alford*, 64 *Ala.* 236, 239; *Shealor v. Superior Court*, 70 *Cal.* 564, 11 *Pac.* 653.

29. *Carter v. Alford*, 64 *Ala.* 236; *Noville v. Dew*, 94 *N. C.* 43.

30. *Ala.*—*Wharton v. King*, 69 *Ala.* 365, 368. *Ark.*—*Hunton v. Luce*, 60 *Ark.* 146, 29 *S. W.* 151, 46 *Am. St. Rep.* 165, 28 *L. R. A.* 221. *N. C.* *Brock v. Scott*, 159 *N. C.* 513, 75 *S. E.* 724. *S. C.*—*Catawba Mills v. Hood*, 42 *S. C.* 203, 20 *S. E.* 91. *Vt.*—*Warren v. Newfane*, 25 *Vt.* 250.

[a] Doctrine of *res judicata* is sometimes said to be the basis of the rule. *People ex rel. Evarts v. Municipal Court*, 162 *App. Div.* 477, 147 *N. Y. Supp.* 615.

31. *Ga.*—*Godfree v. Brooks*, 126 *Ga.*

- 627, 55 *S. E.* 938; *Cox v. Stanton*, 58 *Ga.* 406; *Reeves v. Gower*, 14 *Ga. App.* 293, 80 *S. E.* 699. But see *De Lamater v. Martin*, 117 *Ja.* 139, 43 *S. E.* 459; *Stewart v. Thompson*, 85 *Ga.* 829, 11 *S. E.* 1030 (rule inapplicable in the county court); *Wilhelms v. Noble Bros. & Co.*, 36 *Ga.* 599. *N. J.*—*Howell v. Burnett*, 20 *N. J. L.* 265; *Souders v. Stratton*, 3 *N. J. L.* 528; *Colwell v. Parcell*, 3 *N. J. L.* 148. *N. C.*—See *Moore & Co. v. Thomson*, 44 *N. C.* 221, 59 *Am. Dec.* 550. *Pa.*—*Bower v. McCormick*, 73 *Pa.* 427 (criticizing previous cases); *Collins v. Collins*, 37 *Pa.* 387. *Tex.*—*Mabry v. Little*, 19 *Tex.* 337; *Burke v. Adoue*, 3 *Tex. Civ. App.* 494, 22 *S. W.* 824, 23 *S. W.* 91. But see *Peoples v. Slayden-Kirksey Woolen Mills (Tex. Civ. App.)*, 90 *S. W.* 61, upholding oral remission amounting to an amendment in the justice's court. *Va.*—See *James v. Stokes*, 77 *Va.* 225.

[a] A credit or receipt (1) endorsed on an instrument will not be presumed to be colorable merely. *Fiske v. Gerard*, 2 *McCord (S. C.)* 11. (2) But a credit entered by indorsement "By sundries" is insufficient because indefinite and not evincive of good faith. *Haggerty v. Vankirk*, 9 *N. J. L.* 118.

32. *Peter v. Schlosser*, 81 *Pa.* 439; *Stroh v. Uhrich*, 11 *Watts & S. (Pa.)* 57; *Wanner v. Zimmerman*, 5 *Pa. Dist.* 29; *James v. Frick*, 12 *Phila. (Pa.)* 443.

[a] Where defendant rendered bills and demanded payment plaintiff may allow the credit. *McFarland v. O'Neil*, 155 *Pa.* 260, 25 *Atl.* 756.

interest as damages may be remitted,³³ and the rule is inapplicable to actions seeking the recovery of unliquidated damages.³⁴

(II.) Procedure. — The remission of the excess portion of an obligation may be evidenced by the act of the plaintiff in voluntarily entering a credit or executing a release of an amount sufficient to reduce the claim to one within the jurisdiction of the court.³⁵ In some jurisdictions, the manner in which the remittitur shall be made is prescribed by statute.³⁶ By asking judgment for an amount less than the full amount of his claim a plaintiff waives that portion of it which is in excess of the court's jurisdiction.³⁷ In some jurisdictions, the remis-

33. *De Camp v. Miller*, 44 N. J. L. 617; *Griffith v. Clute*, 9 N. J. L. 264; *Inhabitants of Saddle River v. Colfax*, 6 N. J. L. 115; *Bower v. McCormick*, 73 Pa. 427; *Evans v. Hall*, 45 Pa. 235, 237.

[a] Interest Allowed by Agreement Cannot Be Remitted.—*Howell v. Burnett*, 20 N. J. L. 265, 267. To same effect is *St. Amand v. Gerry*, 2 Nott & McC. (S. C.) 487.

34. *Jennings v. Stripling*, 127 Ga. 778, 56 S. E. 1026; *Chicago & N. W. Ry. v. Elliott*, 16 Ga. App. 388, 85 S. E. 615.

[a] Reason for the Exception.—“In any case where the amount of the demand which the plaintiff holds against the defendant is fixed and certain by the express agreement of the parties, or becomes so by implication of law, the amount of such demand can not be reduced by the creditor so as to bring the same within the jurisdiction of a given court without the consent of the defendant, unless there is a statute which expressly authorizes such a proceeding. But there are many claims which one person may hold against another where the amount due is not fixed by express agreement and does not become certain by implication of the law and what shall be the extent of the claim that the injured party shall assert against the wrong-doer is a matter left to the determination of the party when he brings suit, the amount of the recovery, of course, being left to the determination of the jury, under the evidence in the case. Claims of this character may arise out of contract or out of tort. In neither class of cases is the plaintiff bound to claim all of the damages which might be the subject of a legal recovery.” *Jennings v.*

Stripling, 127 Ga. 778, 782, 56 S. E. 1026.

35. *Stewart v. Thompson*, 85 Ga. 829, 11 S. E. 1030.

[a] Forms.—(1) In *Hunton v. Luce*, 60 Ark. 146, 29 S. W. 151, 46 Am. St. Rep. 165, 28 L. R. A. 221, the plaintiff endorsed on the note “Credit by amount remitted, \$7.50.” (2) In *King v. Dougherty*, 2 Stew. (Ala.) 487, the creditor endorsed on the note: “I relinquish all the within note that is over fifty dollars.”

[b] Furnishing a memorandum to the clerk, stating the demand of plaintiff in an amount within the court's jurisdiction is insufficient, at least on appeal, where the facts conferring jurisdiction must affirmatively appear. *Trapp v. Mersman*, 183 Mo. App. 512, 167 S. W. 612.

36. *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724. See *Dalton v. Webster*, 82 N. C. 279; *Felt v. Felt*, 19 Wis. 193, credits must be endorsed on a note to give a justice jurisdiction if it was originally over \$100.

[a] Statutory Forms.—“The plaintiff in this action forgives and remits to the defendant so much of the principal of this claim as is in excess of two hundred dollars, together with the interest on said excess.” *Brock v. Scott*, 159 N. C. 513, 75 S. E. 724, in justices' courts.

[b] Implied remittitur by demanding an amount within the court's jurisdiction is also permitted. *Cromer v. Marsha*, 122 N. C. 563, 29 S. E. 836.

37. Cal.—*Sanborn v. Contra Costa County*, 60 Cal. 425. Colo.—*Litchfield v. Daniels*, 1 Colo. 268; *Byers v. Bellan-Price Inv. Co.*, 10 Colo. App. 74, 50 Pac. 368. Conn.—*Welles v. Allen*, 41 Conn. 140, although his bill of particulars showed an amount in excess of

sion may be made at any time before judgment is rendered;³⁸ the better rule, however, in view of the principle that it is the amount claimed in the complaint which determines jurisdiction, is that the remission must be made before or at the time suit is instituted.³⁹ A remission cannot be made after the trial is concluded,⁴⁰ or after an appeal has been taken.⁴¹

F. VALUE OF PROPERTY AS CRITERION OF JURISDICTION. — 1. In General. — In some actions the value of the property involved is the controlling factor in determining jurisdiction,⁴² though in far the

jurisdiction to be due. **Ga.**—Pickett v. Smith, 95 Ga. 757, 22 S. E. 669. **Ind.**—Remington v. Henry, 6 Blackf. 63. **Ia.**—Evans v. Murphy, 133 Iowa 550, 110 N. W. 1025; McVey v. Johnson, 75 Iowa 165, 39 N. W. 249. **Mass.**—Hapgood v. Doherty, 8 Gray 373. **Mich.**—Cilley v. Van Patten, 68 Mich. 80, 35 N. W. 831. **Minn.**—Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308. **N. Y.**—Bowditch v. Salisbury, 9 Johns. 366; French v. New York City Ry. Co., 46 Misc. 612, 92 N. Y. Supp. 771. **N. C.**—Knight v. Taylor, 131 N. C. 84, 42 S. E. 537; Cromer v. Marsha, 122 N. C. 563, 29 S. E. 836; Brantley v. Finch, 97 N. C. 91, 1 S. E. 535. **Ohio.**—Butcher v. Smith, 29 Ohio St. 604. **Okla.**—Albaugh Bros. Dover Co. v. White, 26 Okla. 24, 108 Pac. 360, Ann. Cas. 1912A, 1283. **Ore.**—See Ferguson v. Byers, 40 Ore. 468, 67 Pac. 1115, 69 Pac. 32. **Tenn.**—Boyd v. Hensley, 6 Tenn. 258. **Wis.**—Keegan v. Singleton, 5 Wis. 115; McCormick v. Robinson, 2 Pin. 276, 1 Chand. 254.

But see Willett v. Herrin (Tex. Civ. App.), 161 S. W. 26.

[a] It is not necessary to expressly aver in the petition that plaintiff has remitted or released the overplus. Dowdle v. Stein, 103 Ga. 94, 29 S. E. 595.

[b] **Remission of Interest.**—The charge of four years' interest when five years' interest was due "was notice to the defendants of such intention" to waive the amount in excess of the jurisdiction. Hunt v. Rockwell, 41 Conn. 51.

38. Ala.—Crabtree v. Clatt, 22 Ala. 181. **Ill.**—Reading v. Mead, 16 Ill. App. 360, it must be done before the case is submitted. **Mo.**—Vance v. McHugh, 187 Mo. App. 708, 173 S. W. 80; Wells v. De Gouveia, 161 Mo. App. 563, 143 S. W. 517. **N. C.**—Brock v. Scott, 159 N. C. 513, 75 S. E. 724;

McPhail v. Johnson, 115 N. C. 298, 20 S. E. 373.

39. Ark.—See Hunton v. Luce, 60 Ark. 146, 29 S. W. 151, 46 Am. St. Rep. 165, 28 L. R. A. 221. **Mont.**—See Oppenheimer v. Regan, 32 Mont. 110, 79 Pac. 695. **Ore.**—Ferguson v. Byers, 40 Ore. 468, 67 Pac. 1115, 69 Pac. 32. **S. C.**—Plunket v. Evans, 2 S. D. 434, 50 N. W. 961.

As to right to amend to state an amount within the jurisdiction, see *supra*, XII, E, 8.

40. Cramer v. McDowell, 6 Colo. 369.

41. Ariz.—Brown v. Braun, 9 Ariz. 254, 256, 80 Pac. 323. **Ark.**—Rose v. Christinett, 77 Ark. 582, 92 S. W. 866, cannot be remitted by amendment in appellate court. **Mo.**—Batchelor v. Bess, 22 Mo. 402. **N. C.**—Coggins v. Harrell, 86 N. C. 317. **Tenn.**—Dixon v. Caruthers, 9 Yerg. 30. **Tex.**—Pecos & N. T. Ry. Co. v. Canyon Coal Co., 102 Tex. 478, 119 S. W. 294; Hearn v. Cutberth, 10 Tex. 216; St. Louis S. W. Ry. Co. v. Berry (Tex. Civ. App.), 177 S. W. 1187; Chicago, R. I. & G. Ry. Co. v. Gladish (Tex. Civ. App.), 175 S. W. 863.

42. See cases and discussion following.

[a] **Actions Involving the Right to an Office of Profit.**—(1) The value of the office is the test of jurisdiction. State v. De Vargas, 28 La. Ann. 342; State v. De Gress, 72 Tex. 242, 11 S. W. 1029 (quo warranto); State v. Owens, 63 Tex. 261; Harris v. Williamson, 45 Tex. Civ. App. 65, 99 S. W. 713. Compare Dean v. State, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185. (2) "An office of profit is property and can be sued for by the person claiming title thereto just as suits may be brought for the recovery of any other character of property, and in such

greater number of actions, it is the amount sought to be recovered or claimed as damages which is to be considered.⁴³

2. How Determined.—a. *Generally.*—In actions in which the value of the property in dispute is the test of jurisdiction, the general rule is to regard the value as alleged in the complaint in determining the question.⁴⁴

b. *In Actions for the Recovery of Personal Property.*—Various rules are applied to determine the value of personal property as the ground of jurisdiction, in actions to recover its possession. Under some authorities the value of the property as alleged in the complaint is the test of jurisdiction.⁴⁵ In other jurisdictions, the value stated in the accompanying affidavit is either conclusive,⁴⁶ in the absence of bad

suits the value of the office or property in controversy determines the jurisdiction of the court." *Harris v. Williamson*, 45 Tex. Civ. App. 65, 99 S. W. 713. (3) A salary attached to the office after a person's election invests the office with a value which determines jurisdiction. *Krakauer v. Caples*, 5 Tex. Civ. App. 264, 23 S. W. 1036.

[b] In actions by judgment creditors (1) attacking pretended purchases or sales by or in behalf of the judgment debtor, the value of the property involved and not the amount of the judgment held by the creditor is the test. *Chaffe & Sons v. De Moss*, 37 La. Ann. 186; *State v. Judges, etc.*, 33 La. Ann. 1351; *Queyrouze v. Thibodeaux*, 30 La. Ann. 1114. (2) The fact that the creditor attacks the transaction only in so far as his particular claim is concerned, does not affect the rule. *Godshaw v. Judges of Second Circuit Court of Appeals*, 38 La. Ann. 643. *Compare Loeb v. Arent*, 33 La. Ann. 1085.

[c] In a suit to restrain the sale of specific property, it is the value of the property which determines jurisdiction. *Smith Drug Co. v. Rochelle* (Tex. Civ. App.), 135 S. W. 258.

Actions for recovery of personal property, see *infra*, XII, G, 4.

Determination of value, see *infra*, XII, G, 4.

43. See the discussion throughout this article.

[a] In action for injuries to property the value of the property is immaterial. *Watson v. Farmer*, 141 N. C. 452, 54 S. E. 419.

[b] In an action for wrongful interference with property, its value is not material. *De Camp v. Miller*, 44 N. J.

L. 617, unlawful seizure and sale by an officer.

44. *Fowler v. Fowler*, 50 Conn. 256, partition.

45. Cal.—*Shealor v. Superior Court*, 70 Cal. 564, 11 Pac. 653; *J. Dewing Co. v. Thompson*, 19 Cal. App. 85, 124 Pac. 1035; *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500. Ga.—*Long v. Ivey*, 12 Ga. App. 147, 76 S. E. 1055. N. C.—See *Pasterfield v. Sawyer*, 133 N. C. 42, 45 S. E. 524. S. D.—*People's Sec. Bank v. Sanderson*, 24 S. D. 443, 123 N. W. 873. Tenn.—*Gray v. Jones*, 1 Head 542, plaintiff may state any value he wishes in the warrant, even for the purpose of conferring jurisdiction.

46. Miss.—*Thompson v. Poe*, 104 Miss. 586, 61 So. 656; *Johnson v. Tabor*, 101 Miss. 78, 57 So. 365; *Ball, Brown & Co. v. Sledge*, 82 Miss. 749, 35 So. 447, 100 Am. St. Rep. 654. Mo.—*Stephens v. Reberet*, 186 Mo. App. 456, 171 S. W. 638; *Saunders v. Scott*, 132 Mo. App. 209, 111 S. W. 874; *Knoche v. Perry*, 90 Mo. App. 483; *Malone v. Hopkins*, 40 Mo. App. 331; *Payne v. Weems*, 36 Mo. App. 54; *Gottschalk v. Klinger*, 33 Mo. App. 410. *Compare Butler v. Ivie*, 30 Mo. 478, decided under an early statute. Pa.—*Fenton v. Harred*, 17 Pa. 153.

[a] Reason for the Rule.—"The jurisdiction of the courts was not intended to be left as a matter of conjecture to be acquired and liable to be defeated, by honest differences upon a mere matter of opinion." *Ball, Brown & Co. v. Sledge*, 82 Miss. 749, 35 So. 447, 100 Am. St. Rep. 654.

[b] Where the value is not stated either in the affidavit or declaration and the jury returns a valuation below the court's jurisdiction, the action

faith,⁴⁷ or at least *prima facie* evidence of the value of the property.⁴⁸ In still other courts the value fixed by an appraisal made by persons summoned and sworn by the officer who levies the writ,⁴⁹ or the value certified to by such officer,⁵⁰ is determinative of the question. In other courts the real value of the property as determined from the evidence adduced at the trial,⁵¹ is the final test of jurisdiction, and if from the evidence it appears that the property has a greater value than the court is given jurisdiction over, it has no right to determine the right of property involved but must order its return to the defendant,⁵² and the action must be dismissed.⁵³ In some jurisdictions, whenever the defendant in replevin is entitled to recover the value of property replevied, judgment may be rendered in his favor for the real value es-

will be dismissed. *Stephen v. Eisman*, 54 Miss. 535.

[c] The fact that the jury fixed the value of the property at an amount in excess of the court's jurisdiction is immaterial, the plaintiff's recovery being limited by the value stated in the affidavit. *Johnson v. Tabor*, 101 Miss. 78, 57 So. 365.

47. *Ball, Brown & Co. v. Sledge*, 82 Miss. 749, 35 So. 447, 100 Am. St. Rep. 654.

[a] Proof of Bad Faith.—“Conflicting testimony as to the value of the property involved is not sufficient. The proof must go further and show that the valuation was knowingly and purposely falsely magnified or diminished in order to avoid the constitutional limitations of jurisdiction.” *Ball, Brown & Co. v. Sledge*, 82 Miss. 749, 35 So. 447, 100 Am. St. Rep. 654.

48. *Colo.*—*Jakway v. Rivers*, 48 *Colo.* 49, 108 *Pac.* 999. *Ind.*—*Coverdale v. Alexander*, 82 *Ind.* 503. *Compare Markin v. Jornigan*, 3 *Ind.* 548. *Kan.*—*Griffiths v. Wheeler*, 31 *Kan.* 17, 2 *Pac.* 842. *Compare Garrett v. Wood*, 3 *Kan.* 231; *Leslie v. Reber*, 4 *Kan.* 315. *Mich.*—*Burt v. Addison*, 74 *Mich.* 730, 42 *N. W.* 278; *Chilson v. Jennison*, 60 *Mich.* 235, 26 *N. W.* 859; *Carew v. Matthews*, 41 *Mich.* 576, 2 *N. W.* 829; *Henderson v. Desborough*, 28 *Mich.* 170. And see *Merrill v. Butler*, 18 *Mich.* 294. *Minn.*—*Parker v. Bradford*, 68 *Minn.* 437, 71 *N. W.* 619; *Hecklin v. Ess*, 16 *Minn.* 51. *Wis.*—*Darling v. Conklin*, 42 *Wis.* 478. But see *Williams v. McDonal*, 3 *Pin.* 331, 4 *Chand.* 65.

[a] Unless a plea attacking the statement of value made in the affi-

davit is interposed and its allegations proved, that statement is conclusive. *Parker v. Bradford*, 68 *Minn.* 437, 440, 71 *N. W.* 619.

49. *Darrell v. Biscoe*, 94 *Md.* 684, 51 *Atl.* 410; *Selby v. McQuillan*, 59 *Neb.* 158, 80 *N. W.* 504; *Kilpatrick-Kock Dry-Goods Co. v. Rosenberger*, 57 *Neb.* 270, 77 *N. W.* 770; *Bates & Co. v. Stanley*, 51 *Neb.* 252, 70 *N. W.* 972; *Hill v. Wilkinson*, 25 *Neb.* 103, 41 *N. W.* 134.

[a] In case the appraisement discloses the value to be above the court's jurisdiction, the court is sometimes authorized to certify the proceedings to the higher court. *Hill v. Wilkinson*, 25 *Neb.* 103, 41 *N. W.* 134.

50. *Betterton v. Echols*, 85 *Tex.* 212, 20 *S. W.* 63; *Cleveland v. Tufts*, 69 *Tex.* 580, 7 *S. W.* 72; *Erwin v. Blanks*, 60 *Tex.* 583; *Fuller, Hanna & Co. v. Rogers* (*Tex. Civ. App.*), 184 *S. W.* 322; *Widder v. Benjamin*, 75 *Vt.* 152, 53 *Atl.* 1071.

51. *Conn.*—*Sanford v. Scott*, 38 *Conn.* 244, under the act of 1868. *Ill.*—*Cruikshank v. W. W. Kimball Co.*, 75 *Ill. App.* 231; *Vogel v. People*, 37 *Ill. App.* 388. *Me.*—*Small v. Swain*, 1 *Me.* 133. *Mass.*—*Davenport v. Burke*, 9 *Allen* 116, neither the allegations of the writ nor the estimate of appraisers, is material. *N. H.*—*Adams v. Spaulding*, 64 *N. H.* 384, 10 *Atl.* 688.

52. *Ill.*—*Jarrett v. McIntyre*, 134 *Ill. App.* 581; *Cruikshank v. W. W. Kimball Co.*, 75 *Ill. App.* 231; *Powell v. Hyndman*, 29 *Ill. App.* 179, even though the affidavit stated a value within the court's jurisdiction. *N. C.*—*Noville v. Dew*, 94 *N. C.* 43. *Ore.*—*Corbell v. Childers*, 17 *Ore.* 528, 21 *Pac.* 670.

53. *Octo v. Teahan*, 133 *Mass.* 430;

established by the evidence not exceeding the jurisdictional limit of the court,⁵⁴ but in others the court may give defendant judgment for the full value of the property even though this value be in excess of its ordinary jurisdiction.⁵⁵ Where the property replevied has been returned to the defendant, and the case proceeds as one for damages only, if the court ascertains the value of the property and damages to be an amount in excess of its jurisdiction, it may allow the plaintiff to remit the excess.⁵⁶

G. RULES APPLICABLE TO PARTICULAR CASES.—1. In General. Limitations on the amount in controversy or the value of property over which courts are given jurisdiction are sometimes held to be applicable only to ordinary civil actions,⁵⁷ and not to govern special proceedings.⁵⁸

2. Attachments and Executions.—In an action instituted by attachment proceedings the amount of the debt and not the value of the property attached is the test of jurisdiction.⁵⁹ In garnishment proceed-

Widber *v.* Benjamin, 75 Vt. 152, 53 Atl. 1071.

[a] Where the judgment must always determine the value of the property, the court cannot render a judgment on the merits where the value found is an amount which exceeds its jurisdiction. *Darling v. Conklin*, 42 Wis. 478.

54. *Chilson v. Jennison*, 60 Mich. 235, 26 N. W. 859; *Humphrey v. Bayn*, 45 Mich. 565, 8 N. W. 556; *Henderson v. Desborough*, 28 Mich. 170; *Gray v. Jones*, 1 Head (Tenn.) 542.

[a] Double value may be awarded to the defendant under some statutes. *Godsey v. Weatherford*, 86 Tenn. 670, 8 S. W. 385.

55. **Mo.**—*Saunders v. Scott*, 132 Mo. App. 209, 111 S. W. 874. **Neb.**—*Bates & Co. v. Stanley*, 51 Neb. 252, 70 N. W. 972. **Pa.**—*Fenton v. Harred*, 17 Pa. 158. **Tex.**—See *Texas Land & Irr. Co. v. Sanders* (Tex. Civ. App.), 113 S. W. 558.

[a] Plaintiff is not allowed to take advantage of his own wrong to defeat justice. *Fenton v. Harred*, 17 Pa. 158.

[b] On appeal, in a replevin action where judgment for the value of the property is rendered in favor of the defendant, the court may award the true value of the property even though this be greater than the amount over which the court in which the case originated had jurisdiction. *Selby v. McQuillan*, 59 Neb. 158, 80 N. W. 504; *Bates & Co. v. Stanley*, 51 Neb. 252, 70 N. W. 972.

56. *Hill v. Wilkinson*, 25 Neb. 103, 41 N. W. 134.

57. *Wyman v. Felker*, 18 Colo. 382, 33 Pac. 157.

[a] "The county courts have unlimited jurisdiction, not only of all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators, etc., but of civil actions relating to the estates of deceased persons; the limitation as to amount having reference solely to ordinary civil actions." *Wyman v. Felker*, 18 Colo. 382, 386, 33 Pac. 157.

[b] In actions for divorce and adjustment of property rights, (1) the amount or value of the property has no bearing on the jurisdiction of the court. *Deuprez v. Deuprez*, 5 Cal. 387. *Compare State v. Smith*, 19 Wis. 531. (2) An award of alimony and counsel fees, within the jurisdiction of the court, is not enlarged by an order for the payment of \$30 a month for the maintenance of the children. *Hall v. Harrington*, 7 Colo. App. 474, 44 Pac. 365. (3) But where the plaintiff seeks to have a conveyance set aside as being in fraud of her property rights, the value of the property is the test of the court's jurisdiction. *McKnight v. McKnight*, 49 Colo. 60, 111 Pac. 583.

58. *State ex rel. White v. Dickerson*, 33 Nev. 540, 113 Pac. 105, mandamus proceedings are not included. *Contra*, *State ex rel. Johnson v. Hanscom*, 90 Tex. 321, 37 S. W. 601, 38 S. W. 761; *Bigby v. Brantley*, 38 Tex. Civ. App. 44, 85 S. W. 311, mandamus.

59. **Ala.**—See *Witherspoon v. Barber*, 3 Stew. 335. **Ark.**—*Fly v. Grieb's Admr.*, 62 Ark. 209, 35 S. W. 214. **Ia.**

ings, the amount claimed to be due from the principal debtor to the plaintiff and not the amount due from the garnishee to the debtor determines the jurisdiction of the court.⁶⁰ If the judgment rendered against the judgment debtor was within the court's jurisdiction, it may enforce such judgment by garnishment and may even render a judgment against the garnishee for an amount in excess of its ordinary jurisdiction, if the cause requires it.⁶¹

In a suit to restrain the sale of property levied upon under execution, the alleged value of the property and not the amount of the judgment controls.⁶² In actions to determine the ownership of property attached or levied upon, the assessed valuation made by the officer in charge of the proceeding and not the value of the property ascertained at the hearing, is the test of jurisdiction.⁶³ In proceedings against an

Hoppe v. Byers, 39 Iowa 573. **Tex.** *Landa v. Mercantile & Bkg. Co.*, 10 Tex. Civ. App. 582, 31 S. W. 55; *Barnett v. Rayburn* (Tex. Civ. App.), 16 S. W. 537.

[a] In sequestration proceedings the value of the property is the test of jurisdiction. *Houston Ice & Brew. Co. v. North Galveston Imp. Co.*, 29 Tex. Civ. App. 40, 67 S. W. 1079.

[b] Defendant's claim for damages for wrongful attachment is collateral, and the court may award an amount which is beyond its original jurisdiction. *A. S. Barboro & Co. v. Serio*, 110 Miss. 353, 70 So. 458.

60. **Ark.**—*Smith v. Davis*, 83 Ark. 372, 103 S. W. 746; *Davis v. Choctaw, O. & G. R. Co.*, 73 Ark. 120, 83 S. W. 318 (*overruling* *More v. Woodruff*, 5 Ark. 214; *Woodruff v. Griffith*, 5 Ark. 354); *Fly v. Grieb's Admr.*, 62 Ark. 209, 35 S. W. 214 (as between plaintiff in attachment and an intervener); *Traylor v. Allen*, 61 Ark. 13, 31 S. W. 570. **Ga.**—*Welch v. Alligood*, 22 Ga. 618. **Ill.**—*Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636 (*overruling* *Haines v. O'Connor*, 5 Ill. App. 213); *Surine v. Fort Dearborn Nat. Bank*, 59 Ill. App. 329; *Home Ins. Co. v. Kirk*, 23 Ill. App. 19. **Kan.**—*Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366; *Holyoke Envelope Co. v. Heagler*, 10 Kan. App. 572, 63 Pac. 450. **Mich.** *Wetherwax v. Paine*, 2 Mich. 555. **Mo.** *Doggett v. St. Louis M. & F. Ins. Co.*, 19 Mo. 201.

[a] An injunction against garnishment proceedings will not be refused where the debt involved is below the jurisdictional limit of the court, but the amount garnished is in excess of

that, and there is nothing to show that the interest and costs on the debt will not increase it above the jurisdictional amount. *Margarum v. Moon*, 63 N. J. Eq. 586, 53 Atl. 179.

[b] On an appeal by a garnishee, (1) the amount of the debt claimed and not the garnishee's indebtedness to the debtor is to be considered. *Hart v. Gordon*, 8 Ga. App. 825, 70 S. E. 193. See *Howard v. Gammon*, 78 Vt. 420, 62 Atl. 1014; *American Express Co. v. Gray*, 62 Vt. 421, 20 Atl. 276. (2) Costs incurred in the main action are to be added to the debt recovered, in order to determine jurisdiction. *Hubbard v. Vacher* (Tex. Civ. App.), 26 S. W. 921.

61. **Ill.**—*Nesbitt v. Dickover*, 22 Ill. App. 140. **Ind.**—See *Andrews v. Powell*, 27 Ind. 303. **Ia.**—*Gillett v. Richards*, 46 Iowa 652, where costs in the main action had increased the judgment above the jurisdictional amount. **Ky.**—See *Burnes v. Cade*, 10 Bush 251.

[a] Reason for the Rule.—“The garnishee proceedings is only an incident in the collection of the original judgment.” *Nesbitt v. Dickover*, 22 Ill. App. 140.

62. **La.**—*Speyrer v. Miller*, 108 La. 204, 32 So. 524, 61 L. R. A. 781; *Rhodes v. Black*, 34 La. Ann. 406; *Meyer, Weiss & Co. v. Logan*, 33 La. Ann. 1055. **Mich.**—*Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474. **Tex.**—*Jesse French P. & O. Co. v. Clay*, 40 Tex. Civ. App. 638, 90 S. W. 682; *Brown & Co. v. Young*, 1 White & W. Civ. Cas., §1240.

63. *Cleveland v. Tufts*, 69 Tex. 580, 7 S. W. 72; *Chrisman v. Grayham*, 49 Tex. 491.

execution purchaser, who refuses to complete the purchase, to recover the statutory proportion of his bid, the court from which the execution issued has jurisdiction although the amount sought to be recovered is below its ordinary jurisdiction.⁶⁴ On a motion to set aside an execution, jurisdiction is to be determined from the amount stated on the face of the execution.⁶⁵

3. Liens and Mortgages.—Jurisdiction over actions to enforce liens is to be determined by the amount of the debt, rather than by the value of the property subject to the lien,⁶⁶ except where, by statute, jurisdiction over such matters is expressly given to particular courts, irrespective of the amount in controversy or the value of the property involved.⁶⁷ But where the suit is instituted by a land owner to protect his property against a lien asserted against it, the value of the land and not the amount of the claim is controlling.⁶⁸

Mortgages.—In foreclosure suits the amount of the debt secured by the mortgage is deemed to be the amount of the matter in controversy,⁶⁹

64. *Lockridge v. Baldwin*, 20 Tex. 303, 70 Am. Dec. 385.

65. *Force v. Van Patten*, 149 Mo. 446, 50 S. W. 906.

66. *Ala.*—*Reese v. Bessemer Plumbing & Mfg. Co.*, 42 So. 56; *Tolbert v. Falkenberry*, 147 Ala. 204, 40 So. 120, mechanic's lien. *Ark.*—*Shelton v. Little Rock Auto Co.*, 103 Ark. 142, 146 S. W. 129, wheelwright's lien. *Mich.* *Peake v. Bradley*, 121 Mich. 182, 79 N. W. 1108; *Dewey v. Duyer*, 39 Mich. 509. *Miss.*—*May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80. *N. Y.*—*Vaughn v. Ely*, 4 Barb. 159.

[a] **Statement of the amount claimed**, made in an affidavit required by statute to be filed, determines the amount in controversy. *Griffith v. Elder*, 110 Ga. 453, 35 S. E. 641.

[b] **A claim of lien for materials furnished for use on several buildings** is to be treated as an entirety. *Curry v. Spink*, 23 Pa. 58; *Woodruff v. Chambers*, 13 Pa. 132.

[c] **Action against debtor and his transferees to enforce lien.** *Rickets v. Hamilton*, 16 Ky. L. Rep. 762, 29 S. W. 736; *Small v. Rush* (Tex. Civ. App.), 132 S. W. 874. See *Freeman v. Collier Racket Co.* (Tex. Civ. App.), 105 S. W. 1129.

[d] **Landlord's lien on property in possession of a transferee of a tenant** may be enforced by a distress warrant, although the value of such property is less than would otherwise be within the court's jurisdiction. *Small v. Rush* (Tex. Civ. App.), 132 S. W. 874.

67. *Cal.*—*Van Winkle v. Stow*, 23 Cal. 457. *Mass.*—*Busfield v. Wheeler*, 14 Allen 139. *N. C.*—*Murphy v. McNeill*, 82 N. C. 221, foreclosure of mortgage. *Tex.*—*Ablowich v. Greenville National Bank*, 95 Tex. 429, 67 S. W. 79, 881 (foreclosure of lien on land—*overruling* *Carter v. Hubbard*, 79 Tex. 356, 15 S. W. 392, and other cases); *Jenkins v. Cain*, 12 S. W. 1114.

68. *Wileke v. Duross*, 144 Mich. 243, 107 N. W. 907, 115 Am. St. Rep. 394; *Matteson v. Matteson*, 132 Mich. 516, 93 N. W. 1079; *Dodge v. Van Buren Circuit Judge*, 118 Mich. 189, 76 N. W. 315; *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474; *Huyck v. Bailey*, 100 Mich. 223, 58 N. W. 1002; *Fuller v. City of Grand Rapids*, 40 Mich. 395; *White v. Forbes, Walk. Ch.* (Mich.) 112.

[a] **Rule Stated.**—"The matter in dispute is determined by the claim asserted in the suit. If the complainant asserts that valuable property is in danger of being lost, the value of that property determines the jurisdiction. If the claim asserted is a lien against that property, and a suit is brought to collect that claim, its value determines the jurisdiction." *Matteson v. Matteson*, 132 Mich. 516, 518, 93 N. W. 1079.

Lien created by tax proceedings, see *infra*, XII, G, 6.

69. *Conn.*—*Cantoni v. Betts*, 70 Conn. 386, 39 Atl. 604; *Boyle v. Rice*, 41 Conn. 418; *Stone v. Platt*, 41 Conn. 285. Compare *Peters v. Goodrich*, 3

and the same rule applies to suits to redeem mortgaged property.⁷⁰ A court having general jurisdiction to foreclose mortgages may enter a deficiency judgment for any amount even though there is a monetary limitation on its general jurisdiction.⁷¹ In some jurisdictions, in an action to foreclose or enforce a chattel mortgage, or lien on personal property, the value of the property mortgaged is the test of jurisdiction,⁷² at least in cases in which the value of the mortgaged premises is greater than the debt secured;⁷³ but where the debt is greater than

Conn. 146. Ga.—*De Vaughn v. Byrom*, 110 Ga. 904, 36 S. E. 267 (chattel mortgage); *Aycock v. Subers*, 73 Ga. 807. Wis.—*Page v. Harrison*, 20 Wis. 323.

[a] The right to have a prior mortgage set aside, in a foreclosure action, constitutes a distinct cause of action, which may or may not be joined with the foreclosure suit, at the election of the plaintiff, and the matter in demand in such an action is the amount of the mortgage debt, and if this is not within the jurisdiction of the court, the court can render no judgment on this cause of action irrespective of the demand in the foreclosure suit. *Cantoni v. Betts*, 70 Conn. 386, 39 Atl. 604.

[b] Action in Aid of Foreclosure. That an action is in aid of a foreclosure, does not extend the powers of a court of limited jurisdiction. "As a court of equity, the city court may take cognizance of subordinate controversies when appropriate to the full disposition of the main controversy before it; but as a court of limited jurisdiction it can take cognizance of no controversy, whether subordinate or not, where the matter in demand exceeds \$500. In other words, the limitation of its jurisdiction controls its exercise of equity power." *Cantoni v. Betts*, 70 Conn. 386, 389, 39 Atl. 604.

70. *Bronson v. Leibold*, 87 Conn. 293, 87 Atl. 979; *Lucking v. Wesson*, 225 Mich. 443.

[a] Redemption by Attaching Creditor.—The fact that the debt of the attaching creditor who has a right to and is seeking to redeem from a foreclosure on premises of his debtor, together with the amount of the mortgage indebtedness, exceeds the jurisdictional amount, is immaterial. *Town of Bridgeport v. Blinn*, 43 Conn. 274.

[b] An action to set aside a quitclaim deed, executed under a mistake, on payment of the balance due on a

contract to purchase, is analogous to an action to redeem and is governed by the same principles. *Bronson v. Leibold*, 87 Conn. 293, 87 Atl. 979.

71. *Hawley v. Whalen*, 64 Hun 550, 19 N. Y. Supp. 521.

72. *Texas & N. O. R. Co. v. Rucker*, 99 Tex. 125, 87 S. W. 818 (carrier's statutory lien on unclaimed livestock); *Cotulla v. Goggan*, 77 Tex. 32, 13 S. W. 742; *Marshall v. Taylor*, 7 Tex. 235; *City Nat. Bank v. Watson* (Tex. Civ. App.), 178 S. W. 657; *Lusk v. Hardin* (Tex. Civ. App.), 176 S. W. 787; *Richardson v. Hethcock* (Tex. Civ. App.), 173 S. W. 1006; *Brown v. March* (Tex. Civ. App.), 149 S. W. 353; *Poulter v. Southwest Nat. Bank* (Tex. Civ. App.), 146 S. W. 561; *W. R. Kelley & Sons v. J. E. Stevens & Sons* (Tex. Civ. App.), 136 S. W. 94; *McDaniel v. Staples* (Tex. Civ. App.), 113 S. W. 596; *Smith v. Carroll*, 28 Tex. Civ. App. 330, 66 S. W. 863; *Schwartz v. Frees* (Tex. Civ. App.), 31 S. W. 214; *Lake Navigation Co. v. Austin Elec. Sup. Co.* (Tex. Civ. App.), 30 S. W. 832 (involving a maritime lien); *Cox v. Wright* (Tex. Civ. App.), 27 S. W. 294.

[a] The amount of the demand and the value of the property mortgaged are not added together to determine jurisdiction. *Conner v. Jacobs* (Tex. Civ. App.), 51 S. W. 640.

[b] The market value and not the face value of bonds pledged as collateral security, controls. *Wisley v. Houston Nat. Bank*, 28 Tex. Civ. App. 268, 67 S. W. 195.

73. *Cotulla v. Goggan*, 77 Tex. 32, 13 S. W. 742; *Walker Mer. Co. v. J. R. Raney Co.* (Tex. Civ. App.), 154 S. W. 317.

[a] If the value of the property is in excess of the court's jurisdiction (1) but the amount of the debt is within its jurisdiction, the case should be retained in order to determine the issues in regard to the debt (*Jecker*

the value of the mortgaged property, the amount of the debt controls,⁷⁴ and the rule is also inapplicable where the only right asserted by the plaintiff is to seize and sell as much of the property as may be necessary to satisfy the debt.⁷⁵

4. **Actions for the Recovery of Personal Property.**—In actions to recover possession of personal property, the value of the property and not the amount asked for in the alternative that possession cannot be had, is the test of jurisdiction.⁷⁶ Damages claimed for the unlawful detention of the property are, in many states, not to be considered in determining the question of jurisdiction,⁷⁷ though in other states they are held to form a part of the subject matter of the action and must be included.⁷⁸

v. Phytides, 27 Tex. Civ. App. 410, 65 S. W. 1129), (2) at least where the claim of a lien is abandoned. *Iowa Mfg. Co. v. Taylor* (Tex. Civ. App.), 157 S. W. 171. See *City Nat. Bank v. Watson* (Tex. Civ. App.), 178 S. W. 657.

74. *Marshall v. G. A. Stowers Furn. Co.* (Tex. Civ. App.), 167 S. W. 230. See *Beaty v. Thos. Goggan & Bro.* (Tex. Civ. App.), 131 S. W. 631.

[a] **Pleading.**—(1) If the debt be less than the minimum amount of which the court has jurisdiction, a complaint must allege the value of the property. *Marshall v. G. A. Stowers F. Co.* (Tex. Civ. App.), 167 S. W. 230; *Thompson v. Perryman* (Tex. Civ. App.), 141 S. W. 184. (2) In cases in which the debt claimed would of itself be within the court's jurisdiction, there must also be an allegation of the value of the property. *Marshall v. G. A. Stowers Furn. Co.* (Tex. Civ. App.), 167 S. W. 230; *Randals v. Pecos Val. State Bank* (Tex. Civ. App.), 162 S. W. 1190; *Wilson v. Ford* (Tex. Civ. App.), 159 S. W. 73; *Walker Mer. Co. v. J. R. Raney Co.* (Tex. Civ. App.), 154 S. W. 317; *Smith v. Eureka Lumb. Co.* (Tex. Civ. App.), 149 S. W. 747; *Bates v. Hill* (Tex. Civ. App.), 144 S. W. 288; *Stricklin v. Arrington* (Tex. Civ. App.), 141 S. W. 189; *Mangum v. Buffalo Pitts Co.* (Tex. Civ. App.), 131 S. W. 1196. *Contra*, *Cantrell v. Cawyer* (Tex. Civ. App.), 162 S. W. 919; *Edwards v. Mayes* (Tex. Civ. App.), 136 S. W. 510, at least where the value appears from the evidence taken and no objection to the pleading was made.

[b] **Opportunity to amend** will be afforded by the court. *Smith v. Eureka Lumb. Co.* (Tex. Civ. App.), 149

S. W. 747; *Allen v. Glover*, 27 Tex. Civ. App. 483, 65 S. W. 379; *Irion v. Bexar County*, 26 Tex. Civ. App. 527, 63 S. W. 550; *Dazey v. Pennington*, 10 Tex. Civ. App. 326, 31 S. W. 312.

75. *Red Deer Oil Dev. Co. v. Hug-gins* (Tex. Civ. App.), 155 S. W. 949 (a statutory lien); *Ingraham v. Rich* (Tex. Civ. App.), 136 S. W. 549; *Allen v. Glover*, 27 Tex. Civ. App. 483, 65 S. W. 379 (a statutory lien); *Irion v. Bexar County*, 26 Tex. Civ. App. 527, 63 S. W. 550; *Yeiser v. Taylor* (Tex. Civ. App.), 31 S. W. 84; *Lawson v. Lynch*, 9 Tex. Civ. App. 582, 29 S. W. 1128, landlord's lien.

76. *Ala.*—*Carter v. Alford*, 64 Ala. 236. *Ark.*—*Kaufman v. Kelley*, 78 Ark. 176, 95 S. W. 448. *Cal.*—*Shealor v. Superior Court*, 70 Cal. 564, 11 Pac. 653.

77. *Cal.*—*Astell v. Phillippi*, 55 Cal. 265; *Wratten v. Wilson*, 22 Cal. 465. *Kan.*—*Griffiths v. Wheeler*, 31 Kan. 17, 2 Pac. 842. *Miss.*—*Higgins v. Deloach*, 54 Miss. 498. *N. Y.*—*Barnard v. Devine*, 34 Misc. 182, 68 N. Y. Supp. 859. *Wash.*—*Graves v. Thompson*, 35 Wash. 282, 77 Pac. 384.

78. *Ind.*—*Fawkner v. Baden*, 89 Ind. 587. *Ia.*—*Redfield v. Stocker*, 91 Iowa 383, 59 N. W. 270. *Minn.*—*Stevens v. Gunz*, 23 Minn. 520. *Mo.*—*Sample v. Verner-Kelly Live Stock Comm. Co.*, 193 Mo. App. 670, 186 S. W. 1125; *Stephens v. Reberet*, 186 Mo. App. 456, 171 S. W. 638; *Saunders v. Scott*, 132 Mo. App. 209, 111 S. W. 874; *Payne v. Weems*, 36 Mo. App. 54. *Compare Annis v. Bigney*, 28 Mo. 247. *Ohio.* *Dempsey v. Hill*, 3 Ohio Dec. (Reprint) 260. *Ore.*—*Ferguson v. Byers*, 40 Ore. 468, 67 Pac. 1115, 69 Pac. 32. *S. C.* *Reynolds v. Philips*, 72 S. C. 32, 51 S. E. 523.

5. Bonds.—In actions on bonds, given to secure the proper performance of obligations or duties it is the amount claimed in the action which ordinarily determines jurisdiction, and not the penalty of the bond.⁷⁹ Where, however, in an action on a bond, the judgment must be for the full amount of the penalty of the bond, to be discharged on the payment of the damages assessed, it is the amount of the penalty and not the damages claimed, which is the test of jurisdiction.⁸⁰ Where the instrument requires the obligor to deliver specified property or pay a sum named, it stands as security for the return of the property or payment of its value, and it is the value of the property and not the penalty named which is the test of jurisdiction.⁸¹

6. Tax Proceedings.—In actions or proceedings involving the collection, refunding or use of taxes, where the tax itself and not its relation to and effect on property is in question the amount of the tax generally determines the amount in controversy.⁸² But where the property interest affected by the tax is the basis of the action the value of

[a] Damages for detention cannot be awarded in an amount exceeding the jurisdiction of the court. *Zitske v. Goldberg*, 38 Wis. 216.

79. **Ark.**—*Files v. Reynolds*, 66 Ark. 314, 50 S. W. 509. **Cal.**—See *City of Tulare v. Hevren*, 126 Cal. 226, 58 Pac. 530. **Ga.**—*Giles v. Spinks*, 64 Ga. 205. **Ill.**—*People v. Summers*, 16 Ill. 173. **Ind.**—*Anderson v. Farns*, 7 Blackf. 343, indemnity bond. **Ia.**—*Stone v. Murphy*, 2 Iowa 35; *Culbertson v. Tomlinson*, 1 Morris 404. **Miss.**—*State v. Luckey*, 51 Miss. 528; *Shattuck v. Miller*, 50 Miss. 386. **N. J.**—*Anderson v. Rose*, 51 N. J. L. 471, 17 Atl. 956. **S. C.**—*Cavender v. Ward*, 28 S. C. 470, 6 S. E. 302; *Lynch v. Crocker*, 2 Bailey 313. **Tenn.**—*Fowler v. McDaniel*, 6 Heisk. 529. **Tex.**—*Lane v. Delta County* (Tex. Civ. App.), 109 S. W. 866. **Vt.**—*Edgerton v. Smith*, 35 Vt. 573. **Va.**—See *Kabler v. Spencer's Admr.*, 114 Va. 589, 77 S. E. 504, construing Code, §3494, that "jurisdiction shall be determined as if the undertaking to pay such money had been without a penalty." **W. Va.**—*State v. Lambert*, 24 W. Va. 399. **Wis.**—*Buechel v. Buechel*, 65 Wis. 532, 27 N. W. 318.

[a] If the amount recoverable is indefinite, the penalty of the bond controls. *Forrester v. Alexander*, 4 Watts & S. (Pa.) 311.

80. **Colo.**—*Davis v. Wannamaker*, 2 Colo. 637. But see *Rawles v. People*, 2 Colo. App. 501, 31 Pac. 941. **Ill.**—*Snowhook v. Dodge*, 28 Ill. 63. **Ky.**—*Sims v. Harris*, 8 B. Mon. 55 (bond

given to obtain dissolution of an injunction); *Com. v. Bohon*, 1 Litt. 22. **Mich.**—*Richland v. Cliff*, 131 Mich. 628, 92 N. W. 285; *Bishop v. Freeman*, 42 Mich. 533, 4 N. W. 290. But see *Montgomery v. Martin*, 104 Mich. 390, 62 N. W. 578. **Mo.**—*St. Louis v. Fox*, 15 Mo. 71; *State v. Eamerling*, 12 Mo. App. 98; *Pitman v. Dwyer*, 8 Mo. App. 570. **N. C.**—*Coggins v. Harrell*, 86 N. C. 317; *Morris v. Saunders*, 85 N. C. 138; *State ex rel. Bryan v. Rousseau*, 71 N. C. 194; *State ex rel. Fell v. Porter*, 69 N. C. 140. But see *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917.

[a] Judgment Which Stands as Security for Further Breaches.—Where the judgment is necessarily for the penalty named and stands as security in case of further breaches, the amount of the penalty controls. *Durfee v. Dean*, 52 Mich. 387, 18 N. W. 118, administrator's bond.

81. **Conn.**—*Fowler v. Bishop*, 32 Conn. 199. **Ga.**—*Hanjaras v. Kilpatrick*, 7 Ga. App. 464, 67 S. E. 120. **Ind.**—*Paul v. Arnold*, 12 Ind. 197; *Washburn v. Payne*, 2 Blackf. 216. **Kan.**—*Swartz v. English*, 4 Kan. App. 509, 44 Pac. 1004.

[a] Rule Applies to Forthcoming Bonds.—*Bowden v. Taylor*, 81 Ga. 199, 6 S. E. 277; *Hanjaras v. Kilpatrick*, 7 Ga. App. 464, 67 S. E. 120; *Barnes v. Vandiver*, 5 Ga. App. 162, 62 S. E. 994. See *Gray v. Stafford*, 52 Mich. 497, 18 N. W. 235. Compare *Hood v. Spaeth*, 51 N. J. L. 129, 16 Atl. 163.

82. See cases following.

the property involved governs the jurisdictional question.⁸³ Where jurisdiction exists by virtue of the character of the action, the amount involved is not material.⁸⁴

7. Forcible Entry and Detainer Proceedings.—In forcible entry and detainer proceedings, jurisdiction is sometimes conferred irrespective of the value of the property or its rental value:⁸⁵ in other states jurisdiction is made to depend upon the rental value of the premises,⁸⁶ and in still other jurisdictions the court may always award the recovery of possession in such actions but can only give damages in a limited amount.⁸⁷

8. Partition Suits.—In actions for a partition of property, the value of the property determine jurisdiction:⁸⁸ rather than the amount or value of plaintiff's interest.⁸⁹ The fact that on the sale more is re-

[a] In actions to recover excess taxes, the amount or value in controversy is the amount of the tax which plaintiff claims should be refunded and not the value of the property on which the tax is assessed. *Foster v. Hart Consol. M. Co.*, 52 Colo. 429, 122 Pac. 54.

[b] Action To Enjoin Collection of Tax.—*Linehan Ry. Transfer Co. v. Pendergrass*, 70 Fed. 1, 16 C. C. A. 585; *Moody v. Cox*, 54 Tex. 492; *Delling v. Waddell* (Tex. Civ. App.), 64 S. W. 945.

[c] Action To Collect Delinquent Tax.—*State v. Trilling* (Tex. Civ. App.), 62 S. W. 788, no question of foreclosure being involved.

[d] Jurisdiction of a suit to enjoin payment of money collected by a tax is determined by the amount of tax paid by the complainant. *Bartlett v. Austin & Western Co.*, 147 Mich. 58, 110 N. W. 123.

83. See cases following, and compare *supra*, XII, G, 3.

[a] Contesting Tax Liens.—In proceedings taken by taxpayers to contest the validity of contracts, bonds, or improvements, the effect of which would be to render their property subject to a lien for the taxes levied or assessments made to meet the expenditures, the value of the property and not the amount of the tax or assessment is the test. *McManus v. Petoskey*, 164 Mich. 390, 129 N. W. 681 (suit to restrain misuse of public funds); *Dodge v. Van Buren Circuit Judge*, 118 Mich. 189, 76 N. W. 315; *Fuller v. Grand Rapids*, 40 Mich. 395.

84. *Bains Bros. Inv. Co. v. Walthall*, 180 Ala. 45, 60 So. 142, bill to redeem

from tax sale. See *supra*, XII, A; XII, B.

85. Ala.—*Beck v. Glenn*, 69 Ala. 121. Ill.—*Hannigan v. Mossler*, 44 Ill. App. 117. Ind.—*Sturgeon v. Hitchens*, 22 Ind. 107 (against tenants unlawfully holding over); *Ricketts v. Ash*, 7 Blackf. 274; *Ezra v. Manlove*, 6 Blackf. 454. Tex.—*Smith v. Ryan*, 20 Tex. 661.

See generally as to jurisdiction, 8 STANDARD PROC. 1108.

Whether such proceedings involve title to property, see the title "Justices of the Peace," and 8 STANDARD PROC. 1091.

86. *Ballerino v. Bigelow*, 90 Cal. 500, 27 Pac. 372; *Campbell v. Hart*, 118 La. 871, 43 So. 533. See *State v. Third Justice of the Peace*, 15 La. Ann. 660.

[a] Appellate jurisdiction is sometimes dependent upon the rental value for the term in controversy. *Moore v. Richardson*, 197 Ill. 437, 64 N. E. 330; *McDole v. Shepardson*, 156 Ill. 383, 40 N. E. 953; *Flagg v. Walker*, 109 Ill. 494; *Jordan v. Davis*, 108 Ill. 336.

87. *Giddens v. Bolling*, 92 Ala. 586, 590, 9 So. 274; *January v. Stephenson*, 2 Mo. App. 266. But see *Silvey v. Sumner*, 61 Mo. 253.

[a] An award of an excessive amount of damages does not affect the validity of the judgment decreeing a recovery of possession. *South St. Joseph Town Co. v. Scott*, 115 Mo. App. 16, 90 S. W. 727.

88. *Fowler v. Fowler*, 50 Conn. 256. [a] Value of all parcels involved wherever located is the test. *Ridgell v. Bethea*, 2 Hill Eq. (S. C.) 365.

89. *Schulz v. Schulz* (Tex. Civ. App.), 26 S. W. 107.

ceived for the land than its appraised value, does not oust the court of jurisdiction.⁹⁰

9. Actions Involving Principal and Surety.—The amount of the principal obligation sued for rather than the sum for which different sureties are liable, is the test of jurisdiction in an action brought by the creditor to enforce their liability,⁹¹ and the same principle applies where the action is by a surety against his co-sureties, for contribution.⁹² In an action by a surety for reimbursement from his principal, the amount which with interest would fully reimburse the surety for the loss he has sustained and not the face value of the judgment which had been obtained against principal and surety, is the amount in controversy.⁹³

H. PARTIES AFFECTED.—Limitations on the monetary jurisdiction of the court apply to most classes of parties, including counties,⁹⁴ and public charitable institutions,⁹⁵ but not to the state itself, unless it is expressly mentioned in the statute.⁹⁶ Intervenor, in an action of which the court has jurisdiction, are not subject to the limitations.⁹⁷

I. POINT OF TIME CONSIDERED.—The amount in controversy or the value of the property involved is to be ascertained as of the date of the institution of the action.⁹⁸

J. LOSS OF JURISDICTION.—1. In General.—Where jurisdiction has once attached to and vested in a court by the institution in good faith of an action within its jurisdiction, the fact that by subsequent proceedings a portion of the complaint is eliminated from consideration leaving a claim for an amount which would not have been within the original jurisdiction of the court, does not affect its power to proceed

90. *Chambers v. Watson*, 1 Bailey (S. C.) 511.

91. *Robinson v. Chamberlain*, 29 Tex. Civ. App. 170, 68 S. W. 209.

92. *Jarvis v. Matson* (Tex. Civ. App.), 94 S. W. 1079; *Jalufka v. Matejek*, 22 Tex. Civ. App. 384, 55 S. W. 395; *Mateer v. Cockrill*, 18 Tex. Civ. App. 391, 45 S. W. 751.

93. *Miss*—*Wainwright v. Atkins*, 104 Miss. 438, 61 So. 454, where the surety had purchased the judgment for less than its full amount. *Mo*.—*Blake v. Downey*, 51 Mo. 437, amount of the judgment against the surety and not the amount of the obligation on which he became a surety controls. *Tex*. See *Crocker v. Mann* (Tex. Civ. App.), 147 S. W. 311.

94. *Camp v. Marion County*, 91 Ala. 240, 8 So. 786.

95. *Napa State Hospital v. Flaherty*, 134 Cal. 315, 66 Pac. 322.

96. *State v. Garland*, 29 N. C. 48. But see *Morris v. State*, 62 Tex. 728.

[a] *Basis of the Exception.*—"It is a known and firmly established maxim,

that general statutes do not bind the sovereign, unless expressly mentioned in them. Laws are *prima facie* made for the government of the citizen and not of the state herself." *State v. Garland*, 29 N. C. 48, 50.

97. *Peticolas v. Carpenter*, 53 Tex. 23; *Ferrell-Michael Abstract & Title Co. v. McCormac* (Tex. Civ. App.), 184 S. W. 1081. See 14 STANDARD PROC. 291.

98. *Ala.*—*Carter v. Alford*, 64 Ala. 236, *detinue*. *Colo.*—*Denver B. Mfg. Co. v. McAllister*, 6 Colo. 326. *Mass.* *Davenport v. Burke*, 9 Allen 116, *replevin*.

See *infra*, XII, J.

[a] *Elimination of part of a demand* by a judgment obtained in an action subsequently instituted, does not destroy a jurisdiction which has once vested. *Cattlemen's Trust Co. v. Blasingame* (Tex. Civ. App.), 184 S. W. 574.

[b] *In trover*, the value at the date of conversion controls. *Sharp v. Barney*, 114 Ala. 361, 21 So. 490.

with the case,⁹⁹ though there is authority to the contrary.¹ Allegations in the answer controverting the amount in controversy or value of the property as stated in the complaint do not oust the court of jurisdiction.² Mistakes of the plaintiff as to the law applicable to the case are immaterial on the question of jurisdiction;³ the fact that the

[c] On appeal in a replevin action, it is the value at the time suit was instituted and not the value when the case is heard on appeal which controls. *Scott v. Russell*, 39 Mo. 407.

[d] On appeal from justice court the time at which the judgment was rendered is the point of time to be considered. *Barnes v. Feagon* (Tex. Civ. App.), 74 S. W. 329.

Interest, when a factor to be considered, is usually determined as of the date of commencing the action, see *supra*, XII, E, 9, g, (II).

99. *Burmister & Sons Co. v. Empire Gold M. & M. Co.*, 8 Ariz. 158, 71 Pac. 961, motion to strike granted. See also the cases *infra*, this section, and *supra*, XII, I.

[a] This rule is based "upon the principle that, jurisdiction having once attached, every presumption of law is in favor of its continuance." *Burmister & Sons Co. v. Empire Gold M. & M. Co.*, 8 Ariz. 158, 71 Pac. 961.

[b] Where several causes of action (1) may be aggregated to confer jurisdiction the fact that the aggregate amount is decreased below the limit by the sustaining of a demurrer to and the elimination of one cause of action, does not defeat the jurisdiction already vested. *Sloan v. Carolina Cent. R. Co.*, 126 N. C. 487, 36 S. E. 21; *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799. See *Pittsburgh, J., E. & E. R. Co. v. Wakefield Hdw. Co.*, 135 N. C. 73, 47 S. E. 234. (2) This principle is not applicable in those states where each cause of action must stand on its own bottom. *Harris-Damon Lumb. Co. v. Craddock*, 72 Ark. 334, 80 S. W. 228. Compare *supra*, XII, E, 9, d.

1. See cases cited in this note.

[a] If a demurrer or special exception (1) to particular items of plaintiff's claim is properly sustained and the result is to reduce the claim to an amount below the jurisdiction of the court, the case must be dismissed. *Carswell & Co. v. Habberzettle*, 99 Tex. 1, 86 S. W. 738, 122 Am. St. Rep. 597; *Western Union Tel. Co. v. Ar-*

nold, 97 Tex. 365, 77 S. W. 249; *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1093; *L. Grief & Bro. v. Texas Cent. R. Co.* (Tex. Civ. App.), 163 S. W. 345; *Cow Bayou Canal Co. v. Orange County* (Tex. Civ. App.), 158 S. W. 173; *Browning v. El Paso Lumb. Co.* (Tex. Civ. App.), 140 S. W. 386; *Barrett v. Wentz* (Tex. Civ. App.) 138 S. W. 428. Compare *Tidball v. Eichoff*, 66 Tex. 58, 17 S. W. 263. (2) This rule is inapplicable where the plaintiff excepts to the ruling made and does not assent to its correctness. *Missouri, K. & T. R. Co. v. Kolbe*, 95 Tex. 76, 65 S. W. 34.

[b] A plea of *res judicata* as to part of the items if sustained, leaving less than the jurisdictional amount involved, requires the dismissal of the action. *Girardin v. Dean*, 49 Tex. 243.

[c] If items of account barred by statute of limitations are stricken out upon exception, leaving an amount claimed which is less than the jurisdictional amount, a dismissal is required. *Lowe v. Dowbarn*, 26 Tex. 507; *Hill v. Strauss* (Tex. Civ. App.), 56 S. W. 540; *Keller v. Huffman* (Tex. Civ. App.), 26 S. W. 863.

2. Ore.—*Corbell v. Childers*, 17 Ore 528, 21 Pac. 670. Tex.—*Brunson v. Dawson State Bank* (Tex. Civ. App.), 175 S. W. 438 (plea of payment); *Standefor v. Aultman & Taylor Mach. Co.*, 34 Tex. Civ. App. 160, 78 S. W. 552. Vt.—See *Luce v. Minard*, 87 Vt. 177, 88 Atl. 728.

[a] Defense that note was a forgery does not affect the question of jurisdiction. *Butler v. Wagner*, 35 Wis. 54, 58.

3. N. C.—*Broek v. Scott*, 159 N. C. 513, 75 S. E. 724. Tex.—*Dwyer v. Brenham*, 70 Tex. 30, 7 S. W. 598. But see *Tyler v. Cocker*, 58 Tex. Civ. App. 605, 124 S. W. 729. Vt.—*Brainard v. Austin*, 17 Vt. 650.

[a] Mistake in construing the legal effect of a contract and the consequent damages to which the plaintiff was entitled is immaterial. *Horner School v. Westcott*, 124 N. C. 518, 32 S. E. 885.

court determines that a particular claim for damages is not within the law and cannot be maintained, does not operate to divest it of jurisdiction to proceed with the case, although the remaining damages would alone have been insufficient to confer jurisdiction,⁴ and the loss, after the institution of the action, of the right to recover a particular element of damages does not affect the court's jurisdiction.⁵ The fact that the claim is barred by the statute of limitations does not affect the question of jurisdiction.⁶

2. Partial Failure of Proof.—Failure to prove a part of a cause of action does not oust the court of jurisdiction,⁷ and where several causes of action are joined, the failure to establish one cause of action does not defeat jurisdiction though the total amount claimed is thereby reduced below the jurisdictional amount.⁸ It is, however, sometimes provided by statute that where the amount found due is less than the jurisdictional amount, the suit shall be dismissed,⁹ unless the amount claimed was reduced by a set-off successfully made by the defendant,¹⁰

4. Ky.—*Montgomery v. Glascock*, 121 S. W. 668; *Denham v. Western Union Tel. Co.*, 27 Ky. L. Rep. 999, 87 S. W. 788, holding that though damages claimed for mental suffering from failure to deliver a telegram could not be recovered, nominal damages could properly be awarded by the court. **Miss.**—*Jacobs v. Postal Tel. C. Co.*, 76 Miss. 278, 24 So. 535. **N. C.**—*Thompson v. Southern Exp. Co.*, 144 N. C. 389, 57 S. E. 18. **Tex.**—*Tidball v. Eichoff*, 66 Tex. 58, 17 S. W. 263; *Lane v. General Acc. Ins. Co.* (Tex. Civ. App.), 113 S. W. 324. Compare *Western Union Tel. Co. v. Arnold*, 97 Tex. 365, 77 S. W. 249.

[a] Claim for attorney's fees not authorized by statute or the contract of the parties cannot confer jurisdiction. *St. Paul Fire & M. Ins. Co. v. Peck*, 37 Okla. 85, 130 Pac. 805. See *supra*, XII, E, 9, i.

5. Dwyer v. Bassett (Tex. Civ. App.), 29 S. W. 815.

[a] Loss of claim for exemplary damages by reason of the subsequent death of the plaintiff, does not divest the court of jurisdiction although less than the jurisdictional amount is claimed as actual damages. *Dwyer v. Bassett* (Tex. Civ. App.), 29 S. W. 815.

6. Burton v. Archinard (Tex. Civ. App.), 49 S. W. 684; *Harrell v. Storrie* (Tex. Civ. App.), 47 S. W. 838.

[a] Possibility that statute of limitations may be pleaded and thus the sum recoverable reduced below the jurisdictional amount does not show

that the lesser amount only was recoverable since it cannot be known as matter of law that the statute will be pleaded, and if it is not pleaded the amount claimed may be recovered. *Wells v. Cooper*, 57 Conn. 52, 17 Atl. 281.

[b] Plea of statute of limitations as to a portion of the damages claimed does not divest the court of jurisdiction. *Kelly v. Western Union Tel. Co.*, 17 Tex. Civ. App. 344, 43 S. W. 532.

7. Fields v. Brown, 160 N. C. 295, 76 S. E. 8; *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232, 32 Am. St. Rep. 799; *J. C. Stewart Prod. Co. v. Hamilton-Turner Groc. Co.* (Tex. Civ. App.), 163 S. W. 1000; *Levy v. Lupton* (Tex. Civ. App.), 156 S. W. 362; *Garth v. Childs*, 59 Tex. Civ. App. 487, 126 S. W. 284; *McDaniel v. Staples* (Tex. Civ. App.), 113 S. W. 596; *Strickland v. Sloan* (Tex. Civ. App.), 50 S. W. 622.

Amount claimed governs, see *supra*, XII, E, 1.

8. Fields v. Brown, 160 N. C. 295, 76 S. E. 8.

9. Smith v. Allen, 142 Ala. 148, 37 So. 933, motion to dismiss is the proper remedy.

10. Camp v. Marian County, 91 Ala. 240, 8 So. 786; *Wood v. Fowler*, 37 Ala. 55. See *Black v. Ryan*, 194 Ala. 667, 69 So. 633.

[a] It will be presumed on appeal, in the absence of a bill of exceptions, where it appears that a setoff was pleaded, that it was successfully maintained and that plaintiff's recovery was reduced below the jurisdictional

or unless the plaintiff makes and files an affidavit that the amount claimed was due, but a full recovery was defeated for some adequate reason.¹¹ In other jurisdictions the only penalty for a recovery of less than the jurisdictional amount, is the loss of the costs.¹²

3. Effect of Admission of Errors and Overcharges.—If errors be discovered in the computation of the amount claimed to be due, or if there be a mistake in failing to make proper credits, or in making overcharges, and such error is admitted by the plaintiff and called to the attention of the court before or during the trial, the court retains jurisdiction, although the effect of the admission is to reduce the amount claimed to be due below the amount over which the court is given jurisdiction,¹³ and the same is true of similar admissions in the pleadings.¹⁴

amount by reason of that fact, even though another reason is assigned by the court for its ruling. *Camp v. Marian County*, 91 Ala. 240, 8 So. 786. And see *Black v. Ryan*, 194 Ala. 667, 69 So. 633; *Wynn v. Simmons*, 33 Ala. 272.

11. *Black v. Ryan*, 194 Ala. 667, 69 So. 633; *Smith v. Allen*, 142 Ala. 148, 37 So. 933; *McClure v. Lay*, 30 Ala. 208 (distinguishing earlier cases decided under a different statute); *Carter v. Dade*, 1 Stew. (Ala.) 18; *Louisville & N. R. Co. v. McKenzie*, 5 Ala. App. 605, 59 So. 345; *O'Reilly v. Masterson*, 3 Ala. App. 666, 57 So. 1013; *Johnston v. Francis*, 35 N. C. 465; *Parham v. Hardin*, 33 N. C. 219; *Mera v. Scales*, 9 N. C. 364.

[a] **Discretion of the Court.**—Where any of the enumerated causes are relied on in the affidavit the court has no discretion but must enter judgment. *Ramsey v. Strobach*, 52 Ala. 513. And see *Curtis v. Gary*, Minor (Ala.) 118.

[b] **"The truth of the affidavit cannot be controverted and its filing is conclusive of the plaintiff's right to retain his judgment."** *Bullock v. Mason*, 194 Ala. 663, 69 So. 882. And see *Ramsey v. Strobach*, 52 Ala. 513.

[c] **The amount stated in the affidavit to be due need not be the amount claimed in the complaint.** *Bullock v. Mason*, 194 Ala. 663, 69 So. 882, distinguishing *First Nat. Bank v. Pinson*, 105 Ala. 588, 17 So. 182, decided under an earlier statute.

[d] **Necessary Only in Contract Actions.**—(1) Such an affidavit must be filed in all actions ex contractu (*First National Bank v. Pinson*, 105 Ala. 588, 17 So. 182; *Mills v. Long*, 58 Ala. 458), (2) or the suit will be dismissed,

as the provision of the code is mandatory. *Buckner v. Vaught*, 4 Ala. App. 593, 58 So. 813; *O'Reilly v. Masterson*, 3 Ala. App. 666, 57 So. 1013, action to recover a statutory penalty. (3) But it is not required in tort actions. *Morris v. Robinson*, 80 Ala. 291; *Haws v. Morgan*, 59 Ala. 508; *King v. Farmer*, 34 Ala. 416, trover.

12. *Greenbaum v. Martinez*, 86 Cal. 459, 25 Pac. 12; *Pratt v. Welcome*, 6 Cal. App. 475, 92 Pac. 500.

13. Cal.—*Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999. **Conn.**—*Lord v. Parmela*, 1 Root 158. **Miss.**—*Potts v. Hines*, 57 Miss. 735. **Vt.**—*Scott v. Moore*, 41 Vt. 205, 98 Am. Dec. 581.

[a] **Rule Stated.**—"It could make no difference as to the jurisdiction of the court whether counsel admitted an error of \$45 overcharge, or whether it appeared in evidence by the testimony of witnesses." *Rodley v. Curry*, 120 Cal. 541, 52 Pac. 999.

14. C. M. Conover & Co. v. Maverick-Clarke Litho. Co. (Tex. Civ. App.), 115 S. W. 313, admission and tender of amount of set-off pleaded.

[a] **Rule Stated.**—"If upon the trial the defendant reduces the amount of judgment below \$100 by proof of payment, that fact can have no more influence upon jurisdiction than a like reduction of judgment through failure of the plaintiff to prove any allegation of his complaint, and, as affecting jurisdiction, there is no distinction between payment alleged by defendant and proved by witnesses, and payment so alleged and proved by admissions of the plaintiff, whether in open court, or by failure to deny the allegation, or by express admission in his reply. In either case the court adjudges the amount due the plaintiff

An admission of indebtedness by the defendant in his answer does not affect the jurisdiction of the court.¹⁵

4. **Effect of Failure of Equitable Cause of Action.** — If a court in which both legal and equitable remedies are administered, acquires jurisdiction by reason of the equitable features of a case involving also a legal claim below the jurisdictional amount, it does not lose jurisdiction of the latter if the right to equitable relief for any reason fails, but may nevertheless render a money judgment.¹⁶

5. **Effect of Partial Payment or Tender During Suit.** — Payments on account of the principal debt made during the pendency of the action and reducing the amount due to a sum below the court's jurisdiction do not oust it of jurisdiction.¹⁷ The fact that defendant tendered a smaller amount than that claimed, in full satisfaction of the debt, does not make the balance or difference the amount in controversy.¹⁸

K. **PLEADING.** — The general rule is that in case of courts of general jurisdiction, the jurisdictional facts need not be pleaded, since in the absence of some averment to the contrary it will be presumed that such a court has jurisdiction;¹⁹ though from the nature of the case the facts as to the amount in controversy must ordinarily appear in the pleadings as an incident to the statement of the cause of action.²⁰ With respect to courts of limited or inferior jurisdiction, however, there can be no such presumption and the pleading must show that the case

in the exercise of its jurisdiction, determined by the complaint." *Prince v. Takash*, 75 Conn. 616, 620, 54 Atl. 1003.

[b] **Offsets pleaded by defendant and admitted to be due by the plaintiff** do not oust the court of jurisdiction, although the amount claimed by plaintiff is thereby reduced below the jurisdictional minimum. *Ratigan v. Hal-laway*, 69 Tex. 468, 6 S. W. 785.

15. *Abney, Love & Co. v. Whitted*, 28 La. Ann. 818, admission of indebtedness in a sum less than the court's jurisdiction.

16. *Becker v. Superior Court*, 151 Cal. 313, 90 Pac. 689; *Ablowich v. Greenville Nat. Bank*, 95 Tex. 429, 67 S. W. 79, 881 (*overruling Carter v. Hubbard*, 79 Tex. 356, 15 S. W. 392, and previous cases); *Wood v. J. M. Radford Groc. Co.* (Tex. Civ. App.), 164 S. W. 1070. Compare *Tian v. Lloyd*, 21 Tex. Civ. App. 433, 52 S. W. 982.

[a] **In an action to enforce a mechanic's lien**, a court although finding that the lien claimed is void, has jurisdiction to render a money judgment for less than the amount over which it has original jurisdiction. *Becker v. Superior Court*, 151 Cal. 313, 90 Pac.

689, *overruling Miller v. Carlisle*, 127 Cal. 327, 59 Pac. 785. To the same effect, see *Mannix v. Tryon*, 152 Cal. 31, 91 Pac. 983. Compare *Peterson v. McDonald*, 13 Cal. App. 644, 110 Pac. 465; *Davis v. Treacy*, 8 Cal. App. 395, 97 Pac. 78.

17. *Jackson v. Corley*, 30 Tex. Civ. App. 417, 70 S. W. 570.

Effect of partial payments prior to the institution of the action, see *supra*, XII, E, 10, a.

[a] **Effect of setting up such a partial payment in an amended complaint**, see *Mecca Fire Ins. Co. v. First Nat. Bank* (Tex. Civ. App.), 135 S. W. 1083.

18. *Bourn v. Gray* (Tex. Civ. App.), 144 S. W. 356.

19. See 6 STANDARD PROC. 674; 15 STANDARD PROC. 426.

20. See the cases throughout this article, and *infra*, XII, L.

[a] **No presumptions in favor of jurisdiction** can be indulged in the face of express allegations in the pleadings. *Raymond v. Hinkson*, 15 Mich. 113.

[b] **Exemplary damages claimed but not authorized by any facts stated in the complaint**, do not confer jurisdiction where the amount of actual dam-

is one within the jurisdictional limit as to the amount in controversy.²¹ But no particular form of averment is required;²² if from the allegations of the complaint it is a fair inference that the amount in controversy or the value of the property is within the jurisdictional limit, the pleading will be held sufficient.²³

Where jurisdiction is determined by the amount claimed in the prayer of the complaint, a mere inspection of the prayer will ordinarily

ages sought are not within the court's jurisdiction. *Peterson v. Thomas* (Tex. Civ. App.), 24 S. W. 1124.

21. **Colo.**—*Greene v. Gibson*, 53 Colo. 346, 127 Pac. 239; *Home v. Duff*, 5 Colo. 574. **N. Y.**—*Curran v. Arp*, 141 App. Div. 38, 125 N. Y. Supp. 758. **Tex.**—*Lusk v. Hardin* (Tex. Civ. App.), 176 S. W. 787; *Richardson v. Hethcock* (Tex. Civ. App.), 173 S. W. 1006; *Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459; *Cisco Oil Mill v. Van Geem* (Tex. Civ. App.), 166 S. W. 439, 441.

[a] **Rule Where Different Groups of Facts are Alleged.**—If, in stating a cause of action, the plaintiff relies upon different and separable groups of facts, some of which disclose no cause of action upon their face, the jurisdiction of the court is to be determined by the amount of the claim resting upon those facts which are not subject to a general demurrer. *Martin v. Jeffries* (Tex. Civ. App.), 153 S. W. 658; *Tyler v. Cocker*, 58 Tex. Civ. App. 605, 124 S. W. 729; *Lindale Brick Co. v. Smith*, 54 Tex. Civ. App. 297, 118 S. W. 568.

22. *Greene v. Gibson*, 58 Colo. 346, 127 Pac. 239; *Hughes v. Brewer*, 7 Colo. 583, 4 Pac. 1115; *Home v. Duff*, 5 Colo. 574; *Barndollar v. Patton*, 5 Colo. 46.

[a] **In an action to quiet title** (1) an averment "that the value of the properties involved in this action does not exceed or equal the sum of two thousand dollars," was held sufficient. *Greene v. Gibson*, 53 Colo. 346, 348, 127 Pac. 239. (2) But an averment that "the amount herein involved and sued for does not equal nor exceed the sum of two thousand dollars," was held insufficient. *Bloomer v. Jones*, 22 Colo. App. 404, 125 Pac. 541. And see *McKnight v. McKnight*, 49 Colo. 60, 111 Pac. 583.

[b] **Judicial notice** (1) was taken in *Wight v. Roethlisberger*, 116 Mich. 241, 74 N. W. 474, that "44 lots in the city of Grand Rapids are worth more than \$100;" and (2) in *Glidden*

v. Norvell, 44 Mich. 202, 206, 6 N. W. 195, the court said: "We will not assume that a debt to secure which the debtor turned out fifteen hundred tons of number one iron ore, was not over one hundred dollars."

23. **La.**—*State v. Mayor*, 130 La. 195, 57 So. 798. **Mich.**—*Abbott v. Gregory*, 39 Mich. 68, 69. **N. J.**—*Quairol v. Italian Benef. Soc.*, 64 N. J. Eq. 205, 53 Atl. 622. **Tenn.**—*McAffrey v. Richards* (Tenn. Ch.), 59 S. W. 1064. **Tex.**—*Morris v. State*, 62 Tex. 728.

[a] **Demand for judgment against "each" and "both"** of two defendants for \$2,000 was construed not as a demand for \$6,000, but as a demand for one sum of \$2,000. *Curran v. Arp*, 141 App. Div. 38, 125 N. Y. Supp. 758.

[b] **A prayer for \$100 "and over,"** \$100 being the jurisdictional limitation, does not oust the court of jurisdiction as "the words 'and over' are void for uncertainty. They express nothing." *Rockwell v. Perine*, 5 Barb. (N. Y.) 573.

[c] **A quo warranto information** for the usurpation of a franchise which does not allege the value of the franchise, is nevertheless sufficient to show that more than \$500 is involved where "it alleges the collection of more than \$80,000 [in tolls] within less than seven years." *Morris v. State*, 62 Tex. 728.

[d] **An express averment** (1) of the amount or value in controversy will override and control a prayer in the ad damnum clause for recovery of an amount in excess of the court's jurisdiction. *Dunkle v. French*, 51 Colo. 170, 116 Pac. 1039. But see *supra*, XII, E, 1; XII, E, 7. (2) And an averment of a value within the jurisdiction of the court will not control the court where from the facts alleged the real value is necessarily in excess of the jurisdiction. *Learned v. Tritch*, 6 Colo. 432.

[e] **Averment of a Legal Conclusion**

determine the question.²⁴ Where it is sought to confer jurisdiction by aggregating demands of any character, the complaint must set forth fully and clearly the various items relied upon as together constituting the jurisdictional amount.²⁵ After verdict, deficiencies in the complaint may be supplied and aided by matters alleged in the answer,²⁶ and, on appeal, an ambiguous or uncertain pleading is to be construed so as to support a jurisdiction assumed to be exercised by the lower court.²⁷

In suits in equity it has been held unnecessary to insert an averment as to the value of the matter in controversy,²⁸ but that the defendant must bring the question before the court by his pleadings,²⁹ though there is authority to the contrary.³⁰ In a suit for an injunction an allegation that unless the injunction issues plaintiffs will be injured in a named sum is sufficient.³¹

L. HOW QUESTION RAISED AND DISPOSED OF.—Where the amount in controversy is determined by the claims made in good faith in the complaint, an inspection of the pleading will ordinarily determine the question of jurisdiction, and a motion to dismiss for want of jurisdiction may be made,³² or the point may be raised, in some jurisdictions,³³

Is Insufficient.—*Martin v. Jeffries* (Tex. Civ. App.), 153 S. W. 658.

24. See *supra*, XII, E, 1.

Right to amend the claim made, see *supra*, XII, E, 8.

25. *Modern Laundry Co. v. Dilley*, 111 Ark. 350, 163 S. W. 1197.

[a] **Protest fees claimed must be set forth.** *Modern Laundry Co. v. Dilley*, 111 Ark. 350, 163 S. W. 1197.

[b] **Interest or Exemplary Damages.**—*Hannon v. Bramley*, 65 Conn. 193, 200, 32 Atl. 336.

26. *Arkansas Fer. Co. v. City Nat. Bank*, 104 Tex. 187, 135 S. W. 529.

27. **Cal.**—*Bartnett v. Hull*, 19 Cal. App. 91, 94, 124 Pac. 885. **Fla.**—*Georgia F. & A. Ry. Co. v. Andrews*, 61 Fla. 246, 54 So. 461. **Tex.**—*Arkansas F. Co. v. City Nat. Bank*, 104 Tex. 187, 135 S. W. 529.

28. *Brandt v. Luce*, 177 Mich. 184, 142 N. W. 1117 (suit by taxpayer to restrain misuse of public funds); *Brassington v. Waldron*, 143 Mich. 364, 107 N. W. 100; *Church v. Ide*, 1 Clarke (N. Y.) 494, 498; *Bradt v. Kirkpatrick*, 7 Paige (N. Y.) 62, a creditor's bill.

29. *Bradt v. Kirkpatrick*, 7 Paige (N. Y.) 62.

30. *De Witt v. Wischkemper*, 95 Tex. 435, 67 S. W. 882 (suit for injunction to prevent opening of a road); *Staley v. Derden*, 57 Tex. Civ. App. 142, 121 S. W. 1133.

31. *Stade v. Judge of Civil Dist.*

Court, 39 La. Ann. 619; *Gay v. New Orleans Pac. Ry. Co.*, 31 La. Ann. 274; *Tomlin v. Clay* (Tex. Civ. App.), 167 S. W. 204.

32. *Wiseman v. Witherow*, 90 N. C. 140.

[a] **Rule Stated.**—"We see no reason why a party defendant should be put to his plea denying the jurisdiction. An objection interposed by motion to dismiss is sufficient," especially in justice's courts. "It is well settled that a motion to dismiss a suit for want of jurisdiction of the *subject-matter* is never out of time. This cannot be waived by consent as want of jurisdiction over the person may be." *Burns v. Henry*, 67 Ala. 209, 210. See *Memphis & C. R. R. Co. v. Hembree*, 84 Ala. 182, 4 So. 392; *Eulless v. Russell* (Tex. Civ. App.), 34 S. W. 176.

[b] **A motion cannot be based on ground that the evidence shows the amount in controversy or value of property to be greater or less than the amount over which the court has jurisdiction, except in those cases where the value or amount proved governs the jurisdiction.** *Kaufman v. Kelley*, 78 Ark. 176, 95 S. W. 448, *detinue*. See *Jakway v. Rivers*, 48 Colo. 49, 108 Pac. 999; *Davenport v. Burke*, 9 Allen (Mass.) 116.

33. **Colo.**—*Davis v. Wannamaker*, 2 Colo. 637. **Ky.**—*Grant v. Tams & Co.*, 7 Mon. 218. **Md.**—*Legum v. Blank*,

by demurrer; or the court may, of its own motion, dismiss the action.³⁴ Where the want of jurisdiction does not appear on the face of the complaint, it may be set up by plea in abatement,³⁵ or by answer,³⁶ but the objection cannot be made by motion.³⁷ A counterclaim in excess of the jurisdictional amount may be stricken,³⁸ and a motion to strike the case from the files may be made after judgment is rendered, the jurisdictional defect then being established.³⁹ No further valid proceedings can be taken after want of jurisdiction is established, other than those necessary to properly dispose of the case.⁴⁰

In equity practice, in suits on monied demands, if the amount claimed is below the jurisdictional amount, the bill is demurrable,⁴¹ and in bills not for monied demands, where a statement of the value of the property is not required, unless the defendant by some pleading raises the issue of its value, proof will not be received to establish a value below the court's jurisdiction.⁴²

105 Md. 126, 65 Atl. 1071. **N. J.** Allen v. Demarest, 41 N. J. Eq. 162, 2 Atl. 655, in equity. **N. Y.**—Owen v. Brown, 78 Misc. 273, 139 N. Y. Supp. 451.

[a] In states in which a demurrer admits the jurisdiction of the court, it cannot be employed for this purpose. Johnson v. Cooke, 85 Conn. 679, 84 Atl. 97, Ann. Cas. 1913C, 275.

34. Allen v. Demarest, 41 N. J. Eq. 162, 2 Atl. 655; Branch v. Houston, 44 N. C. 85.

[a] "It is the duty of the court, in order to prevent its time from being consumed in frivolous controversies, to the detriment of suitors who are entitled to its attention, to decline to entertain them, although the defendants make no specific objection on this ground by demurrer or otherwise." Chapman v. Banker & T. Pub. Co., 128 Mass. 478.

35. Ala.—Sharpe v. Barney, 114 Ala. 361, 21 So. 490; Burns v. Henry, 67 Ala. 209, 210; Carter v. Alford, 64 Ala. 236 (by plea in abatement in detinue); Crabtree v. Cliatt, 22 Ala. 181. **Ark.**—Dillard v. Noel, 2 Ark. 449; Hanna v. Harter, 2 Ark. 392; Heilman v. Martin, 2 Ark. 158. **N. C.**—Newman v. Tabor, 27 N. C. 231; Clark v. Cameron, 26 N. C. 161. **Tex.** Bridge v. Ballew, 11 Tex. 269.

[a] A plea in abatement is insufficient which merely states that "the matter or thing in demand exceeded" the jurisdictional amount; it should state what is the matter in demand and also its value. Peters v. Goodrich, 3 Conn. 146.

[b] **Verification of the plea** is unnecessary where the truth of the matters set out appeared from plaintiff's petition. Lyons Bros. Co. v. Corley (Tex. Civ. App.), 135 S. W. 603.

[c] **Rule inapplicable to unliquidated and uncertain demands.** Heilman v. Martin, 2 Ark. 158, 172.

[d] **May Be Shown Under General Issue.**—Brown v. McQueen, 6 Blackf. (Ind.) 208; Perkins v. Smith, 4 Blackf. (Ind.) 299.

36. Small v. Gwinn, 6 Cal. 447, this issue should be first tried.

[a] **By special plea**, in Georgia, the defendant may show that by credits, the amount due is really below the jurisdiction of the court. Stovall v. Kelly Bros., 8 Ga. App. 550, 70 S. E. 17, in city court of Atlanta.

37. Ramer v. Smith, 4 Colo. App. 434, 36 Pac. 302, though supported by affidavit.

38. Hillger v. Yenrick, 25 Cal. App. 604, 144 Pac. 980 (but the court did not commit error in proceeding to the trial without taking such action); Martin v. Eastman, 109 Wis. 286, 85 N. W. 359.

39. Camp v. Stevens, 45 Conn. 92, such a motion must be made during the same term of court.

40. Denver, W. & P. Ry. Co. v. Church, 7 Colo. 143, 2 Pac. 218.

41. Church v. Ide, 1 Clarke (N. Y.) 494; Bradt v. Kirkpatrick, 7 Paige (N. Y.) 62.

42. Church v. Ide, 1 Clarke (N. Y.) 494.

XIII. RAISING AND WAIVING OBJECTIONS TO JURISDICTION.—A. **NECESSITY FOR OBJECTIONS.**—Since jurisdiction of the subject matter cannot be conferred by consent or waiver,⁴³ it is not only the power but it is the duty of the court to inquire whether the facts give jurisdiction over the subject matter even though the question is not raised by the parties,⁴⁴ and even if both parties assert

43. See *supra*, IV, C, 1; *infra*, XIII, E

44. **U. S.**—*Perez v. Fernandez*, 202 U. S. 80, 26 Sup. Ct. 561, 50 L. ed. 942; *Thomas v. Ohio State University*, 195 U. S. 207, 25 Sup. Ct. 24, 49 L. ed. 160; *Defiance Water Co. v. Defiance*, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. ed. 140; *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407, 28 L. ed. 419; *Mansfield C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Lewis v. Cocks*, 23 Wall. 466, 23 L. ed. 70; *Oelrichs v. Spain*, 15 Wall. 211, 21 L. ed. 43; *Cutler v. Rae*, 7 How. 729, 12 L. ed. 899, 8 How. 615, 12 L. ed. 1221; *McKinney v. Carroll*, 12 Pet. 66, 9 L. ed. 1002; *In re Hollins*, 229 Fed. 349, 143 C. C. 469; *McEldowney v. Card*, 193 Fed. 475; *Dumont v. Fry*, 12 Fed. 21. **Ala.**—*Woolf v. McGaugh*, 175 Ala. 299, 57 So. 754; *Clark v. Rose*, 75 Ala. 129; *Fields v. Walker*, 23 Ala. 155. **Ariz.**—*State v. Downen*, 17 Ariz. 365, 368, 152 Pac. 857. **Ark.**—*Crawford v. Carson*, 35 Ark. 565. **Conn.**—*Woodmont Assn. v. Milford*, 85 Conn. 517, 84 Atl. 307; *Pettibone v. Phelps*, 2 Root 137. **D. C.** *Columbia Nat. D. Co. v. Morton*, 28 App. Cas. 288, 7 L. R. A. (N. S.) 114, 8 Ann. Cas. 511; *Dewey Hotel Co. v. United States Elec. L. Co.*, 17 App. Cas. 356. **Ill.**—*People v. Industrial Sav. Bank*, 275 Ill. 139, 113 N. E. 937; *Roby v. South Park Comrs.*, 215 Ill. 200, 74 N. E. 125. **Ind.**—*Prather v. Brandon*, 44 Ind. App. 45, 88 N. E. 700. **Ia.**—*State v. Van Beek*, 87 Iowa 569, 54 N. W. 525, 43 Am. St. Rep. 397, 19 L. R. A. 622. **Ky.**—*Walton Bk. & Tr. Co. v. Glinn*, 161 Ky. 60, 170 S. W. 511. **La.**—*Fleming v. Hiligsberg*, 11 Rob. 77; *Greiner v. Thielen*, 6 Rob. 365; *Dupez v. Greffin's Exr.*, 1 Mart. N. S. 198. **Me.**—*Chalmers v. Hack*, 19 Me. 124. **Md.**—*Berrett v. Oliver*, 7 Gill & J. 191. **Mass.**—*Hill v. Moors*, 224 Mass. 163, 112 N. E. 641; *Lawrence v. Smith*, 5 Mass. 362. **Mich.**—*Bradley v. Board of State Canvassers*, 154 Mich. 274, 282, 117 N. W. 649. **Minn.**—*Hunstiger v. Kilian*, 130

Minn. 538, 153 N. W. 1095. **Miss.** *Stamps v. Newton*, 3 How. 34. **Mo.** *In re Letcher*, 190 S. W. 19; *McMenamy Inv. & R. E. Co. v. Stillwell C. Co.*, 267 Mo. 340, 184 S. W. 467; *Schmidt v. Supreme Court*, 259 Mo. 491, 168 S. W. 626; *State v. Finley*, 259 Mo. 414, 417, 168 S. W. 921; *Dubowsky v. Binggeli*, 258 Mo. 197, 167 S. W. 999; *Springfield S. W. R. Co. v. Schweitzer*, 246 Mo. 122, 151 S. W. 128; *Bush Const. Co. v. Withnell*, 185 Mo. App. 408, 170 S. W. 361. **Nev.**—*Gamble v. Silver Peak Mines*, 35 Nev. 319, 133 Pac. 936; *Persing v. Reno Stock Brokerage Co.*, 30 Nev. 342, 352, 96 Pac. 1054. **N. Y.**—*Matter of Will of Walker*, 136 N. Y. 20, 32 N. E. 633; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; *Griffin v. Dominguez*, 2 Duer 656, 11 Leg. Obs. 285. **N. C.**—*Hannah v. Richmond & D. R. Co.*, 87 N. C. 351; *Branch v. Houston*, 44 N. C. 85. **Ohio.**—*Cincinnati, C. & W. Turnpike Co. v. Cincinnati & C. Tract. Co.*, 15 Ohio Dec. 118. **Okl.** *Apache State Bank v. Voight*, 161 Pac. 214; *Keenan v. Chastain*, 157 Pac. 326; *Beach v. Beach*, 4 Okla. 359, 46 Pac. 514. **P. R.**—*Binet v. Garcia*, 18 Porto Rico 331. **S. C.**—*Gibbes v. Morrison*, 39 S. C. 369, 17 S. E. 803; *Hammarskold v. Bull*, 9 Rich. L. 474. **Tex.** *Burks v. Bennett*, 55 Tex. 237. **Vt.** *Glidden v. Elkins*, 2 Tyler 218. **W. Va.** *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; *State v. Lambert*, 52 W. Va. 248, 43 S. E. 176. **Can.**—*Mutrie v. Alexander*, 23 Ont. L. R. 396, 18 Ont. W. R. 836, 2 Ont. W. N. 884.

[a] **The failure of a party to appear and object to the jurisdiction of the court is not a waiver of the objection.** *Comrs. Court of Talladega v. Thompson*, 18 Ala. 694.

[b] **Equity Jurisdiction.**—(1) By statute the filing of an answer is a waiver of objection to the jurisdiction of a court of equity over the subject-matter (*Walsh v. Crook*, 91 Tenn. 388, 19 S. W. 19; *Dean v. Snelling*, 2 Heisk.

jurisdiction.⁴⁵ The objection may be raised under the general issue without pleading it.⁴⁶ But in order to avail one's self of an objection to the want of jurisdiction over the person,⁴⁷ or over the particular case falling within the general class of cases within the general jurisdiction of the court, the objection must be made or it will be waived.⁴⁸

B. MANNER OF RAISING OBJECTION.—Want of jurisdiction of the subject matter may be raised by demurrer if apparent upon the face of the pleadings,⁴⁹ but if not so apparent, a demurrer is not appropri-

[Tenn.] 484; *Vincent v. Vincent*, 1 Heisk. [Tenn.] 333; *Stockley v. Rowley*, 2 Head [Tenn.] 493, (2) though the court at any time may permit the withdrawal of the answer and the filing of a demurrer raising the want of jurisdiction. *Lowe v. Morris*, 4 Sneed (Tenn.) 69.

45. *Bradley v. Board of State Canners*, 154 Mich. 274, 117 N. W. 649.

46. *Maisonnaire v. Keating*, 2 Gall. 325, 16 Fed. Cas. No. 8,978.

[a] If the court is one of limited and inferior jurisdiction, the want of jurisdiction may be raised under the general issue. *Brown v. McQueen*, 6 Blackf. (Ind.) 208; *Thomas v. Winters*, 4 Blackf. (Ind.) 161. See the title "Justices of the Peace."

47. *Louisville & N. R. Co. v. Stewart*, 163 Ky. 164, 173 S. W. 757; *Richardson v. Louisville & N. R. Co.*, 129 Ky. 449, 111 S. W. 343, 112 S. W. 582; *Davidson v. Johnson*, 113 Ky. 202, 210, 67 S. W. 996. See *supra*, IV, C, 2.

48. *Pittsburgh, C. C. & St. L. R. Co. v. Gregg*, 181 Ind. 42, 48, 102 N. E. 961; *Daniels v. Bruce*, 176 Ind. 151, 95 N. E. 569.

49. **U. S.**—*Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942; *Meyer v. Herrera*, 41 Fed. 65; *Varner v. West*, 1 Woods 493, 28 Fed. Cas. No. 16,885; *Donaldson v. Hazen*, Hempst. 423, 7 Fed. Cas. No. 3,984. **Ala.**—*Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858; *Harwell v. Lehman*, 72 Ala. 344; *Long v. Bakefield*, 48 Ala. 608; *Rose v. Thompson*, 17 Ala. 628. **Cal.**—*Doll v. Feller*, 16 Cal. 432. **Colo.** *Hughes v. Cummings*, 7 Colo. 203, 2 Pac. 928; *Davis v. Wannamaker*, 2 Colo. 637. **Conn.**—*Hoxie v. New York, N. H. & H. R. Co.*, 82 Conn. 352, 73 Atl. 754, 17 Ann. Cas. 324. **Del.**—*Knight v. Ferris*, 6 Houst. 283. **Ga.**—*Kendrick v. Whitfield*, 20 Ga. 379; *Wallace v.*

Southern Exp. Co., 7 Ga. App. 565, 67 S. E. 694. **Ind.**—*State v. Ennis*, 74 Ind. 17; *Keiser v. Yandes*, 45 Ind. 174; *Stanford v. Stanford*, 42 Ind. 485; *Loeb v. Mathis*, 37 Ind. 306; *Newell v. Gatling*, 7 Ind. 147; *Oreutt v. Hanson*, 71 Iowa 514, 32 N. W. 482. **Ky.**—*Grant v. Tams & Co.*, 7 T. B. Mon. 218. **Me.** *Stephenson v. Davis*, 56 Me. 73; *De-muth v. Cutler*, 50 Me. 298; *Hathorne v. Haines*, 1 Greenl. 238. **Md.**—*Crook v. Pitcher*, 61 Md. 510. **Mich.**—*Titus v. Chippewa Circ. Judge*, 168 Mich. 507, 134 N. W. 487. **Mo.**—*Lindell Real Estate Co. v. Lindell*, 133 Mo. 386, 33 S. W. 466; *Kingman-St. Louis Impl. Co. v. Bantley Bros. Hardware Co.*, 137 Mo. App. 308, 118 S. W. 500. **N. Y.** *Gervais v. Chicago, R. I. & P. R. Co.*, 58 Hun 610, 12 N. Y. Supp. 312, 20 N. Y. Civ. Proc. 95, 35 N. Y. St. 129; *Chapman v. Wilber*, 6 Hill 475; *Varick v. Dodge*, 9 Paige 149; *Cragin v. Quitman*, 22 Hun 101. **N. J.**—*Hill v. Nelson*, 70 N. J. L. 376, 381, 57 Atl. 411. **Okla.**—*Parker v. Lynch*, 7 Okla. 631, 650, 56 Pac. 1082. **Tex.**—*Master-son v. Cundiff*, 58 Tex. 472; *Bigham v. Talbot*, 51 Tex. 450; *Willis v. White* (Tex. Civ. App.), 29 S. W. 818; *Johnston v. Price*, 2 Wills. Civ. Cas., §756. **Va.**—*Poindexter v. Burwell*, 82 Va. 507; *Ryan v. Com.*, 80 Va. 385. **Vt.**—*Murphy v. Lincoln*, 63 Vt. 278, 22 Atl. 418.

See 6 STANDARD PROC. 893.

See generally the title "Demurrer," vol. 6, page 845.

[a] The want of jurisdiction for which a demurrer may be interposed under the code, and which is not waived by an omission to demur or answer for that cause, is when the cause of action disclosed by the complaint is not properly cognizable by any court of justice to which the provisions of the code are applicable. *De Bussierre v. Holladay*, 4 Abb. N. C. (N. Y.) 111, 55 How. Pr. 210.

ate.⁵⁰ Want of jurisdiction over the subject matter may be raised by motion to dismiss,⁵¹ by motion for instruction,⁵² by motion in arrest of judgment,⁵³ or to set aside the judgment;⁵⁴ but not by motion to set aside the service of process.⁵⁵ Such lack of jurisdiction may also be

50. **U. S.**—*Robinson v. National Stock-Yard Co.*, 20 Blatchf. 513, 12 Fed. 361. **Ala.**—*Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858; *Abraham v. Hall*, 59 Ala. 386; *Jordan v. Hazard*, 10 Ala. 221. **Cal.**—*Doll v. Feller*, 16 Cal. 432. **Conn.**—*Johnson v. Cooke*, 85 Conn. 679, 84 Atl. 97, Ann. Cas. 1913C, 275. **Ind.**—*Indianapolis St. Ry. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169, 1034. **Kan.**—*Bliss v. Burnes*, *McCahon* 91. **Ky.**—*Baker v. Louisville & N. R. Co.*, 4 Bush 619; *Currie Fertilizer Co. v. Krish*, 24 Ky. L. Rep. 2471, 74 S. W. 268. **Md.**—*Gittings v. State*, 33 Md. 458. **Minn.**—*Gill v. Bradley*, 21 Minn. 15; *Dorman v. Ames*, 9 Minn. 180; *Powers v. Ames*, 9 Minn. 178. **Miss.**—*Hurt v. Southern R. Co.*, 40 Miss. 391. **Mont.**—*Knight v. Le Beau*, 19 Mont. 223, 47 Pac. 952. **N. J.**—*Winant v. Nautical Preparatory School*, 70 N. J. L. 366, 57 Atl. 133. **N. Y.**—*Bradt v. Kirkpatrick*, 7 Paige 62; *Belden v. Wilkinson*, 44 App. Div. 420, 60 N. Y. Supp. 1083, 7 N. Y. Ann. Cas. 48. **N. C.**—*Charlotte Bank v. Britton*, 66 N. C. 365. **P. R.**—*Lowande v. Garcia*, 13 Porto Rico 263. **R. I.**—*Third Nat. Bank v. Angell*, 18 R. I. 1, 29 Atl. 500. **S. C.**—*Pollock v. Carolina Interstate Bldg. & L. Assn.*, 48 S. C. 65, 25 S. E. 977, 59 Am. St. Rep. 695. **Tex.**—*Dwyer v. Bassett*, 63 Tex. 274; *Walhoefer v. Hobgood*, 18 Tex. Civ. App. 291, 44 S. W. 566. **Va.**—*Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226.
51. **U. S.**—*Susquehanna, etc. R. Co. v. Blatchford*, 11 Wall. 172, 20 L. ed 179; *Municipal Inv. Co. v. Gardiner*, 62 Fed. 954; *Donaldson v. Hazen*, *Hempst.* 423, 7 Fed. Cas. No. 3,984. **Ala.**—*Burns v. Henry*, 67 Ala. 209; *McClure v. Lay*, 30 Ala. 208. **Conn.**—*Wildman v. Rider*, 23 Conn. 172. **Ill.**—*Frantz v. Fleitz*, 85 Ill. 362; *Douglas v. Dee*, 194 Ill. App. 612; *Windsor v. Cleveland, etc. R. Co.*, 105 Ill. App. 46. **La.**—*Dartez v. Lege*, 28 La. Ann. 640. **Me.**—*Upham v. Bradley*, 17 Me. 423. **Mich.**—*Johnson v. Burke*, 167 Mich. 349, 355, 132 N. W. 1017. **Mo.**—*Dillard v. St. Louis, K. C. & N. R. Co.*, 58 Mo. 69. **N. J.**—*Buttoro v. Whalen*, 64 N. J. L. 461, 45 Atl. 981. **N. Y.**—*Gormly v. McIntosh*, 22 Barb. 271; *Fairelough v. Southern Pac. Co.*, 171 App. Div. 496, 157 N. Y. Supp. 862. *Contra*, *Delaware, L. & W. R. Co. v. New York S. & W. R. Co.*, 12 Misc. 230, 33 N. Y. Supp. 1081. **N. C.**—*Parker v. Southern Express Co.*, 132 N. C. 128, 43 S. E. 603. **Pa.**—*Collins v. Collins*, 37 Pa. 387. **R. I.**—*Edwards v. Hopkins*, 5 R. I. 138. **Tex.**—*Able v. Bloomfield*, 6 Tex. 263. **Vt.**—*Sanders v. Pierce*, 68 Vt. 468, 35 Atl. 377; *Ferris v. Ferris*, 25 Vt. 100; *Stoughton v. Mott*, 13 Vt. 175. **Va.**—*Hilton v. Consumers' Can Co.*, 103 Va. 255, 48 S. E. 899. **W. Va.**—*Surber's Admr. v. McClintic*, 10 W. Va. 236. **Wis.**—*Butler v. Wagner*, 35 Wis. 54.
- [a] **Form of Motion To Dismiss.** *Irwin v. Irwin*, 2 Okla. 180, 37 Pac. 548.
52. *Ryan v. Com.*, 80 Va. 385; *Philips v. Com.*, 19 Gratt. (60 Va.) 485, 519.
53. **U. S.**—*McLaughlin v. Stelle*, 1 Cranch C. C. 483, 16 Fed. Cas. No. 8,873. **Conn.**—*Strong v. Avery*, 1 Root 259; *Moultrop v. Bennet*, *Kirby* 351. **Del.**—*Knight v. Ferris*, 6 Houst. 283. **Ind.**—*Loeb v. Mathis*, 37 Ind. 306; *New Albany & S. R. Co. v. Huff*, 19 Ind. 444; *Daniels v. Bruce* (Ind. App.), 93 N. E. 675. **Md.**—*United States Express Co. v. Hurlock*, 120 Md. 107, 87 Atl. 834, Ann. Cas. 1915A, 563. **Mass.**—*Robinson v. Mead*, 7 Mass. 353. **Mo.**—*Stansbury v. Stansbury*, 118 Mo. App. 427, 94 S. W. 566. **Va.**—*Ryan v. Com.*, 80 Va. 385; *Philips v. Com.*, 19 Gratt. (60 Va.) 485.
54. *Evans v. Oregon Short Line R. Co.*, 51 Mont. 107, 149 Pac. 715.
55. *Atlantic & Pac. Tel. Co. v. Baltimore & O. R. Co.*, 87 N. Y. 355; *Mallory v. Virginia Hot Springs Co.*, 157 App. Div. 253, 141 N. Y. Supp. 961; *Manning, Maxwell & Moore v. Canadian L. Co.*, 120 App. Div. 735, 105 N. Y. Supp. 662. See also *Toronto General Trust Co. v. Chicago, etc. R. R. Co.*, 32 Hun (N. Y.) 190; *Delaware, L. & W. R. Co. v. New York S. & W. R. Co.*, 12 Misc. 230, 33 N. Y. Supp. 1081, 67 N. Y. St. 784.

raised by a plea,⁵⁶ especially where not apparent upon the face of the record,⁵⁷ or by motion to nonsuit,⁵⁸ or by appeal or writ of error,⁵⁹ or by objection to the judgment when introduced in evidence.⁶⁰

Jurisdiction Over the Person or Particular Case.—Since a general appearance waives want of jurisdiction over the person, it is necessary for a defendant who wishes to raise the question of jurisdiction over his person to plead in abatement to the jurisdiction setting up the particular matter relied upon⁶¹ before he appears generally.⁶² In making

56. **Ill.**—*Douglas v. Dee*, 194 Ill. App. 612. **Ind.**—*Great Western Life Assur. Co. v. State*, 181 Ind. 28, 34, 102 N. E. 849, 103 N. E. 843. **Mich.** *Johnson v. Burke*, 167 Mich. 349, 355, 132 N. W. 1017. **N. J.**—*Hill v. Nelson*, 70 N. J. L. 376, 381, 57 Atl. 411. **N. Y.**—*Rosenblatt v. Jersey Nov. Co.*, 45 Misc. 59, 90 N. Y. Supp. 816.

Pleas to the jurisdiction, see *infra*, XIV, C.

57. **U. S.**—*Susquehanna, etc. R., etc. Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Walker v. Flint*, 7 Fed. 435, 2 McCrary 341; *Smith v. McCleod*, 1 Cranch C. C. 43, 22 Fed. Cas. No. 13,073. **Ala.**—*Burns v. Henry*, 67 Ala. 209. **Del.**—*Knight v. Ferris*, 6 Houst. 283. **Ga.**—*Crawford v. Ryals*, 86 Ga. 349, 12 S. E. 814. **Ill.**—*People v. Bowman*, 147 Ill. App. 67. **Ind.**—*Ludwick v. Beckamire*, 15 Ind. 198; *Ragan v. Haynes*, 10 Ind. 348; *Brownfield v. Weicht*, 9 Ind. 394. **N. J.**—*Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, *affirmed*, 72 N. J. Eq. 434, 940, 65 Atl. 1117. **N. Y.**—*Gormly v. McIntosh*, 22 Barb. 271; *Bradt v. Kirkpatrick*, 7 Paige 62. **N. C.**—*Cole v. Carolina Cent. Ry. Co.*, 74 N. C. 587. **Tex.**—*Hoffman v. Cleburne Bldg. & Loan Assn.*, 85 Tex. 409, 22 S. W. 154; *Carter v. Hubbard*, 79 Tex. 356, 15 S. W. 392. **Can.**—*Brown v. Corporation of York County*, 8 Ont. Pr. 139.

58. *Hill v. Nelson*, 70 N. J. L. 374, 381, 57 Atl. 411.

59. **U. S.**—*Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 23 L. ed. 462; *Capron v. Van Norden*, 2 Cranch 126, 2 L. ed. 229; *Blachly v. Davis*, 1 McLean 412, 3 Fed. Cas. No. 1,456. **Ala.**—*Whorton v. Moragne*, 62 Ala. 201. **Cal.**—*McConoughey v. San Diego*, 128 Cal. 366, 60 Pac. 925; *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305. **Colo.** *McKinnon v. Hall*, 10 Colo. App. 291, 50 Pac. 1052. **Conn.**—*Wildman v. Rider*, 23 Conn. 172. **Fla.**—*Livingston v.*

Webster, 26 Fla. 325, 8 So. 442. **Ga.** *Dickinson v. Mann*, 74 Ga. 217. **Ill.** *Foote v. Yarlott*, 238 Ill. 54, 87 N. E. 62; *Way v. Way*, 64 Ill. 406. **Ind.** *Forsythe v. Hammond*, 142 Ind. 505, 40 N. E. 267, 41 N. E. 950, 30 L. R. A. 576. **Ia.**—*Groves v. Richmond*, 53 Iowa 570, 5 N. W. 763. **Ky.**—*Harper v. Montgomery*, 5 Litt. 347. **Md.**—*United States Exp. Co. v. Hurlock*, 120 Md. 107, 87 Atl. 834, Ann. Cas. 1915A, 566; *Schiff v. Solomon*, 57 Md. 572; *Armstrong v. Hagerstown*, 32 Md. 54. **Mass.**—*Riley v. Lowell*, 117 Mass. 76; *Jordan v. Dennis*, 7 Mete. 590. **Miss.**—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. **Mo.**—*Lindsay v. Kansas City, Ft. S. & M. Ry. Co.*, 36 Mo. App. 51. **Mont.**—*Evans v. Oregon S. L. R. Co.*, 51 Mont. 107, 149 Pac. 715. **N. Y.** *In re Walker*, 136 N. Y. 20, 32 N. E. 633; *Fiester v. Shepard*, 92 N. Y. 251; *Striker v. Mott*, 6 Wend. 465. **N. C.** *Whitehurst v. Pettipher*, 105 N. C. 40, 11 S. E. 369. **Okla.**—*Myers v. Berry*, 3 Okla. 612, 41 Pac. 580. **Pa.**—*Fowler v. Eddy*, 110 Pa. 117, 1 Atl. 789. **P. I.** *Government v. American Surety Co.*, 11 Phil. Isl. 203. **Tex.**—*Roeser v. Bellmer*, 7 Tex. 1; *Gray v. Maddox*, 5 Tex. 528. **Va.**—*Witz v. Mullin*, 90 Va. 805, 20 S. E. 783; *Ryan v. Com.*, 80 Va. 385. **Wash.**—*Wade v. Weber*, 82 Wash. 591, 144 Pac. 901; *Stewart v. Lohr*, 1 Wash. 341, 25 Pac. 457, 22 Am. St. Rep. 150. **Wis.**—*Dewey v. Hyde*, 1 Pin. 469.

60. *Evans v. Oregon S. L. R. Co.*, 51 Mont. 107, 149 Pac. 715.

61. **Colo.**—*Western Union T. Co. v. Claymore*, 2 Colo. 32. **Mich.**—*Johnson v. Burke*, 167 Mich. 349, 132 N. W. 1017. **Tenn.**—*Agee v. Dement*, 1 Humph. 332. **Va.**—*Washington, etc. T. Co. v. Hobson*, 15 Gratt. (56 Va.) 122.

Plea to the jurisdiction, see *infra*, XIV, C.

62. *Davidson v. Johnson*, 113 Ky. 202, 210, 67 S. W. 996.

such objection the defendant should ordinarily appear specially for this purpose.⁶³ If a defendant claims that the court has acquired no jurisdiction over his person, by reason of defects or irregularities in the process, or service thereof, his course is by special appearance and objections to the jurisdiction; and if he goes further, and enters a general appearance, or invokes the powers of the court for any other purpose than quashing the pretended process, or service thereof, the defects are waived;⁶⁴ but if he has appeared generally, he may be allowed to withdraw his appearance and file a plea to the jurisdiction.⁶⁵

Where the court has general jurisdiction of the subject matter of the action and the objection is to its jurisdiction over the particular case, if the want of jurisdiction does not appear on the face of the complaint objection must be made by plea or answer, depending upon the local practice.⁶⁶ Where the action is not instituted in the proper county or

[a] A plea seeking to make available the privilege accorded to a defendant by statutes, of being sued in a county other than that in which the action is brought, is a plea in abatement, and not a plea to the jurisdiction of the court. *Bishop v. Camp*, 39 Fla. 517, 22 So. 735.

63. **U. S.**—*Western Loan Co. v. Butte & B. Consol. Min. Co.*, 210 U. S. 368, 23 Sup. Ct. 720, 52 L. ed. 1101; *In re Keasbey & M. Co.*, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. ed. 402; *Shaw v. Quincy Min. Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. ed. 768; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. **Ind.**—*Toledo, W. & W. Ry. Co. v. Milligan*, 52 Ind. 505; *Baily v. Schrader*, 34 Ind. 260. **Kan.**—*Carver v. Shelly & Co.*, 17 Kan. 472. **Mo.** *State ex rel. Pac. Mut. L. Ins. Co. v. Grimm*, 239 Mo. 135, 173, 143 S. W. 483.

See generally the title "Appearances."

64. *Baker v. Union Stock Yards Nat. Bank*, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484; *Ley v. Pilger*, 59 Neb. 561, 45 N. W. 174; *Lowe v. Riley*, 57 Neb. 252, 258, 77 N. W. 758; *Omaha Loan & Tr. Co. Sav. Bk. v. Knight*, 50 Neb. 342, 69 N. W. 933.

65. *Lehigh Val. Coal Co. v. Yensavage*, 218 Fed. 547, 134 C. C. A. 275; *Kever v. Philadelphia & R. C. & I. Co.*, 234 Fed. 814.

66. See the following cases: **U. S.** *Wickliffe v. Owings*, 17 How. 47, 15 L. ed. 44; *Smith v. Kernocen*, 7 How. 198, 12 L. ed. 666; *Bettes v. Brower*, 184

Fed. 342; *Dinsmore v. Central R. Co.*, 19 Fed. 153; *Gilmer v. Grand Rapids*, 16 Fed. 708; *Walker v. Flint*, 2 McCrary 341, 7 Fed. 435; *Parsons v. Denis*, 2 McCrary 359, 7 Fed. 317; *Varner v. West*, 1 Woods 493, 28 Fed. Cas. No. 16,885. **Ala.**—*Tigrett v. Taylor*, 180 Ala. 296, 60 So. 858; *Harwell v. Lehman, Durr & Co.*, 72 Ala. 344; *Campbell v. Crawford*, 63 Ala. 392; *Abraham v. Hall*, 59 Ala. 386; *Long v. Bakefield*, 48 Ala. 608; *Nabors v. Nabors*, 2 Port. 162. **Ark.**—*Heilman v. Martin*, 2 Ark. 158, 163; *Hughes v. Martin*, 1 Ark. 455. **Cal.**—*Small v. Gwinn*, 6 Cal. 447. **Colo.**—*Western Union Tel. Co. v. Claymore*, 2 Colo. 32; *Cody v. Raynaud*, 1 Colo. 272. **Conn.**—*Johnson v. Cooke*, 85 Conn. 679, 84 Atl. 97, Ann. Cas. 1913C, 275; *Bishop v. Vose*, 27 Conn. 1. **Del.**—*Townsend v. Steward*, 4 Harr. 94. **Fla.**—*Putnam Lumb. Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193. **Ga.**—*White v. North Georgia Electric Co.*, 136 Ga. 21, 70 S. E. 639; *Campbell v. Mereer*, 108 Ga. 103, 33 S. E. 871; *East Tennessee, etc. R. Co. v. Suddeth*, 86 Ga. 388, 12 S. E. 682. **Ill.**—*Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107 (*affirming* 116 Ill. App. 496); *Mason & Tazewell Special Drain Dist. Comrs. v. Griffin*, 134 Ill. 330, 25 N. E. 995; *Greer v. Young*, 120 Ill. 184, 11 N. E. 167; *Farmers', etc. Ins. Co. v. Buckles*, 49 Ill. 482; *Holloway Co. v. Freeman*, 22 Ill. 197; *Watterman v. Tuttle*, 18 Ill. 292. **Ind.**—*Eel River R. Co. v. State*, 143 Ind. 231, 42 N. E. 617; *Rauber v. Whitney*, 125 Ind. 216, 25 N. E. 186; *Day v. Henry*, 104 Ind. 324, 4 N. E. 44; *Wilcox v. Moudy*, 82 Ind. 219; *Keiser v. Yandes*, 45 Ind.

township,⁶⁷ or the court has no jurisdiction over the person of the defendant because of non-residence, or because he is an alien, or for some

174; *Ludwick v. Beckamire*, 15 Ind. 198; *Indianapolis St. R. Co. v. Seerley*, 35 Ind. App. 467, 72 N. E. 169, 1034. **Ia.**—*Meunch v. Breitenbach*, 41 Iowa 527. **Kan.**—*Wells v. Patton*, 50 Kan. 732, 33 Pac. 15; *Bliss v. Burnes*, 1 Kan. 518, *McCahon* 91. **Ky.**—*Anderson's Admr. and Heirs v. Irvine*, 11 B. Mon. 341; *National Life Ins. Co. v. Tweddell*, 22 Ky. L. Rep. 881, 58 S. W. 699. **La.**—*Mix v. His Creditors*, 39 La. Ann. 624, 2 So. 391. **Me.**—*Stephenson v. Davis*, 56 Me. 73; *Badger v. Towle*, 48 Me. 20; *Webb v. Goddard*, 46 Me. 505; *Stetson v. Corinna*, 44 Me. 29. **Mass.**—*Johnson v. Carr*, 210 Mass. 1, 95 N. E. 966; *Crosby v. Harrison*, 116 Mass. 114; *Brown v. Webber*, 6 Cush. 560. **Mich.**—*Thompson v. Michigan Mut. Ben. Assn.*, 52 Mich. 522, 18 N. W. 247. **Mo.**—*Chouteau v. Allen*, 70 Mo. 290; *Curfman v. Maryland Fidelity & D. Co.*, 167 Mo. App. 507, 152 S. W. 126; *Kincaid v. Storz*, 52 Mo. App. 564; *Christian v. Williams*, 35 Mo. App. 297. **Neb.**—*Lowe v. Riley*, 57 Neb. 252, 77 N. W. 758; *Kyd v. Cortland Exch. Bank*, 56 Neb. 557, 76 N. W. 1058; *Herbert v. Wortendyke*, 49 Neb. 182, 68 N. W. 350; *Anheuser-Busch Brew. Assn. v. Peterson*, 41 Neb. 897, 60 N. W. 373; *Hurlburt v. Palmer*, 39 Neb. 158, 57 N. W. 1019. **N. H.** *Bishop v. Silver Lake Min. Co.*, 62 N. H. 455; *Christian Educational Soc. v. Varney*, 54 N. H. 376. **N. J.**—*Camden Rolling Mill Co. v. Swede Iron Co.*, 32 N. J. L. 15; *Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, *affirming* 72 N. J. Eq. 434, 940, 65 Atl. 1117. **N. Y.** *Wheelock v. Lee*, 74 N. Y. 495, 5 Abb. N. C. 72, 54 How. Pr. 402; *Bailey v. Spofford*, 14 Hun 86; *Johnson v. Adams Tobacco Co.*, 14 Hun 89; *Koenig v. Nott*, 2 Hilt. 323; *Gervais v. Chicago, R. I. & P. R. Co.*, 58 Hun 610, 12 N. Y. Supp. 312, 20 N. Y. Civ. Proc. 95, 35 N. Y. St. 129; *Bradt v. Kirkpatrick*, 7 Paige 62. **N. C.**—*McLean v. McDugald*, 53 N. C. 383; *Newman v. Tabor*, 27 N. C. 231; *Killian v. Fulbright*, 25 N. C. 9. **Ohio.**—*Long v. Newhouse*, 57 Ohio St. 348, 49 N. E. 79; *Kehnast v. Daum*, 6 Ohio Dec. 401, 4 Ohio N. P. 366. **Pa.**—*Smith v. People's, etc. Ins. Co.*, 173 Pa. 15, 33 Atl. 567; *Black's Exrs. v. Black's Exrs.*, 34 Pa. 354. **P. R.**—*Lowande v. Garcia*,

13 Porto Rico 263. **Tenn.**—*Templeton v. Mason*, 107 Tenn. 625, 65 S. W. 25. **Tex.**—*San Antonio, etc. R. Co. v. Cockrill*, 72 Tex. 613, 10 S. W. 702; *International & G. N. R. Co. v. Nicholson*, 61 Tex. 550; *Masterson v. Cundiff*, 58 Tex. 472; *Piedmont & Arlington Life Ins. Co. v. Ray*, 50 Tex. 511; *Davis v. Texas, etc. R. Co.*, 12 Tex. Civ. App. 427, 34 S. W. 144; *Meyer v. Smith*, 3 Tex. Civ. App. 37, 21 S. W. 995. **Vt.**—*Bellows Falls Bank v. Rutland & B. R. Co.*, 28 Vt. 470. **Va.** *North American Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909; *Norfolk & W. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Wells v. Hughes' Exr.*, 89 Va. 543, 16 S. E. 689; *Jones v. Bradshaw*, 16 Gratt. (57 Va.) 355; *Washington, etc. Tel. Co. v. Hobson*, 15 Gratt. (56 Va.) 122. **W. Va.**—*Netter-Oppenheim & Co. v. Elfant*, 63 W. Va. 99, 59 S. E. 892; *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 46 S. E. 366, 102 Am. St. Rep. 941, 63 L. R. A. 896; *Valley Bank v. Gettinger*, 3 W. Va. 309. **Wis.**—*Dutcher v. Dutcher*, 39 Wis. 651.

[a] In equity by special plea. *Bettes v. Brower*, 184 Fed. 342.

[b] **Counterclaim—Land Beyond State.**—The want of jurisdiction over a counterclaim for trespass to lands lying in another state, cannot be raised by demurrer where it does not appear from the counterclaim that the land is situated in another state. *Cragin v. Quitman*, 22 Hun (N. Y.) 101.

67. U. S.—*Lewis Blind Stitch Co. v. Arbetter Felling Machine Co.*, 181 Fed. 974. **Ala.**—*Torbert v. Wilson*, 1 Stew. & P. 200. **Colo.**—*Cody v. Raynaud*, 1 Colo. 272. **Fla.**—*Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507; *Curtis v. Howard*, 33 Fla. 251, 14 So. 812; *Bucki v. Cone*, 25 Fla. 1, 6 So. 160. **Ga.**—*Cox v. Potts*, 67 Ga. 521. **Ill.**—*Mason & T. Special Drain. Dist. Comrs. v. Griffin*, 134 Ill. 330, 25 N. E. 995; *Drake v. Drake*, 83 Ill. 526; *Farmers', etc. Ins. Co. v. Buckles*, 49 Ill. 482; *Hardy v. Adams*, 48 Ill. 532; *Waterman v. Tuttle*, 18 Ill. 292; *Kenney v. Greer*, 13 Ill. 432, 54 Am. Dec. 439; *Clark v. Evans*, 138 Ill. App. 56. **Ind.**—*Day v. Henry*, 104 Ind. 324, 4 N. E. 44; *Baily v. Schrader*, 34 Ind. 260; *Indianapolis & Madison R. Co. v. Solomon*, 23 Ind. 534; *Ft. Wayne Ins.*

other reason,⁶⁸ as that plaintiff has resorted to fraudulent, illegal or criminal means in order to secure jurisdiction over the person of the

- Co. v. Irwin, 23 Ind. App. 53, 54 N. E. 817; Ohio Farmers' Ins. Co. v. Stowman, 16 Ind. App. 205, 44 N. E. 558.
- Ky.**—Girtz v. Logan, 6 Bush 8. **La.**—Tegarden v. Powell, 15 La. Ann. 184; McAlpine v. Jones, 13 La. Ann. 409; Knight v. Callender, 10 La. 226; Crouse v. Duffield, 12 Mart. (O. S.) 539. **Me.**—Demuth v. Cutler, 50 Me. 298; Webb v. Goddard, 46 Me. 505. **Md.**—Tyler v. Murray, 57 Md. 418; Hamilton v. State, 32 Md. 348. **Mass.**—Silver v. Graves, 210 Mass. 26, 95 N. E. 948; Hastings v. Bolton, 1 Allen 529; Barry v. Page, 10 Gray 398; Brown v. Webber, 6 Cush. 560; Davis v. Marston, 5 Mass. 199; Cleveland v. Welsh, 4 Mass. 591. **Mo.**—Johnson v. Detrick, 152 Mo. 243, 53 S. W. 891; State v. Rombauer, 140 Mo. 121, 40 S. W. 763; Chouteau v. Allen, 70 Mo. 290; Kincaid v. Storz, 52 Mo. App. 564. **N. H.**—Bishop v. Silver Lake Min. Co., 62 N. H. 455. **N. M.**—Geek v. Shepherd, 1 N. M. 346. **N. Y.**—Daniels v. Patterson, 3 N. Y. 47. **N. C.**—McLean v. McDugald, 53 N. C. 383; Whicker v. Roberts, 32 N. C. 485; Killian v. Fulbright, 25 N. C. 9; Green v. Mangum, 7 N. C. 39. **Ohio.**—Allen v. Miller, 11 Ohio St. 374. **Pa.**—Smith v. People's Mut. Live Stock Ins. Co., 173 Pa. 15, 33 Atl. 567; Fennell v. Guffey, 155 Pa. 38, 25 Atl. 785. **S. C.**—Comstock & Co. v. Alexander, 2 Spears 274. **Tenn.**—O'Sullivan v. Larry, 2 Head 54; Cain v. Butler's Admr., 4 Hayw. 53. **Tex.**—San Antonio, etc. R. Co. v. Cockrill, 72 Tex. 613, 10 S. W. 702; Watson v. Baker, 67 Tex. 48, 2 S. W. 375; Master-son v. Cundiff, 58 Tex. 472; Piedmont & Arlington Life Ins. Co. v. Ray, 50 Tex. 511; Campbell v. Wilson, 6 Tex. 379; Fields v. Ft. Worth, etc. R. Co. (Tex. Civ. App.), 30 S. W. 255. **Va.**—Norfolk & W. R. Co. v. Ampey, 93 Va. 108, 25 S. E. 226. **W. Va.**—Netter-Oppheimer & Co. v. Elfant, 63 W. Va. 99, 59 S. E. 892; Valley Bank v. Berkeley Bank, 3 W. Va. 386. **Wis.**—Dutcher v. Dutcher, 39 Wis. 651.
- Contra.* **Ind.**—Louisville, N. A. & C. Ry. Co. v. Davis, 83 Ind. 89; Chicago & S. E. R. Co. v. Wheeler, 14 Ind. App. 62, 42 N. E. 489. **Ia.**—Orcutt v. Hanson, 71 Iowa 514, 32 N. W. 482. **Mass.**—Robinson v. Mead, 7 Mass. 353. **Wash.**—McMaster v. Advance Thresher Co., 10 Wash. 147, 38 Pac. 760; McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76.
68. **U. S.**—Rateau v. Bernard, 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; Miller v. Gages, 4 McLean 436, 17 Fed. Cas. No. 9,571; The Bee, 1 Ware 332, 3 Fed. Cas. No. 1,219. **Ala.**—Tigrett v. Taylor, 180 Ala. 296, 60 So. 858; Peebles v. Weir, 60 Ala. 413; Yonge v. Broxson, 23 Ala. 684; Johnson v. King, 20 Ala. 270. **Colo.**—Cody v. Raynaud, 1 Colo. 272. **Conn.**—Bishop v. Vose, 27 Conn. 1; Bulkley v. Starr, 2 Day 552. **Fla.**—Putnam Lumb. Co. v. Ellis-Young Co., 50 Fla. 251, 39 So. 193. **Ga.**—Beall v. Rust, 68 Ga. 774; Cox v. Potts, 67 Ga. 521; Bell v. New Orleans & N. E. R. Co., 2 Ga. App. 812, 59 S. E. 102. **Ill.**—Traders' Mut. L. Ins. Co. v. Humphrey, 207 Ill. 540, 69 N. E. 875 (affirmed), 109 Ill. App. 246; Farmers', etc. Ins. Co. v. Buckles, 49 Ill. 482; Hardy v. Adams, 48 Ill. 532; Gregg v. Sumner, 21 Ill. App. 110. **Ind.**—Day v. Henry, 104 Ind. 324, 4 N. E. 44; Keiser v. Yandes, 45 Ind. 174; Baily v. Schrader, 34 Ind. 260; Brady v. Richardson, 18 Ind. 1; Ludwick v. Beckamire, 15 Ind. 198; Ohio Farmers' Ins. Co. v. Stowman, 16 Ind. App. 205, 44 N. E. 558, 940. **Ia.**—Schrader v. Hoover, 87 Iowa 654, 54 N. W. 463. **Kan.**—Bliss v. Burns, McCahon 91. **Ky.**—Wood v. Wood, 78 Ky. 624, 1 Ky. L. Rep. 358. **La.**—Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 So. 753; West v. Lehmer, 115 La. 213, 38 So. 969; Tegarden v. Powell, 15 La. Ann. 184. **Me.**—Hall v. Gilmore, 40 Me. 578; Cook v. Lothrop, 18 Me. 260. **Mass.**—Young v. Providence, etc. Steamship Co., 150 Mass. 550, 23 N. E. 579; Day v. Floyd, 130 Mass. 488; Smith v. Dexter, 121 Mass. 597; Crosby v. Harrison, 116 Mass. 114; Stevens v. Ewer, 2 Mete. 74; Simonds v. Parker, 1 Mete. 508; Carlisle v. Weston, 21 Pick. 535. **Mich.**—Maxwell v. Speed, 60 Mich. 36, 26 N. W. 824. **Miss.**—Thornton v. Fitzhugh, 10 Smed. & M. 438. **Mo.**—Curfman v. Maryland Fidelity & D. Co., 167 Mo. App. 507, 152 S. W. 126; Kincaid v. Storz, 52 Mo. App. 564. **Neb.**—Lowe v. Riley, 57 Neb. 252, 77 N. W. 758; Kyd v. Cortland Exch. Bank, 56 Neb. 557, 76 N. W. 1058; Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019. **N. H.**

defendant,⁶⁹ such objection must be set up by plea or answer where the facts are not apparent upon the face of the record.⁷⁰ But the defendant cannot plead to jurisdiction and defend on the merits at the

Christian Educational Soc. *v.* Varney, 54 N. H. 376; Curtis *v.* Baldwin, 42 N. H. 398; Parsons *v.* Swett, 32 N. H. 87, 64 Am. Dec. 352; Morse *v.* Calley, 5 N. H. 222. **N. Y.**—Burdick *v.* Freeman, 46 Hun 138, 10 N. Y. St. 756, *affirmed*, 120 N. Y. 420, 24 N. E. 949; Koppel *v.* Heinrichs, 1 Barb. 449; McLean *v.* St. Paul & C. Ry. Co., 13 Daly 446, 18 Abb. N. C. 423, 9 Civ. Proc. 394; Pease *v.* Delaware, L. & W. R. Co., 10 Daly 459. **Okla.**—Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356. **Pa.**—West's Exrs. *v.* Nixon's Exrs., 3 Grant Cas. 236. **Tenn.** Peters *v.* Neely, 16 Lea 275; Boyd *v.* Buckingham & Co., 10 Humph. 434. **Vt.**—Shaw *v.* Baldwin, 33 Vt. 447. **Va.** Richmond & D. R. Co. *v.* Rudd, 88 Va. 648, 14 S. E. 361; Barksdale *v.* Neal, 16 Gratt. (57 Va.) 314; Monroe *v.* Redman, 2 Munf. (16 Va.) 240. **W. Va.** Hinton *v.* Ballard, 3 W. Va. 582. **Wis.** Damp *v.* Dane, 29 Wis. 419.

69. U. S.—Smith *v.* Kernochen, 7 How. 198, 12 L. ed. 666; Dinsmore *v.* New Jersey Cent. R. Co., 19 Fed. 153; Gause *v.* Clarksville, 1 McCrary 78, 1 Fed. 353; Boyreau *v.* Campbell, 1 McAll. 119, 3 Fed. Cas. No. 1,760, *affirmed*, 21 How. 223, 16 L. ed. 96. **Ark.**—Neale *v.* Smith, 61 Ark. 564, 33 S. W. 1058. **Neb.**—Hurlburt *v.* Palmer, 39 Neb. 158, 57 N. W. 1019. **N. C.** McLean *v.* McDugald, 53 N. C. 383. **Tex.**—Hoffman *v.* Cleburne Bldg. & Loan Assn., 85 Tex. 409, 22 S. W. 154; Tidball *v.* Eichoff, 66 Tex. 58, 17 S. W. 263; Dwyer *v.* Bassett, 63 Tex. 274; Eden *v.* Osborne & Co. (Tex. Civ. App.), 29 S. W. 414.

[a] The objection that the complaint was not exhibited in good faith or for the honest purpose of asserting the plaintiff's rights, should be presented by plea in abatement, and not by an answer, as it is waived by answer to the merits. Dinsmore *v.* Central R. Co., 19 Fed. 153.

[b] **Notice Under General Issue.** The objection that the goods ordered were ordered merely for the purpose of attaching them may be raised by notice of defense under the general issue. Copas *v.* Anglo-Am. Prov. Co., 73 Mich. 541, 41 N. W. 690.

70. Ind.—State *v.* Ennis, 74 Ind. 17; Keiser *v.* Yandes, 45 Ind. 174; Brownfield *v.* Weicht, 9 Ind. 394. **Kan.** Wells *v.* Patton, 50 Kan. 732, 33 Pac. 15; Bliss *v.* Burnes, 1 Kan. 518, McCahon 91. **Mich.**—Frohlich *v.* Independent Glass Co., 144 Mich. 278, 107 N. W. 889, plea in abatement. **Mo.** State ex rel. Pac. Mut. L. Ins. Co. *v.* Grimm, 239 Mo. 135, 173, 143 S. W. 483; Christian *v.* Williams, 35 Mo. App. 297. **Neb.**—Baker *v.* Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484; Goldstein *v.* Fred Krug Brewing Co., 62 Neb. 728, 87 N. W. 958; Barry *v.* Wachosky, 57 Neb. 534, 535, 77 N. W. 1080; Herbert *v.* Wortendyke, 49 Neb. 182, 68 N. W. 350; Anheuser-Busch Brewing Assn. *v.* Peterson, 41 Neb. 597, 60 N. W. 373; Hurlburt *v.* Palmer, 39 Neb. 158, 57 N. W. 1019. **N. Y.** Wheelock *v.* Lee, 74 N. Y. 495, 5 Abb. N. C. 72, 54 How. Pr. 402; Bailey *v.* Spofford, 14 Hun 86; Delaware L. & W. R. Co. *v.* New York S. & W. R. Co., 12 Misc. 230, 33 N. Y. Supp. 1081.

[a] **Amended Answer.**—A defendant should plead the want of jurisdiction as soon as called upon to answer. If he answers without so doing, he cannot afterwards make the defense in an amended answer. Baker *v.* Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484.

[b] **A want of jurisdiction as to a non resident corporation** not amenable to suit in the state, may be raised by a plea to the jurisdiction. Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758; Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. L. 15.

[c] **That the defendant filed a special demurrer** raising the want of jurisdiction where the want of jurisdiction is not apparent upon the face of the pleadings, does not obviate the necessity of raising the objection by answer. Louisville & N. R. Co. *v.* Stewart, 163 Ky. 164, 173 S. W. 757.

[d] **Bill in Equity.**—Where the defendant appeared to a bill in chancery, and defended the suit, and no want of jurisdiction appeared in the record, and

same time,⁷¹ though under some statutes such a plea may be set up as a separate defense in the answer,⁷² in which event, however, it must, according to some authorities, be disposed of before taking further proceedings on the merits.⁷³ If facts showing want of jurisdiction are apparent of record such facts should not be presented by plea or answer, but by demurrer or motion.⁷⁴ Under some of the codes the proper form of objection is by demurrer.⁷⁵ A motion is appropriate not only

then the complainant died, an objection that the defendants were citizens of another state comes too late when made to a bill of revivor, which is only a continuance of the suit. *Whyte v. Gibbes*, 20 How. (N. S.) 541, 15 L. ed. 1016.

71. *Kever v. Philadelphia & Reading C. & L. Co.*, 234 Fed. 814. See also *Putnam Lumb. Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193. But see *Painter Fertilizer Co. v. Du Pont*, 54 Fla. 288, 45 So. 507.

72. **U. S.**—*Leonard v. Merchants Coal Co.*, 162 Fed. 885, 89 C. C. A. 575. **Ga.**—*Stallings v. Stallings*, 127 Ga. 464, 56 S. E. 469, 9 L. R. A. (N. S.) 593; *Drake v. Lewis*, 13 Ga. App. 276, 79 S. E. 167. **Kan.**—*Wells v. Patton*, 50 Kan. 732, 33 Pac. 15. **Mass.**—*O'Loughlin v. Bird*, 128 Mass. 600. **Mo.**—*State ex rel. Pac. Mut. L. Ins. Co. v. Grimm*, 239 Mo. 135, 165, 143 S. W. 483. **Neb.** See *Stelling v. Peddicord*, 78 Neb. 779, 111 N. W. 793; *Linton v. Heye*, 69 Neb. 450, 95 N. W. 1040, 111 Am. St. Rep. 556; *Grand Lodge A. O. U. W. v. Bartes*, 64 Neb. 800, 90 N. W. 901. **Tex.** *Pyron v. Graef*, 31 Tex. Civ. App. 405, 72 S. W. 101. **Wis.**—*Dutcher v. Dutcher*, 39 Wis. 651.

73. *Shuler v. American Benevolent Assn.*, 132 Mo. App. 123, 111 S. W. 618. See *Wells v. Patton*, 50 Kan. 732, 33 Pac. 15.

74. **Ala.**—*Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498, 3 So. 499, 3 Am. St. Rep. 758. **Ind.**—*Newell v. Gatling*, 7 Ind. 147. **Mo.**—*Kingman-St. Louis Impl. Co. v. Bantley Bros. Hardware Co.*, 137 Mo. App. 308, 118 S. W. 500. **N. Y.**—*Varick v. Dodge*, 9 Paige 149; *McLean v. St. Paul & C. Ry. Co.*, 13 Daly 446, 18 Abb. N. C. 423, 9 N. Y. Civ. Proc. 394.

75. **U. S.**—*Fry v. Denver & R. G. R. Co.*, 26 Fed. 893. **Ga.**—*Kendrick v. Whitfield*, 20 Ga. 379. **Ind.**—*Keiser v. Yandes*, 45 Ind. 174. **Me.**—*Stephenson v. Davis*, 56 Me. 73. **Mo.**—*State ex rel. Pac. Mut. L. Ins. Co. v. Grimm*, 239 Mo. 135, 165, 143 S. W. 483. **N. Y.**

Delaware, L. & W. R. Co. v. New York S. & W. R. Co., 12 Misc. 230, 33 N. Y. Supp. 1081; *Gurney v. Grand Trunk Ry. Co.*, 59 Hun 625, 13 N. Y. Supp. 645, 37 N. Y. St. 557, 560; *Gervais v. Chicago, R. I. & P. R. Co.*, 53 Hun 610, 12 N. Y. Supp. 312, 20 N. Y. Civ. Proc. 95, 35 N. Y. St. 129. **Okla.** *Parker v. Lynch*, 7 Okla. 631, 650, 56 Pac. 1082. **Tex.**—*Bigham v. Talbot*, 51 Tex. 450; *Johnston v. Price*, 2 Wills. Civ. Cas. §756.

See 6 STANDARD PROC. 893.

[a] Testing the sufficiency of the petition by demurrer, or by motion to make more definite,—to the end that it may be intelligently answered and defended, is not asking such affirmative relief as will deprive the defendant of the benefit of his objection to the jurisdiction. *Commonwealth Cotton Oil Co. v. Hudson (Okla.)*, 161 Pac. 535.

[b] Coupling other grounds of demurrer with objections to the jurisdiction is not a waiver of want of jurisdiction under statutes providing that objections to jurisdiction of the court over the person where they appear upon the face of the complaint must be taken by demurrer. *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893; but such joinder is a waiver of the objection and a general appearance, under code provisions providing for special appearances for raising such objection. *Western Loan Co. v. Butte & B. Consol. Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. ed. 1101; *St. Louis, etc. R. Co. v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. ed. 659.

[c] Objection to Amendment to Petition.—The question of a court's jurisdiction to entertain an action cannot be properly raised by presenting objections to an amendment to the plaintiff's petition, the allowance of which would make no change in the status of the case with respect to the matter of jurisdiction. *Reed v. Equitable Trust Co.*, 115 Ga. 780, 42 S. E. 102.

where the want of jurisdiction is apparent of record,⁷⁶ but also in some jurisdictions, when supported by affidavits, where the facts showing want of jurisdiction are not apparent of record.⁷⁷

C. WHO MAY OBJECT.—The right to question the jurisdiction of the court, over the person of the defendant is personal⁷⁸ to the parties

76. U. S.—Municipal Inv. Co. v. Gardiner, 62 Fed. 954; Nazro v. Cragin, 3 Dill. 474, 17 Fed. Cas. No. 10,062. **Ala.**—Tigrett v. Taylor, 180 Ala. 296, 60 So. 858; Harwell v. Lehman, Durr & Co., 72 Ala. 344. **Conn.**—Bishop v. Vose, 27 Conn. 1. **Fla.**—Engelke & Feiner Mill. Co. v. Grunthal, 46 Fla. 349, 35 So. 17. **Ill.**—Greer v. Young, 120 Ill. 184, 11 N. E. 167. **Kan.**—Cohen v. Trowbridge, 6 Kan. 385. **Me.**—Casity v. Cota, 54 Me. 380; Webb v. Goddard, 46 Me. 505. **Mass.**—Brown v. Webber, 6 Cush. 560. **Neb.**—Forbes v. McHaffie, 32 Neb. 742, 49 N. W. 721; Bell v. White Lake Lumber Co., 21 Neb. 525, 32 N. W. 561. **N. Y.**—Otis v. Wakeman, 1 Hill 604. **Tenn.**—Parker v. Porter, 4 Yerg. 81. **Vt.**—Stoughton v. Mott, 13 Vt. 175. **W. Va.**—Netter-Opppenheimer & Co. v. Elfant, 63 W. Va. 99, 59 S. E. 892.

[a] **Motion Not Proper.**—**U. S.** Varner v. West, 1 Woods 493, 27 Fed. Cas. No. 16,885. **Colo.**—Cody v. Raynaud, 1 Colo. 272. **N. Y.**—Johnson v. Adams Tobacco Co., 14 Hun 89. The want of jurisdiction over a non-resident corporation cannot be entertained upon motion for leave to file a supplemental complaint. Johnson v. Victoria, C. C. Min. etc. Co., 60 Misc. 467, 113 N. Y. Supp. 1023.

[b] A motion to quash the declaration is not a proper remedy to raise the question of the want of jurisdiction over a foreign corporation where the complaint does not set up facts showing want of jurisdiction. Maxwell v. Speed, 60 Mich. 36, 26 N. W. 824.

[c] A motion to dismiss is an appropriate manner of raising the objection of want of jurisdiction over the person where the defect is apparent on the face of the proceedings. Brown v. Webber, 6 Cush. (Mass.) 560, 564; Hilton v. Consumers' Can Co., 103 Va. 255, 48 S. E. 899.

77. U. S.—Lewis Blind Stitch Co. v. Arbetter Felling Mach. Co., 181 Fed. 974; Nazro v. Cragin, 3 Dill. 474, 17 Fed. Cas. No. 10,062. **Ill.**—Gregg v. Sumner, 21 Ill. App. 110. **Kan.**—Van

Horn v. Great Western Mfg. Co., 37 Kan. 523, 15 Pac. 562. **Neb.**—Brown v. Goodyear, 29 Neb. 376, 45 N. W. 618; Freeman v. Burks, 16 Neb. 328, 20 N. W. 207. **N. Y.**—Daniels v. Patterson, 3 N. Y. 47; Dewitt v. Buchanan, 54 Barb. 31; McKee v. Oliver, 2 Daly 381; Perry v. Erie Trans. Co., 19 N. Y. Supp. 239, 22 N. Y. Civ. Proc. 178, 28 Abb. N. Cas. 430. **Ohio.**—Craig v. Toledo, A. A. & N. M. R. Co., 3 Ohio Dec. 146, 2 Ohio N. P. 64. **Tex.**—Gouhenant v. Anderson, 20 Tex. 459; Austin v. Jordan, 5 Tex. 130; Fitzpatrick v. Small, 1 White & W. Civ. Cas. §1140; Sanger Bros. v. Ker, 1 White & W. Civ. Cas. §1081.

Contra. **U. S.**—Walker v. Flint, 2 McCrary, 341, 7 Fed. 435. **Ala.**—Tigrett v. Taylor, 180 Ala. 296, 60 So. 858. **Colo.**—Cady v. Raynaud, 1 Colo. 272. **Conn.**—Bishop v. Vose, 27 Conn. 1. **Ill.**—Greer v. Young, 120 Ill. 184, 11 N. E. 167; Farmers, etc. Ins. Co. v. Buckles, 49 Ill. 482. **Ind.**—Day v. Henry, 104 Ind. 324, 4 N. E. 44; Ludwick v. Beckamire, 15 Ind. 198. **Me.**—Badger v. Towle, 48 Me. 20. **Mass.**—Johnson v. Carr, 210 Mass. 1, 95 N. E. 966; Crosby v. Harrison, 116 Mass. 114. **N. H.**—Bishop v. Silver Lake Min. Co., 62 N. H. 455. **N. Y.**—Bradt v. Kirkpatrick, 7 Paige 62; Johnson v. Adams Tobacco Co., 14 Hun 89; Barber v. Barber, 137 App. Div. 665, 122 N. Y. Supp. 452; Johnson v. Victoria C. C. Min. etc., Co., 60 Misc. 467, 113 N. Y. Supp. 1023; Delaware, etc. R. Co. v. New York, etc., R. Co., 12 Misc. 230, 33 N. Y. Supp. 1081, 67 N. Y. St. 784.

[a] Jurisdiction of transitory actions may be tried on motion based upon affidavits if the facts are not of record or within judicial notice. Haywood v. Johnson, 41 Mich. 598, 2 N. W. 928.

78. U. S.—Harrison v. Urann, 1 Story 64, 11 Fed. Cas. No. 6,146; Craig v. Cummings, 2 Wash. C. C. 505, 6 Fed. Cas. No. 3,331; Cooper v. Gordon, 4 McLean 6, 6 Fed. Cas. No. 3,195. **Ala.**—Weaver v. Crenshaw, 6 Ala. 873. **Ga.**—Colquitt v. Mercer, 44 Ga. 432; Mum-

themselves and cannot be pleaded by the co-defendants:⁷⁹ but where one of the parties has waived jurisdiction so far as the rights of the parties are concerned, a third party prejudiced thereby may take advantage of the want of jurisdiction.⁸⁰ The appellant cannot object to the jurisdiction of the appellate court,⁸¹ but an unsuccessful plaintiff in the lower court may raise the lack of jurisdiction of the trial court over the subject matter.⁸²

D. TIME OF RAISING OBJECTION.—The want of jurisdiction over the subject matter may be questioned at any time.⁸³ It may be ques-

ford v. Solomon, 8 Ga. App. 286, 88 S. E. 1075; *Brisco v. Brewer*, 2 Ga. Dec. 105. **Ky.**—*Moore v. Smith*, 2 B. Mon. 340.

79. *Colquitt v. Mercer*, 44 Ga. 432.

80. *Beach v. Atkinson*, 87 Ga. 288, 293, 13 S. E. 591; *Suydam v. Palmer*, 63 Ga. 546.

81. *Hunter v. Oelrich*, Dall. (Tex.) 357.

82. *Sprinkle v. Duty*, 54 W. Va. 559, 46 S. E. 557; *Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556.

83. **U. S.**—*Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. ed. 690; *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. ed. 462; *Capron v. Van Noorden*, 2 Cranch 126, 2 L. ed. 229; *Lewicki v. Wiardi & Co.*, 213 Fed. 647; *Daily v. Doe*, 3 Fed. 903; *Maisonnaire v. Keating*, 2 Gall. 325, 16 Fed. Cas. No. 8,978; *Kelly v. Harding*, 5 Blatchf. 502, 14 Fed. Cas. No. 7,670; *Donaldson v. Hazen*, Hempst. 423, 7 Fed. Cas. No. 3,984. **Ala.**—*Karthauss v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268; *McClure v. Lay*, 30 Ala. 208; *Talladega Comrs. Ct. v. Thompson*, 18 Ala. 694; *Wyatt v. Judge*, 7 Port. 37. **Ark.** *Jacks v. Moore*, 33 Ark. 31. **Cal.**—*Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Rogers v. Cady*, 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; *In re Grove Street*, 61 Cal. 438. **Colo.**—*Arapahoe v. Denver Union Water Co.*, 32 Colo. 382, 76 Pac. 1060; *Whipple v. Stevenson*, 25 Colo. 447, 55 Pac. 188; *Schilling v. Rominger*, 4 Colo. 100; *Empire Ranch & C. Co. v. Millet*, 24 Colo. App. 464, 135 Pac. 127; *Strousse v. Bank of Clear Creek*, 9 Colo. App. 478, 49 Pac. 260. **Conn.**—*Coyne v. Plume*, 90 Conn. 293, 97 Atl. 337; *Clark v. Mfrg. Nat. Bank*, 74 Conn. 263, 50 Atl. 727; *Banks v. Porter*, 39 Conn. 307; *Wildman v. Rider*, 23 Conn. 172; *Davison v. Champlin*, 7 Conn. 244; *Strong v. Avery*, 1

Root 259. **Del.**—*Knight v. Ferris*, 6 Houst. 283; *Beeson v. Elliott*, 1 Del. Ch. 368. **D. C.**—*Palmer v. Fleming*, 1 App. Cas. 528. **Ga.**—*Raney v. McRae*, 14 Ga. 589, 60 Am. Dec. 660. **Haw.** *Coerper v. Gouveia*, 21 Hawaii 270. **Ill.** *People v. May*, 276 Ill. 332, 114 N. E. 685; *Demilly v. Grosrenaud*, 201 Ill. 272, 66 N. E. 234; *Parsons v. Millar*, 189 Ill. 107, 59 N. E. 606; *Hammond v. Leavitt*, 181 Ill. 416, 54 N. E. 982; *Douglass v. Dee*, 194 Ill. App. 612; *State Bank v. Thweatt*, 111 Ill. App. 599; *Mathias v. Mathias*, 104 Ill. App. 344, *affirming* 202 Ill. 125, 66 N. E. 1042; *Vogel v. People*, 37 Ill. App. 388. **Ind.**—*Great Western Life Assur. Co. v. State*, 181 Ind. 28, 102 N. E. 849; 103 N. E. 843; *Steinmetz v. G. H. Hammond Co.*, 167 Ind. 153, 78 N. E. 628; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Louisville, etc. R. Co. v. Davis*, 83 Ind. 89; *Doctor v. Hartman*, 74 Ind. 221; *Harris v. Harris*, 61 Ind. 117; *Lane v. Taylor*, 40 Ind. 495; *Loeb v. Mathis*, 37 Ind. 306; *Riley v. Butler*, 36 Ind. 51; *New Albany & S. R. Co. v. Huff*, 19 Ind. 444; *Brownfield v. Weicht*, 9 Ind. 394; *Prather v. Brandon*, 44 Ind. App. 45, 88 N. E. 700; *Chicago & S. E. R. Co. v. Wheeler*, 14 Ind. App. 62, 42 N. E. 489. **Ia.**—*Oreutt v. Hanson*, 71 Iowa 514, 32 N. W. 482; *Smiths v. Dubuque County*, 1 Iowa 492. **Ky.** *Louisville & N. R. Co. v. Grimes*, 150 Ky. 219, 225, 150 S. W. 346; *Davidson v. Johnson*, 113 Ky. 202, 67 S. W. 996; *Brown v. McKee's Representatives*, 1 J. J. Marsh. 471. **La.**—*Bernstein v. Dalton Clark Stave Co.*, 122 La. 412, 47 So. 753. **Me.**—*Haskell v. Woolwich*, 58 Me. 535. **Md.**—*United States Express Co. v. Hurlock*, 120 Md. 107, 87 Atl. 834, Ann. Cas. 1915A, 566; *Hadaway v. Hynson*, 89 Md. 305, 43 Atl. 806; *Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366, 33 Am. Rep. 258. **Mass.** *Cheshire v. Adams & C. Reservoir Co.*,

- 119 Mass. 356; *Custy v. Lowell*, 117 Mass. 78; *Riley v. Lowell*, 117 Mass. 76; *Elder v. Dwight Mfg. Co.*, 4 Gray 201; *Richardson v. Welcome*, 6 Cush. 331; *Jordan v. Dennis*, 7 Mete. 590; *Osgood v. Thurston*, 23 Pick. 110; *Carlisle v. Weston*, 21 Pick. 535; *Robinson v. Mead*, 7 Mass. 353; *Martin v. Com.*, 1 Mass. 347. **Mich.**—*Kirkwood v. Hoxie*, 95 Mich. 62, 54 N. W. 720, 35 Am. St. Rep. 549; *Thompson v. Michigan Mut. Ben. Asso.*, 52 Mich. 522, 18 N. W. 247; *Moore v. Ellis*, 18 Mich. 77; *Farrand v. Bentley*, 6 Mich. 281. **Minn.**—*Druhe Hardwood Lumb. Co. v. Fischbein*, 101 Minn. 81, 111 N. W. 950; *Hagemeyer v. Wright*, 71 Minn. 42, 73 N. W. 628. **Miss.**—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. **Mo.**—*McMenamy Inv. & Real Estate Co. v. Stillwell C. Co.*, 267 Mo. 340, 184 S. W. 467 (reversing 175 Mo. App. 668, 158 S. W. 427); *Ripkey v. Binns*, 264 Mo. 505, 175 S. W. 206; *Bowles v. Troll*, 262 Mo. 377, 171 S. W. 326; *State ex rel. Greffet v. Williams*, 227 Mo. 32, 127 S. W. 52; *Haseltine v. Messmore*, 184 Mo. 298, 82 S. W. 115; *Dillard v. St. Louis, etc. R. Co.*, 58 Mo. 69; *Nebel v. Bockhorst*, 186 Mo. App. 499, 172 S. W. 452; *Kingman-St. Louis Impl. Co. v. Bantley Bros. Hardware Co.*, 137 Mo. App. 308, 118 S. W. 500; *Stansbury v. Stansbury*, 118 Mo. App. 427, 94 S. W. 566. **Neb.**—*Crawford Co. v. Hathaway*, 61 Neb. 317, 85 N. W. 303. **Nev.**—*Gamble v. Silver Peak Mines*, 35 Nev. 319, 133 Pac. 936; *Phillips v. Welch*, 11 Nev. 187. **N. H.**—*Boston & M. R. R. Co. v. State*, 77 N. H. 437, 93 Atl. 306; *State v. Richmond*, 26 N. H. 232. **N. J.**—*Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, affirmed, 72 N. J. Eq. 434, 65 Atl. 1117; *Collins v. Keller*, 58 N. J. L. 429, 34 Atl. 753; *Warren County v. Stocker*, 42 N. J. L. 115; *Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, affirmed, 72 N. J. Eq. 434, 940, 65 Atl. 1117. **N. Y.**—*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636, affirming 24 Jones & S. 108, 1 N. Y. Supp. 418, 15 N. Y. Civ. Proc. 88; *Delafield v. Wright*, 3 Sandf. 746, 1 Code Rep. (N. S.) 123; *Fairclough v. Southern Pac. Co.*, 171 App. Div. 496, 157 N. Y. Supp. 862; *Halperin v. Langrock Bros. Co.*, 169 App. Div. 464, 155 N. Y. Supp. 167; *Payne v. New York, S. & W. R. Co.*, 157 App. Div. 302, 142 N. Y. Supp. 241; *Eldert v. Cross Country R. Co.*, 88 Misc. 684, 151 N. Y. Supp. 441; *Miners' & Merchants' Bank v. Brady*, 134 N. Y. Supp. 590; *Oppenheimer v. Trebla Realty Co.*, 134 N. Y. Supp. 1695. **N. C.**—*Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923; *Hannah v. Richmond, etc., R. Co.*, 87 N. C. 351; *Branch v. Houston*, 44 N. C. 85. **Ohio.**—*General Buell v. Long*, 18 Ohio St. 521; *Rohn v. Dunbar*, 13 Ohio St. 572. **Okla.**—*Hobbs v. German-American Doctors*, 14 Okla. 236, 78 Pac. 356; *Vowell v. Taylor*, 8 Okla. 625, 58 Pac. 944; *Myers v. Berry*, 3 Okla. 612, 41 Pac. 580; *Twine v. Carey*, 2 Okla. 249, 37 Pac. 1096. **Ore.**—*Montesano Lumb. Co. v. Portland Iron Works*, 78 Ore. 53, 152 Pac. 244; *Holton v. Holton*, 64 Ore. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779. **Pa.**—*Rosenberg v. Cupersmith*, 240 Pa. 162, 87 Atl. 570, Ann. Cas. 1915A, 312, 47 L. R. A. (N. S.) 706; *Rankins' Appeal*, 95 Pa. 358; *Collins v. Collins*, 37 Pa. 387; *In re Little Meadows*, 28 Pa. 256; *In re Clarion Tp.*, 35 Pa. Co. Ct. 17; *Patrowitz v. Lucknow Iron & S. Co.*, 32 Pa. Co. Ct. 78. **P. I.**—*Government v. American Surety Co.*, 11 Phil. Isl. 203; *Antipolo v. Cainta*, 2 Phil. Isl. 204. **P. R.**—*Binet v. Garcia*, 18 Porto Rico 331; *Property Owners' League v. San Juan*, 14 Porto Rico 85. **R. I.**—*Fitts v. Shaw*, 22 R. I. 17, 46 Atl. 42. **S. C.**—*Hunter v. Alderman & Sons Co.*, 79 S. C. 555, 61 S. E. 202; *Gibbes v. Morrison*, 39 S. C. 369, 17 S. E. 803; *Eno v. Calder*, 14 Rich. Eq. 154. **S. D.**—*Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750. **Tenn.**—*St. Francis Levee Dist. v. Bodkin*, 108 Tenn. 700, 69 S. W. 270; *Ridley v. Halliday*, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477; *Baker v. Mitchell*, 105 Tenn. 610, 59 S. W. 137; *Merchant v. Preston*, 1 Lea 280; *Lowe v. Morris*, 4 Sneed 68. **Tex.**—*Burks v. Bennett*, 55 Tex. 237; *Swigley v. Dickson*, 2 Tex. 192; *Kirk v. Ivey*, 2 Wills. Civ. Cas. §37; *Griffin v. Brown*, 1 White & W. Civ. Cas. §1097. **Utah.**—*Davidson v. Munsey*, 27 Utah 87, 74 Pac. 431. **Vt.**—*Lamson v. Worcester*, 58 Vt. 381, 4 Atl. 145; *Ferris v. Ferris*, 25 Vt. 100; *Stoughton v. Mott*, 13 Vt. 175. **Wash.**—*West v. Martin*, 47 Wash. 417, 92 Pac. 334; *McMaster v. Advance Thresher Co.*, 10 Wash. 147, 38 Pac. 760; *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76. **W. Va.**—*Freer v. Davis*, 52 W. Va. 1, 43 S. E. 164, 94 Am. St. Rep. 895, 59 L. R. A. 556; *Yates v. Taylor*

tioned either in the trial court,⁸⁴ before or after judgment,⁸⁵ or for the first time in an appellate court,⁸⁶ and is fatal at any stage of the proceeding,⁸⁷ even when collaterally involved,⁸⁸ unless there is an estoppel to raise the question.⁸⁹ It is not waived by demurrer to the complaint.⁹⁰

If the court has jurisdiction over the subject matter, an objection to the exercise of jurisdiction in the particular case before it is generally an objection to the jurisdiction over the person and must be taken at the earliest possible moment.⁹¹ The objection must be interposed be-

County Court, 47 W. Va. 376, 35 S. E. 24; *Valley Bank v. Gettinger*, 3 W. Va. 309. **Wis.**—*Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Collette v. Weed*, 68 Wis. 428, 32 N. W. 753; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Damp v. Dane*, 29 Wis. 419; *Peck v. School Dist.*, 21 Wis. 516; *Congar v. Galena & Chicago U. R. Co.*, 17 Wis. 477; *Woodward v. Garner*, 2 Pin. 28; *Dewey v. Hyde*, 1 Pin. 469.

See *supra*, IV, C, 1; XIII, A.

84. **Cal.**—*In re Grove Street*, 61 Cal. 438. **Ind.**—*Godfrey v. Godfrey*, 17 Ind. 6, 79 Am. Dec. 448. **Ky.**—*Davidson v. Johnson*, 113 Ky. 202, 210, 67 S. W. 996. **Mo.**—*Bowles v. Troll*, 262 Mo. 277, 171 S. W. 326. **N. Y.**—*Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636. **Wis.**—*O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Detroit Safe Co. v. Kelly*, 78 Wis. 134, 47 N. W. 187.

[a] After examination of several witnesses by commission and the case is ready for trial. *Fairclough v. Southern Pac. Co.*, 171 App. Div. 496, 157 N. Y. Supp. 862.

85. *Wayne v. Caldwell*, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750.

[a] May be raised by exception to the judgment though not previously raised. *Combs v. Combs (Ga.)*, 90 S. E. 862.

86. **Cal.**—*In re Grove Street*, 61 Cal. 438. **D. C.**—*Columbia Nat. D. Co. v. Morton*, 28 App. Cas. 288, 7 L. R. A. (N. S.) 114, 8 Ann. Cas. 511. **Miss.**—*Green v. Creighton*, 10 Smed. & M. 159, 48 Am. Dec. 742. **Mo.**—*McMenamy Inv. & R. E. Co. v. Stillwell C. Co.*, 267 Mo. 340, 184 S. W. 467, reversing 175 Mo. App. 668, 158 S. W. 427; *Bowles v. Troll*, 262 Mo. 377, 171 S. W. 326. **N. Y.**—*Matter of Will of Walker*, 136 N. Y. 20, 32 N. E. 633. **N. C.**—*Froelich v. Southern Exp. Co.*, 67 N. C. 1. **Ohio.**—*Baltimore & O. R. Co. v. Hollenberger*, 76 Ohio St. 177, 81 N. E. 184. **Tex.**—*Western Union T. Co. v.*

Campbell, 36 Tex. Civ. App. 276, 81 S. W. 580; *Lawson v. Lynch*, 9 Tex. Civ. App. 582, 29 S. W. 1128. **Wis.**—*O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Detroit, etc. Co. v. Kelly*, 78 Wis. 134, 47 N. W. 187; *Mathie v. McIntosh*, 40 Wis. 120; *Peck v. School Dist.*, 21 Wis. 516; *Woodward v. Garner*, 2 Pin. 28.

See generally 8 STANDARD PROC. 526.

87. *Robinson v. Peru P. & W. Co.*, 1 Okla. 140, 31 Pac. 988; *Ridley v. Halliday*, 106 Tenn. 607, 61 S. W. 1025, 82 Am. St. Rep. 902, 53 L. R. A. 477; *Baker v. Mitchell*, 105 Tenn. 610, 59 S. W. 137.

88. *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Detroit Safe Co. v. Kelly*, 78 Wis. 134, 47 N. W. 187; *Peck v. School Dist.*, 21 Wis. 516.

As to collateral attack for lack of jurisdiction, see the title "Judgments."

89. *Gamble v. Silver Peak Mines*, 35 Nev. 319, 133 Pac. 936.

[a] A party, after testifying under oath upon the trial, to a state of facts which, if true would show proper jurisdiction, should not be permitted, after the trial had ended, to file a motion raising a jurisdictional question bot-tomed upon alleged facts contradicted by his own testimony given under solemn oath upon the trial. *Ripkey v. Binns*, 264 Mo. 505, 516, 175 S. W. 206.

90. *Eldert v. Cross County R. Co.*, 88 Misc. 684, 151 N. Y. Supp. 441.

91. **U. S.**—*The Bee*, 1 Ware (332) 336, 3 Fed. Cas. No. 1,219. **Ala.**—*Gager v. Doe ex dem. Gordon*, 29 Ala. 341; *Lampley v. Beavers*, 25 Ala. 534; *Stanley v. Mobile Bank*, 23 Ala. 652; *Walker v. Chapman*, 22 Ala. 116. **Ark.**—*Frank v. Hedrick*, 18 Ark. 304, 308; *Ex parte Woods*, 3 Ark. 532; *Heilman v. Martin*, 2 Ark. 158, 163. **Cal.**—*Luco v. Superior Court*, 71 Cal. 555, 12 Pac. 677. **Colo.**—*Smith v. District Court*, 4 Colo. 235. **Conn.**—*Haussman v. Burnham*, 59 Conn. 117, 136, 21 Am. St.

fore pleading to the merits or it will be waived.⁹² It is too late after issue joined,⁹³ and the objecting party has gone to trial on the merits,⁹⁴ and cannot be raised for the first time on appeal.⁹⁵

Rep. 74; Hotchkiss' Appeal, 32 Conn. 353; Payne v. Farmers,' etc. Bank, 29 Conn. 415. **Del.**—Townsend v. Steward, 4 Harr. 94. **Fla.**—Jackson v. Relf, 26 Fla. 465, 8 So. 184. **Ga.**—Perseverance Min. Co. v. Bisaner, 87 Ga. 193, 13 S. E. 461. **Ill.**—Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Baldwin v. Murphy, 82 Ill. 485; Callender v. Gates, 45 Ill. App. 374; Yaeger v. Henry, 39 Ill. App. 21. **Ind.**—Mayes v. Goldsmith, 58 Ind. 94; Aurora Fire Ins. Co. v. Johnson, 46 Ind. 315; Nesbit v. Long, 37 Ind. 300; Test v. Small, 21 Ind. 127. **Ia.**—Schrader v. Hoover, 87 Iowa 654, 54 N. W. 463; German Bank v. American Fire Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; Marquardt v. Thompson, 78 Iowa 158, 42 N. W. 634. **Ky.**—Howe v. Stevenson, 84 Ky. 576, 2 S. W. 231. **La.**—Mix v. His Creditors, 39 La. Ann. 624, 2 So. 391; Marqueeze & Co. v. Le Blanc, 29 La. Ann. 194. **Me.**—Buckfield Branch R. Co. v. Benson, 43 Me. 274. **Mass.**—Carlisle v. Weston, 21 Pick. 535. **Mich.**—Thompson v. Michigan Mut. Ben. Assn., 52 Mich. 522, 18 N. W. 247; Maxwell v. Deens, 46 Mich. 35, 8 N. W. 561; Pardee v. Smith, 27 Mich. 33; Greeley v. Stilson, 27 Mich. 153. **Minn.**—*In re Ellis'* Estate, 55 Minn. 401, 56 N. W. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287; State v. Fitzgerald, 51 Minn. 534, 53 N. W. 799; Anderson v. Southern Minn. R. Co., 21 Minn. 30. **Neb.**—Gandy v. Jolly, 35 Neb. 711, 53 N. W. 658, 37 Am. St. Rep. 460; Johnson v. Jones, 2 Neb. 126, 135. **N. H.**—Gilmanton v. Ham, 38 N. H. 108; Warren v. Glynn, 37 N. H. 340. **N. J.**—North Hudson County Ry. Co. v. Flanagan, 57 N. J. L. 236, 30 Atl. 476; Funck v. Smith, 46 N. J. L. 484. **N. Y.**—McCormick v. Pennsylvania Cent. R. Co., 49 N. Y. 303; Clapp v. Graves, 26 N. Y. 418; Pease v. Daly, L. & W. R. Co., 10 Daly 459; Bunker v. Langs, 76 Hun 543, 28 N. Y. Supp. 210, 58 N. Y. St. 243; People ex rel. Jennys v. Brennan, 3 Hun 666. **Ohio.**—Long v. Newhouse, 57 Ohio St. 348, 49 N. E. 79; General Buell v. Long, 18 Ohio St. 521; Thompson v. Steamboat Julius D. Morton, 2 Ohio St. 26, 59 Am. Dec. 658. **Ore.**—White

v. Northwest Stage Co., 5 Ore. 99. **Pa.** Larkin v. Scranton, 162 Pa. 289, 29 Atl. 910; Schenley v. Com., 36 Pa. 29, 78 Am. Dec. 359; Dewart v. Purdy, 29 Pa. 113. **S. D.**—Wayne v. Caldwell, 1 S. D. 483, 47 N. W. 547, 36 Am. St. Rep. 750. **Tenn.**—Holcomb v. Canady, 2 Heisk. 610; Chester v. Embree, Peek 370. **Tex.**—Douglas v. Baker, 79 Tex. 499, 505, 15 S. W. 801; Brooks v. Chatbam, 57 Tex. 31. **Vt.**—Lyman v. Central Vermont R. Co., 59 Vt. 167, 10 Atl. 346; Blood v. Crandall, 28 Vt. 396. **Va.**—Western Union T. Co. v. Pettyjohn, 88 Va. 296, 13 S. E. 431. **Wis.** Fairfield v. Madison Mfg. Co., 38 Wis. 346; Atkins v. Fraker, 32 Wis. 510; Congar v. Galena & Chicago U. R. Co., 17 Wis. 477.

See *supra*, XIII, A and B.

[a] The withdrawal of a motion to dismiss a cause because not instituted at the residence of the defendant is a waiver of the objection. *Luco v. Superior Court*, 71 Cal. 555, 12 Pac. 677.

92. **U. S.**—McEldowney v. Card, 193 Fed. 475. **Mich.**—Johnson v. Burke, 167 Mich. 349, 355, 132 N. W. 1017. **Ohio.** Thompson v. Steamboat Julius D. Morton, 2 Ohio St. 26.

See *supra*, XIII, A and B, and the title "Appearances."

[a] The right of objection to the local jurisdiction in the particular district in which the suit is brought for want of proper residence of the parties, is merely a personal privilege of the defendant, which he may waive, and which he will be held to waive by appearing and pleading to the merits. *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.*, 210 U. S. 368, 369, 23 Sup. Ct. 720, 52 L. ed. 1101.

93. **U. S.**—Harkness v. Hyde, 98 U. S. 476, 25 L. ed. 237. **Ky.**—Chesapeake, O. & S. W. R. Co. v. Heath's Admr., 87 Ky. 651, 9 S. W. 832; Baker v. Louisville, etc. R. Co., 4 Bush 619. **Mich.** Johnson v. Burke, 167 Mich. 349, 132 N. W. 1017. **Va.**—Monroe v. Redman, 2 Munf. (16 Va.) 240.

94. *Hunter v. Humphreys*, 14 Gratt. (55 Va.) 287; *Congar v. Galena & Chicago U. R. Co.*, 17 Wis. 477.

95. *Schilling v. Rominger*, 4 Colo. 100.

E. WAIVER OF OBJECTIONS.—As has already been shown⁹⁶ the right to object to lack of jurisdiction of the subject matter cannot be waived;⁹⁷ but lack of jurisdiction over the person is waived by failing to make a seasonable⁹⁸ objection in the manner⁹⁹ prescribed by law. If an objection, properly and seasonably made, has been overruled and the point saved by proper exception, it is not waived by proceeding with the case on the merits,¹ though a contrary rule prevails in some states.² But if the defendant by cross-complaint or otherwise seeks affirmative relief after his objection has been overruled, he thereby submits to the jurisdiction and waives his objection.³

XIV. PLEADINGS.—A. NECESSITY OF PLEADING JURISDICTION.

96. See *supra*, IV, C, 1; XIII, A; XIII, D.

97. See *supra*, XIII, A and D.

As to effect of appearance, see 2 STANDARD PROC. 522.

98. See *supra*, XIII, D.

99. See *supra*, XIII, B.

1. **U. S.**—First Nat. Bank *v.* Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. ed. 1051; *Goldrey v. Morning News*, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517; *Mexican Cent. R. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942; *Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. **Cal.** *Arroyo Ditch & Water Co. v. Superior Court*, 92 Cal. 47, 28 Pac. 50, 27 Am. St. Rep. 91. But see *Sears v. Starbird*, 78 Cal. 225, 20 Pac. 547. **Conn.**—*Coyne v. Plume*, 90 Conn. 293, 97 Atl. 337. **Ga.**—*Cox v. Potts*, 67 Ga. 521. **Ind.** *Hadley v. Gutridge*, 58 Ind. 302. **Kan.** *St. Louis, K. & S. W. Ry. Co. v. Morse*, 50 Kan. 99, 31 Pac. 676. **Ky.**—*Davidson v. Johnson*, 113 Ky. 202, 210, 67 S. W. 996; *Chesapeake, O. & S. W. R. Co. v. Heath's Admr.*, 87 Ky. 651, 659, 9 S. W. 832. **Mass.**—*Walling v. Beers*, 120 Mass. 548. **Mo.**—*City of East Prairie v. Greer* (Mo. App.), 186 S. W. 952. **Mont.**—*Black v. Clendenin*, 3 Mont. 44. **Neb.**—*Templin v. Kimsey*, 74 Neb. 614, 105 N. W. 89. **N. Y.** *Rutherford v. Holmes*, 66 N. Y. 368; *Landers v. Staten Isl. R. Co.*, 53 N. Y. 450, 14 Abb. Pr. (N. S.) 346; *Burekle v. Eckhardt*, 3 N. Y. 132; *Baird v. Helfer*, 12 App. Div. 23, 42 N. Y. Supp. 484; *Holcomb v. Kelly*, 114 N. Y. Supp. 1048. **N. C.**—*Graham v. O'Bryan*, 120 N. C. 463, 27 S. E. 122. **N. D.**—*Miner v. Francis*, 3 N. D. 549, 58 N. W. 343. **Ohio.**—*Baltimore & O. R. Co. v. Collins*,

11 Ohio Cir. Dec. 334. **Okla.**—*Commonwealth Cotton Oil Co. v. Hudson*, 161 Pac. 535. **Pa.**—*Coleman's Appeal*, 75 Pa. 441. **S. D.**—*Benedict v. Johnson*, 4 S. D. 387, 57 N. W. 66. **Wash.**—*Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243. **W. Va.**—*Fisher, Sons & Co. v. Crowley*, 57 W. Va. 312, 50 S. E. 422.

[a] The reason given by the courts for holding that making a defense does not waive the jurisdictional point is that, in theory at least, the defendant has been brought into court wrongfully, and is there under protest, and answers and defends himself, in a sense, under compulsion, and that, such being the case, he may do so, still preserving his rights on the point of jurisdiction. *Commonwealth Cotton Oil Co. v. Hudson* (Okla.), 161 Pac. 535.

2. **Ark.**—*Burris v. Wise*, 2 Ark. 33. **Colo.**—*Ruby Chief Min. & Mill. Co. v. Gurley*, 17 Colo. 199, 29 Pac. 668. **Fla.**—*Stephens v. Bradley*, 24 Fla. 201, 5 So. 415. **La.**—*Knight v. Callender*, 10 La. 226. **Mich.**—*Frohlich v. Independent Glass Co.*, 144 Mich. 278, 107 N. W. 889. **Ore.**—*Sealy v. California Lumb. Co.*, 19 Ore. 94, 24 Pac. 197. **Tenn.**—*Simpson v. East Tennessee, V. & G. R. Co.*, 89 Tenn. 304, 15 S. W. 735. **Wis.**—*Lowe v. Stringham*, 14 Wis. 222.

3. **Ind.**—*Chandler v. Citizens' Nat. Bank*, 149 Ind. 601, 49 N. E. 579. **Kan.** *Thompson v. Greer*, 62 Kan. 522, 64 Pac. 48. **Okla.**—*Commonwealth Cotton Oil Co. v. Hudson*, 161 Pac. 535. **Tex.** *Slator v. Trostel* (Tex. Civ. App.), 21 S. W. 285.

[a] Filing demurrer or motion to make more definite and certain does not seek affirmative relief. *Commonwealth Cotton Oil Co. v. Hudson* (Okla.), 161 Pac. 535,

The necessity of pleading jurisdictional facts in a declaration or complaint is elsewhere treated.⁴

B. AMENDMENTS AS TO JURISDICTION.—1. In General.—Under the modern statutes permitting great liberality in amendments, it is ordinarily permissible where the facts existed at the commencement of the action to set up by amendment the necessary jurisdictional facts,⁵ unless the amendment sets up an entirely new and separate cause of action.⁶ Thus plaintiff may amend his complaint by showing defendant to be a resident of the forum,⁷ or showing the plaintiff's residence,⁸ or by changing the venue in a transitory action,⁹ or by setting up fraud committed within the jurisdiction of the court as a ground for jurisdiction,¹⁰ or alleging that the nonresident defendants have property

4. See the titles "Bills and Answers;" "Declaration and Complaint;" "Justices of the Peace;" "United States Courts;" and the particular titles throughout the work.

5. **U. S.**—Halsted *v. Buster*, 119 U. S. 341, 7 Sup. Ct. 276, 30 L. ed. 462. **Ark.**—Frizzell *v. Duffer*, 58 Ark. 612, 25 S. W. 1111. **Colo.**—Southwestern Land Co. *v. Hickory Jackson Ditch Co.*, 18 Colo. 489, 33 Pac. 275. **Ga.**—Lathrop *v. Adkisson*, 87 Ga. 339, 13 S. E. 517. **Kan.**—Hastie *v. Burrage*, 69 Kan. 560, 77 Pac. 268. **Minn.**—Berryhill *v. Healey*, 89 Minn. 444, 95 N. W. 314. **Mo.**—Mitchell *v. Missouri Pac. Ry. Co.*, 82 Mo. 106; Mier *v. St. Louis I. M. & S. Ry. Co.*, 56 Mo. App. 655. **S. C.**—Chafee *v. Postal Tel. C. Co.*, 35 S. C. 372, 14 S. E. 764; Sibley *v. Young*, 26 S. C. 415, 422, 2 S. E. 314. **Tex.**—Evans *v. Mills*, 16 Tex. 196.

[a] **Amount in Controversy Too Small—Amending.**—A complaint seeking a sum less than the amount required to give the court jurisdiction in an action for the unlawful detention of property may be amended so as to set up an unlawful taking without the consent of plaintiff so as to give such court jurisdiction. Frizzell *v. Duffer*, 58 Ark. 612, 25 S. W. 1111.

6. Mitchell *v. Missouri Pac. Ry. Co.*, 82 Mo. 106; Gillam *v. Life Ins. Co.*, 121 N. C. 369, 28 S. E. 470.

As to new cause of action by amendment see the title "New Cause of Action or Defense."

Amendments as to amount in controversy, see *supra*, XII, E, 8.

[a] **Action for Forcible Taking Amended To Set up Fraud.**—A suit to recover a slave forcibly taken away may be amended to set up a fraudulent

combination to defraud plaintiff thereof. Evans *v. Mills*, 16 Tex. 196.

[b] An amendment which would set up a new cause of action and have the effect of depriving the defendant of the benefit of the defense of the statute of limitations which could be used against a new action, should not be allowed. Gilliam *v. Life Ins. Co.*, 121 N. C. 369, 28 S. E. 470.

[c] **New Cause of Action—Texas.** Where the petition claimed a sum within the jurisdiction of the court, but a demurrer was sustained as to part of said demand, an amended complaint setting up a new cause of action is permissible. Wood *v. Cate*, 75 Tex. 215, 12 S. W. 535.

[d] **Amendment of Removable Cause.**—An amendment in the state court increasing the amount sued for over five hundred dollars after the defendant had pleaded and lost his right to remove the cause is permissible unless this was a device or artifice to prevent such removal. Austin *v. Northern Pac. R. Co.*, 34 Minn. 473, 476, 26 N. W. 607.

7. **Ga.**—Hall *v. Mobley*, 13 Ga. 318. **La.**—Lowery *v. Kline*, 6 La. 380. **N. Y.** House *v. Cooper*, 16 How. Pr. 292; Hogan *v. Glueck*, 2 App. Div. 82, 37 N. Y. Supp. 522; Jenkins *v. Hall*, 85 Hun 619, 32 N. Y. Supp. 883, 66 N. Y. St. 201. **S. C.**—Chafee *v. Postal Tel. C. Co.*, 35 S. C. 372, 14 S. E. 764. **Tex.**—Kendall *v. Hackworth*, 66 Tex. 499, 18 S. W. 104; Evans *v. Mills*, 16 Tex. 196.

8. Lowery *v. Kline*, 6 La. 380; Chafee *v. Postal Tel. C. Co.*, 35 S. C. 372, 14 S. E. 764.

9. Gay *v. Homer*, 13 Pick. (Mass.) 535.

10. Evans *v. Mills*, 16 Tex. 196.

[a] Such amendment is permissible

within the state,¹¹ or by omitting one of two separate causes of action over which the court had no jurisdiction,¹² or may amend the caption of the complaint so as to insert the name of the county and court in which filed.¹³ Such amendment should be allowed at any time during the progress of the cause and before the final judgment if no injustice is done thereby.¹⁴

2. In United States Courts.—The federal statutes authorize the court to allow either party to amend at any time any defect in the process or pleadings,¹⁵ and the courts are very liberal in allowing amendments to the declaration or other pleading, setting up jurisdictional facts.¹⁶ Thus the courts permit an amendment setting up facts showing defendant to be a citizen of the United States,¹⁷ or show the plaintiff to be an alien instead of a citizen as alleged,¹⁸ though the allowance thereof lies within the sound discretion of the court and is not reviewable unless abused,¹⁹ and will not be allowed unless the amendment will be likely to avail the plaintiff.²⁰ Likewise an amendment is permissible setting up a question arising under the constitution and laws of the United States,²¹ or to show diversity of citizenship between

even after plea in abatement filed and exception to the jurisdiction of the court. *Little v. Woodbridge*, 1 White & W. Civ. Cas. (Tex.), §152.

11. *Piedmont & Arlington L. Ins. Co. v. Fitzgerald*, 1 White & W. Civ. Cas. (Tex.), §1345.

12. *Karthauss v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268.

13. *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268.

[a] The omission of the word "petition" from the caption, the insertion of which the statute makes equally mandatory, is not fatal and may be cured by amendment. *Butcher v. Bank of Brownsville*, 2 Kan. 70, 83 Am. Dec. 446.

[b] **Name of County.**—The declaration in attachment may be amended by striking out "Georgia, Decatur County," and inserting "Georgia, Early County," the true venue of the cause being Early county, and the trial pending therein. *Perry v. Mulligan*, 58 Ga. 479.

14. *Karthauss v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268.

15. See the United States statute and *Woolridge v. McKenna*, 8 Fed. 650, 679.

16. *Jackson v. Ashton*, 10 Pet. (U. S.) 480, 9 L. ed. 502; *Conolly v. Taylor*, 2 Pet. (U. S.) 556, 564, 7 L. ed. 518; *Woolridge v. McKenna*, 8 Fed. 650, 679; *Michaelson v. Denison*, 3 Day 294, 17 Fed. Cas. No. 9,523.

[a] **Amendment to petitions for removal of a cause to the federal court.** *Woolridge v. McKenna*, 8 Fed. 650, 679. See generally the title "Removal of Causes."

17. *Mexican Cent. Ry. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. ed. 715; *Halsted v. Buster*, 119 U. S. 341, 7 Sup. Ct. 276, 30 L. ed. 462; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. ed. 380; *Robertson v. Cease*, 97 U. S. 646, 24 L. ed. 1057; *Imperial Ref. Co. v. Wyman*, 38 Fed. 574, 3 L. R. A. 503.

18. *Connolly v. Taylor*, 2 Pet. (U. S.) 556, 565, 7 L. ed. 518; *Betzoldt v. American Ins. Co.*, 47 Fed. 705; *Hilliard v. Brevoort*, 4 McLean 24, 12 Fed. Cas. No. 6,505.

19. *Mexican Cent. Ry. Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. ed. 699.

20. *Rae v. Grand Trunk Ry. Co.*, 14 Fed. 401.

[a] Where the bill is brought in a jurisdiction other than the district of which the vendor company was a resident, it cannot be amended so as to bring the company in as a defendant, and is fatally defective. *Swan Land & Cattle Co. v. Frank*, 39 Fed. 456.

21. *Rae v. Grand Trunk Ry. Co.*, 14 Fed. 401; *Woolridge v. McKenna*, 8 Fed. 650, 679, petition for removal to federal court.

the parties,²² or set up defendant to be an alien.²³ Such amendments are permissible even after the commencement of trial,²⁴ or even after submission of the cause,²⁵ or after verdict.²⁶ But it must be made in the trial court, it cannot be made upon appeal.²⁷

C. PLEAS TO JURISDICTION.²⁸ — 1. **Nature of Plea.** — A plea to the jurisdiction differs at common law from a plea in abatement.²⁹ A plea to the jurisdiction is a dilatory plea³⁰ and must be specially pleaded.³¹

2. **When Filed.**³² — While a plea to the jurisdiction of the court over the subject matter may be filed at any time,³³ an objection to the jurisdiction of the court over the person or for other grounds in abatement of the action must be filed at the earliest possible moment,³⁴ which under some statutes is at the first term,³⁵ unless the plaintiff so amends his petition at a subsequent stage of the cause so as to render

22. *Maddox v. Thorn*, 60 Fed. 217, 8 C. C. A. 574; *Kelsey v. Pennsylvania R. Co.*, 14 Blatchf. 89, 14 Fed. Cas. No. 7,679.

[a] An amendment setting up diversity of citizenship must show such diversity existed at the time of the commencement of the suit and not at the time of the amendment. *Laskey v. Newtown Min. Co.*, 56 Fed. 628.

[b] Such an amendment setting up federal jurisdiction cures any invalidity in attachment made prior to the amendment. *Bowden v. Burnham*, 59 Fed. 752, 8 C. C. A. 248, 19 U. S. App. 448.

23. *Michaelson v. Denison*, 17 Fed. Cas. No. 9,523, wherein an allegation that defendant was a subject of a foreign power was amended to set up alienage.

24. *Imperial Ref. Co. v. Wyman*, 38 Fed. 574, 3 L. R. A. 503.

25. *Maddox v. Thorn*, 60 Fed. 217, 8 C. C. A. 574.

26. *Mexican Cent. R. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. ed. 715.

27. *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 240, 7 Sup. Ct. 193, 30 L. ed. 380.

28. **Propriety of plea as method of objecting to lack of jurisdiction**, see *supra*, XIII, B.

29. 1 Chitty Pl. 457; *Dutcher v. Dutcher*, 39 Wis. 651.

[a] A plea to the jurisdiction of the court is a meritorious plea and is not, strictly speaking, a plea in abatement, although it is in the nature of such a plea. *Safford v. Sangamo Ins. Co.*, 88 Ill. 296; *Kamp v. Bartlett*, 164 Ill. App. 338, 344.

30. **Ala.**—*Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 So. 663; *Fields v. Walker*, 23 Ala. 155, 163. **Ga.**—*Bass v. Stevens*, 17 Ga. 573. **Ill.**—*Scott v. Waller*, 65 Ill. 181. **Mich.**—*National Fraternity v. Wayne Circ. Judge*, 127 Mich. 186, 86 N. W. 540; *Heyman v. Covell*, 36 Mich. 157. **Mo.**—*Kincaid v. Storz*, 52 Mo. App. 564. **Neb.**—*Guthman v. Guthman*, 18 Neb. 98, 24 N. W. 435. **Pa.**—*Smith v. People's Mut. Live Stock Ins. Co.*, 173 Pa. 15, 33 Atl. 567. **Vt.**—*Leonard v. McArthur*, 52 Vt. 439.

31. *Colquitt v. Mercer*, 44 Ga. 432; *Dutcher v. Dutcher*, 39 Wis. 651, divorce.

[a] A defense in divorce on the ground of plaintiff's nonresidence is in the nature of a plea to the jurisdiction and has to be pleaded specially. *Dutcher v. Dutcher*, 39 Wis. 651.

32. **As to time of raising objection to lack of jurisdiction**, see *supra*, XIII, D.

33. **U. S.**—*Morris v. Gilmer*, 129 U. S. 315, 9 Sup. Ct. 289, 32 L. ed. 690. **Ala.**—*Karthaus v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268; *Howard v. Ingersoll*, 23 Ala. 673. **La.**—*Bernstein v. Dalton Clark Stave Co.*, 122 La. 412, 47 So. 753. **Md.**—*Cromwell v. Royal Canadian Ins. Co.*, 49 Md. 366, 33 Am. Rep. 258. **Mass.**—*Robinson v. Mead*, 7 Mass. 353. **N. J.**—*Duke v. Duke*, 70 N. J. Eq. 135, 62 Atl. 466, affirmed, 72 N. J. Eq. 434, 940, 65 Atl. 1117.

See *supra*, XIII, D.

34. *Sheppard v. Graves*, 14 How. (U. S.) 505, 14 L. ed. 518. See *supra*, XIII, D.

35. *White v. North Georgia Elec. Co.*, 136 Ga. 21, 70 S. E. 639; *Earle v.*

it open to such a plea for the first time, in which case it may then be filed.³⁶ Such objection cannot be urged after demurrer or answer filed,³⁷ unless the court in its discretion permits the withdrawal of the

Sayre, 99 Ga. 617, 25 S. E. 943; Mott v. Hall, Moses & Co., 41 Ga. 117; Stetson v. Corinna, 44 Me. 29.

[a] This is required only where defendant pleads to the merits at such term. Colquitt v. Mercer, 44 Ga. 432.

[b] Where service is quashed at the first term, a plea to the jurisdiction may be filed at the succeeding term. Atchison, etc. R. Co. v. Adams (Tex. App.), 14 S. W. 1015.

36. White v. North Georgia Elec. Co., 136 Ga. 21, 70 S. E. 639; Lowe v. Echols, 98 Ga. 36, 25 S. E. 906.

37. U. S.—Whyte v. Gibbs, 20 How. 541, 15 L. ed. 1016; Eddy v. Lafayette, 49 Fed. 807, 1 C. C. A. 441, *affirmed*, 163 U. S. 456, 16 Sup. Ct. 1082, 41 L. ed. 225; Derk P. Yonkerman Co. v. Fuller's Adv. Agency, 135 Fed. 613; Bottom v. National R. Bldg. & Loan Assn., 123 Fed. 744; Scott v. Hoover, 99 Fed. 247; Grove v. Grove, 93 Fed. 865; *Ex parte* Davidson, 57 Fed. 883; Hewitt v. Story, 39 Fed. 158. Ala.—Rose v. Thompson, 17 Ala. 628. Ark.—Hawkins v. Taylor, 56 Ark. 45, 19 S. W. 105, 35 Am. St. Rep. 82; Heilman v. Martin, 2 Ark. 158. Cal.—Sears v. Starbird, 78 Cal. 225, 20 Pac. 547. Fla.—Bucki v. Cone, 25 Fla. 1, 6 So. 160. Ga.—McGahee v. Hilton & Dodge Lumb. Co., 112 Ga. 513, 37 S. E. 708; Campbell v. Mercer, 108 Ga. 103, 33 S. E. 871; East Tennessee, V. & G. R. Co. v. Suddeth, 86 Ga. 388, 12 S. E. 682; Beall v. Rust, 68 Ga. 774; Mays v. Taylor, 7 Ga. 238; Drake v. Lewis, 13 Ga. App. 276, 79 S. E. 167; Bunting v. Hutchinson, 5 Ga. App. 194, 63 S. E. 49. Ill.—Kreitz v. Behrensmeyer, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349; Gillilan v. Gray, 14 Ill. 416; Clark v. Evans, 138 Ill. App. 56, 59. Ind.—Evans v. State, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651, 2 L. R. A. (N. S.) 619, 6 Ann. Cas. 813; El River R. Co. v. State, 155 Ind. 433, 57 N. E. 388; Day v. Henry, 104 Ind. 324, 4 N. E. 44; Slaughter v. Hollowell, 90 Ind. 286; Crawfordsville v. Hays, 42 Ind. 200; New Albany, etc. R. Co. v. Wilson, 16 Ind. 402; Knight v. Low, 15 Ind. 374; Kegg v. Welden, 10 Ind. 550; Johnson v. Staley, 32 Ind. App. 628, 70 N. E. 541. Ia.—Moffitt v. Chi-

cago Chronicle Co., 107 Iowa 407, 78 N. W. 45; Locke v. Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49; Schrader v. Hoover, 87 Iowa 654, 54 N. W. 463. Kan.—Bliss v. Burnes, McCahon 91. Ky.—Gillen v. Illinois Cent. R. Co., 137 Ky. 375, 125 S. W. 1047; Girty v. Logan, 6 Bush 8; Baker v. Louisville & N. R. Co., 4 Bush 619; Anderson v. Irvine, 11 B. Mon. 341; National Life Ins. Co. v. Tweddell, 22 Ky. L. Rep. 881, 58 S. W. 699. La.—Bernstein v. Dalton Clark Stave Co., 122 La. 412, 47 So. 753; Mix v. Creditors, 39 La. Ann. 624, 2 So. 391; Knight v. Callender, 10 La. 226. Me.—Demuth v. Cutler, 50 Me. 298. Mass.—Pierce v. Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Morris v. Farrington, 133 Mass. 466; Hastings v. Bolton, 1 Allen 529; Barry v. Page, 10 Gray 398. Mich.—Hicks v. Steel, 126 Mich. 408, 85 N. W. 1121; Westfall v. Board of Water Comrs., 93 Mich. 210, 53 N. W. 161; Thompson v. Michigan Mut. Ben. Assn., 52 Mich. 522, 18 N. W. 247; Gott v. Brigham, 41 Mich. 227, 2 N. W. 5; Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461; Webb v. Mann, 3 Mich. 139. Miss.—Memphis & C. R. Co. v. Glover, 78 Miss. 467, 29 So. 89; New Orleans, etc. R. Co. v. Wallace, 50 Miss. 244; Peters v. Finney, 12 Smed. & M. 449. Mo.—State v. Rombauer, 140 Mo. 121, 40 S. W. 763; Lindell Real Est. Co. v. Lindell, 133 Mo. 386, 33 S. W. 466; Chouteau v. Allen, 70 Mo. 290; Rippstein v. St. Louis Mut. L. Ins. Co., 57 Mo. 86; Kingman-St. Louis Impl. Co. v. Bantley Bros. Hardware Co., 137 Mo. App. 308, 118 S. W. 500; Kincaid v. Storz, 52 Mo. App. 564. Neb.—Grand Lodge A. O. U. W. v. Bartes, 64 Neb. 800, 90 N. W. 901; Baker v. Union Stock Yards Nat. Bank, 63 Neb. 801, 89 N. W. 269, 93 Am. St. Rep. 484; Lowe v. Riley, 57 Neb. 252, 77 N. W. 758. N. J.—Hale v. Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190. N. Y.—Pease v. Delaware, L. & W. R. Co., 10 Daly 459; Clyde & Rose Plank Road Co. v. Parker, 22 Barb. 323; Koppel v. Heinrichs, 1 Barb. 449; Smith v. Elder, 3 Johns. 105; Bunker v. Langs, 76 Hun 543, 28 N. Y. Supp. 210, 58 N. Y.

pleading and the filing of a plea to the jurisdiction or in abatement filed.³⁸

3. Making and Verification of Plea.—At common law a plea to the jurisdiction must be pleaded in person and not by an attorney.³⁹ Statutes also sometimes require it to be verified by a party personally,⁴⁰

St. 243; *Dake v. Miller*, 15 Hun 356. **N. C.**—*McCullen v. Seaboard Air Line Ry. Co.*, 146 N. C. 568, 60 S. E. 506; *Fort v. Penny*, 122 N. C. 230, 29 S. E. 362. **N. D.**—*Stockwell v. Haigh*, 23 N. D. 54, 135 N. W. 764. **Okla.**—*Winfield Nat. Bank v. McWilliams*, 9 Okla. 493, 60 Pac. 229. **Pa.**—*Smith v. People's Mut. Live Stock Ins. Co.*, 173 Pa. 15, 33 Atl. 567; *Larkin v. Scranton*, 162 Pa. 289, 29 Atl. 910; *Fennell v. Guffey*, 155 Pa. 38, 25 Atl. 785; *Adam's Appeal*, 113 Pa. 449, 6 Atl. 100; *McMurray v. Hopper*, 43 Pa. 468; *Schenley v. Com.*, 36 Pa. 29, 78 Am. Dec. 359; *Morris & Essex Mut. Coal Co. v. Delaware, L. & W. R. Co.*, 1 Lack. Leg. N. 176. **Tex.**—*Schauer v. Beitel's Exr.*, 92 Tex. 601, 50 S. W. 931 (cannot assert by amended answer); *Hoffman v. Cleburne Bldg. & Loan Assn.*, 85 Tex. 409, 22 S. W. 154; *St. Louis & S. F. R. Co. v. Traweek*, 84 Tex. 65, 19 S. W. 370; *Willis v. Hudson*, 72 Tex. 598, 10 S. W. 713; *Ryan v. Jackson*, 11 Tex. 391; *Moore v. Torrey*, 1 Tex. 42; *O'Neil v. Murray* (Tex. Civ. App.), 94 S. W. 1090; *Price v. Garvin* (Tex. Civ. App.), 69 S. W. 985; *Tignor v. Toney*, 13 Tex. Civ. App. 518, 35 S. W. 881; *Meade v. Jones*, 13 Tex. Civ. App. 320, 35 S. W. 310; *Meade v. Warring* (Tex. Civ. App.), 35 S. W. 308; *Waco Ice & Rfg. Co. v. Wiggins* (Tex. Civ. App.), 32 S. W. 58; *Fields v. Ft. Worth*, etc. R. Co. (Tex. Civ. App.), 30 S. W. 255; *Eden v. Osborne & Co.* (Tex. Civ. App.), 29 S. W. 414; *Logan v. Texas Bldg.*, etc. Assn., 8 Tex. Civ. App. 490, 28 S. W. 141; *Hoffman v. Cleburne Bldg. & L. Assn.*, 2 Tex. Civ. App. 688, 22 S. W. 155; *Meyer v. Smith*, 3 Tex. Civ. App. 37, 21 S. W. 995; *Keystone Nat. Bank v. Hinchman*, 3 Wills. Civ. Cas., §375. **Utah.**—*Stone v. Union Pac. R. Co.*, 32 Utah 185, 89 Pac. 715; *White v. Rio Grande W. R. Co.*, 25 Utah 346, 71 Pac. 593. **Vt.**—*Lyman v. Central Vermont R. Co.*, 59 Vt. 167, 10 Atl. 346. **Va.**—*Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Washington*, etc. Tel. Co. v. *Hobson*, 15 Gratt. (56 Va.) 122. **W. Va.**—*Andrews v. Mundy*,

36 W. Va. 22, 14 S. E. 414. **Wyo.** *Chadron Bank v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

[a] **An amended answer setting up want of jurisdiction** because the allegations of the petition were fraudulently made, raised for the first time by such amended answer after pleading to the merits, is too late. *Price v. Garvin* (Tex. Civ. App.), 69 S. W. 985.

38. *Eberly v. Moore*, 24 How. (U. S.) 147, 16 L. ed. 612; *Karthaus v. Nashville, C. & St. L. R. Co.*, 140 Ala. 433, 37 So. 268; *Massey v. Steele's Admr.*, 11 Ala. 340.

39. **Fla.**—See *Putnam Lumb. Co. v. Ellis-Young Co.*, 50 Fla. 251, 39 So. 193. **Ga.**—*Colquitt v. Mercer*, 44 Ga. 432. **Ill.**—*Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124. **Tenn.**—*Shelby v. Johnson*, 7 Humph. 503. **Vt.**—*Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850. **Va.**—See *Hortons v. Townes*, 6 Leigh (33 Va.) 47.

[a] **Must be signed in person**, not by attorney. *Kenney v. Howard*, 67 Vt. 375, 31 Atl. 850; *Quarrier v. Peabody Ins. Co.*, 10 W. Va. 507, 27 Am. Rep. 582.

[b] **Under the Texas system of procedure** the common-law rule is not recognized, and a party may make any defense through an attorney. *Richardson v. Wells*, 3 Tex. 223.

40. *Akers v. High Co.*, 122 Ga. 279, 50 S. E. 105; *Talbott v. Collier*, 102 Ga. 550, 28 S. E. 225; *Colquitt v. Mercer*, 44 Ga. 432; *Bass v. Stevens*, 17 Ga. 573.

[a] **A plea by one defendant that none of the defendants are residents of the county**, verified by such defendant is good as to him. *White v. North Georgia Elec. Co.*, 136 Ga. 21, 70 S. E. 639.

[b] **A verification to the best of one's own belief of matters not within one's own knowledge is sufficient.** *Clark v. Croft*, 51 Ga. 368. See the title "Verification."

[c] **Verification not required under Illinois statute.** *Pooler v. Southwick*, 126 Ill. App. 264.

not by his attorney,⁴¹ notwithstanding a statute authorizes an attorney to make oath setting up issuable defenses.⁴² A joint plea to the jurisdiction must be verified by all the parties so pleading and not merely by one of them.⁴³

Form and Contents.—Forms of such pleas and of answers containing objections to the jurisdiction may be found elsewhere in this work.⁴⁴ The law has always required great accuracy and precision in the structure and form of such pleas.⁴⁵ They must be certain to every intent, and there must be proper averment of facts accurately and logically stated, excluding every intendment of jurisdiction.⁴⁶ It is not sufficient to deny the jurisdiction of the court within which the action is brought.⁴⁷ While a plea to the jurisdiction of an inferior court of limited jurisdiction need only show such court has no jurisdiction without showing the court plaintiff should have resorted to,⁴⁸ a plea to the jurisdiction in a court of general jurisdiction must not only show that the court assuming jurisdiction has none, but must allege that another court in the state has jurisdiction,⁴⁹ though a plea presenting facts showing that the subject matter is beyond the general jurisdiction of the courts of the state need not show what court has jurisdiction.⁵⁰ A plea to the jurisdiction over the person of the defendant, however, is

41. *Smith v. Rawson*, 61 Ga. 208; *Colquitt v. Mercer*, 44 Ga. 432; *Mumford v. Solomon*, 8 Ga. App. 286, 68 S. E. 1075.

42. *Colquitt v. Mercer*, 44 Ga. 432.

43. *White v. North Georgia Elec. Co.*, 136 Ga. 21, 70 S. E. 639.

44. See 9 STANDARD PROC. 756.

[a] Such a plea concludes with a prayer "if the court here will take cognizance of the action aforesaid." *Pooler v. Southwick*, 126 Ill. App. 264; *Mosely v. Hunter*, 25 N. C. 543.

45. *Willard v. Zehr*, 215 Ill. 148, 155, 74 N. E. 107. See also *Crockett & Co. v. Garrard & Co.*, 4 Ga. App. 360, 61 S. E. 552.

46. *Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107.

[a] A plea alleging defendant was not voluntarily in the county, but was there under indictment wrongfully procured by the plaintiff which was dismissed after service of summons, is not sufficient. It should show he was not guilty of the crime charged or that plaintiff falsely charged or caused him to be charged with crime. *Willard v. Zehr*, 215 Ill. 148, 74 N. E. 107.

47. *National Bank v. Southern Porcelain Mfg. Co.*, 55 Ga. 36, 40.

[a] A denial of the allegation of

residence of defendant within the jurisdiction of the court, is not a sufficient plea to the jurisdiction. *Crockett & Co. v. Garrard & Co.*, 4 Ga. App. 360, 61 S. E. 552.

[b] Argumentative denial of residence not sufficient. *Mosely v. Hunter*, 25 N. C. 543.

48. *Sodor v. Derby*, 2 Vesey Sen. 337, 28 Eng. Reprint 217.

49. U. S.—*Rhode Island v. Massachusetts*, 12 Pet. 657, 9 L. ed. 1233. Ala.—*Fields v. Walker*, 23 Ala. 155. Ark.—*Heilman v. Martin*, 2 Ark. 158. Ga.—*Kahn v. Southern Building & L. Assn.*, 115 Ga. 459, 41 S. E. 648; *Fain v. Crawford*, 91 Ga. 30, 16 S. E. 106; *Ridling v. Stewart*, 77 Ga. 539. Mass.—*Tingley v. Bateman*, 10 Mass. 343; *Lawrence v. Smith*, 5 Mass. 362; *Rea v. Hayden*, 3 Mass. 24. Mich.—*Heyman v. Covell*, 36 Mich. 157. N. H.—*Jones v. Winchester*, 6 N. H. 497. N. Y.—*Otis v. Wakeman*, 1 Hill 604. Vt.—*Peck v. Barnum*, 24 Vt. 75. Va.—*North American Guarantee Co. v. First Nat. Bank*, 95 Va. 480, 28 S. E. 909. Eng.—*Rex v. Johnson*, 6 East 583, 102 Eng. Reprint 1412.

50. *Hill v. Nelson*, 70 N. J. L. 376, 57 Atl. 411; *London v. Cox*, L. R. 2 H. L. (Eng.) 239; *Companhia de Mo-*

sufficient if it shows the court assuming to act has no jurisdiction over his person, without showing another court has jurisdiction.⁵¹

XV. TRANSFER OF CAUSE. — The transfer of a cause which is not within the jurisdiction of the court in which it is begun, is treated elsewhere.⁵²

cambique v. British So. Africa Co., 2 Q. B. Div. (1892) 358.

51. *Midland Pac. R. Co. v. McDer-*
mid, 91 Ill. 170.

52. See the title "Transfer of Causes."

Transfer from justice to superior

court, see the title "Justices of the Peace."

Removal from state to federal court, see the title "Removal of Causes."

Change of venue, see the title "Change of Venue." In justice courts,

see the title "Justices of the Peace."

JURY. — See Juries and Jurors.

Vol. XVII

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By the Editorial Staff.

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Q. *Records and Dockets.* [See 18 STANDARD PROC.]

R. *Transfer of Cause.* [See 18 STANDARD PROC.]

S. *Foreign Judgments.* [See 18 STANDARD PROC.]

IV. REVIEW OF PROCEEDINGS BEFORE. [See 18 STANDARD PROC.]

V. PROCEEDINGS AGAINST. [See 18 STANDARD PROC.]

CROSS-REFERENCES:

Appeals;
Indictment and Information;
Preliminary Examination;
Process;

Security To Keep the Peace;
Service of Process and Papers;
Threats;
Warrants.

Criminal complaint before justice, see the title "Indictment and Information."

Jurisdiction of justice over preliminary examinations, see the title "Preliminary Examination."

Jurisdiction of justice in criminal cases generally, see the title "Jurisdiction."

As to jurisdiction of justices in particular actions or proceedings, see the specific titles throughout this work.

For further references and cross-references, see the index to this work and the cross-references throughout this article.

Jurisdiction as determined by the amount in controversy, see the title "Jurisdiction."

I. DEFINITIONS AND GENERAL STATEMENT. — Justices of the peace are judicial officers¹ of limited jurisdiction,² in whom, with the judges of the superior courts, is vested the judicial power of the

1. U. S.—Katz v. Herschel Mfg. Co., 150 Fed. 684. Alaska.—Mitchell v. Galen, 1 Alaska 339, inferior judicial officer. Cal.—People ex rel. Pennie v. Ransom, 58 Cal. 558; McGrew v. San Jose, 55 Cal. 611. Conn.—McVeigh v. Ripley, 77 Conn. 136, 58 Atl. 701; Scott v. Spiegel, 67 Conn. 349, 35 Atl. 282. Ind.—Vogel v. State, 107 Ind. 374, 8 N. E. 164. Ky.—Wheeler v. Schulman, 165 Ky. 185, 176 S. W. 1017. Tenn.—Grainger v. State, 111 Tenn. 234, 80 S. W. 750. Vt.—Hogle v. Mott, 62 Vt. 255, 20 Atl. 276; McGregor v. Balch, 14 Vt. 428, 39 Am. Dec. 231. Wyo.—Ballantyne v. Bower, 17 Wyo. 356, 99 Pac. 869, 17 Ann. Cas. 82.

[a] A Public Officer.—State v. Albright, 25 Ala. 141, 46 So. 470.

[b] A mayor of a corporate town or city is, in some of the states, a justice of the peace ex officio. Helms v. O'Bannon, 26 Ga. 132; State v. Jamison, 100 Iowa 342, 69 N. W. 529, although the mayor is given the jurisdiction of a justice of the peace, a statute allowing a change of venue to another "justice" does not contemplate a change to a "mayor."

[c] The term "other justice of either of the United States," in a statute relating to proving powers of attorney to authorize a conveyance, includes a justice of the peace. Helms v. O'Bannon, 26 Ga. 132.

As to judicial officers generally, see the title "Judicial Officers."

2. See *infra*, II, A.

state.³ In addition to being a judicial officer, the justice is a ministerial officer,⁴ and sometimes a political officer also.⁵

While the office of the justice of the peace is one of the earliest known to the law,⁶ at the present time, the justice is generally a constitutional officer,⁷ although the term is sometimes applied to officers of inferior local courts created by statute.⁸ Since created as justices of the peace for cities and towns,⁹ as well as for townships,¹⁰ and counties,¹¹ the justice is, under various statutes and constitutions, regarded as a town officer,¹² a township officer,¹³ a precinct officer,¹⁴ and a county offi-

3. Cal.—*Bishop v. Oakland*, 53 Cal. 572; *People ex rel. Pennie v. Ransom*, 58 Cal. 558. Ill.—*People v. Wilson*, 15 Ill. 388. N. Y.—*People v. Keeler*, 25 Barb. 421.

4. *Scott v. Spiegel*, 67 Conn. 349, 35 Atl. 262 (judicial in the trial of causes, ministerial in recording his judgments); *Wheeler v. Schulman*, 165 Ky. 185, 176 S. W. 1017.

5. *Grainger v. State*, 111 Tenn. 234, 80 S. W. 750, as a member of the quarterly county court which is the governing agency or legislative body of the county. And see *Com. v. Kennedy*, 118 Ky. 618, 82 S. W. 237, where a justice is authorized to levy taxes.

6. See the following: Ind.—*Willey v. Strickland*, 8 Ind. 453. Kan.—*In re Greer*, 58 Kan. 268, 48 Pac. 950. Md.—*Weikel v. Cate*, 58 Md. 105. N. J.—*Schrader v. Ehlers*, 31 N. J. L. 44; *Smith v. Abbott*, 17 N. J. L. 358. N. Y.—*People ex rel. Lawrence v. Mann*, 97 N. Y. 530, 49 Am. Rep. 556; *Gurnsey v. Lovell*, 9 Wend. 319; *People ex rel. Burley v. Howland*, 17 App. Div. 165, 45 N. Y. Supp. 347. Vt.—*In re Barker*, 56 Vt. 14.

7. See generally the constitutions, and the following: U. S.—*Katz v. Herschel Mfg. Co.*, 150 Fed. 684. Cal.—*Graham v. City of Fresno*, 151 Cal. 465, 91 Pac. 147; *People ex rel. Pennie v. Ransom*, 58 Cal. 558. Ga.—*Winn v. Butts*, 127 Ga. 385, 56 S. E. 406. Kan.—*In re Greer*, 58 Kan. 268, 48 Pac. 950. Mass.—*Wales v. Belcher*, 3 Pick. 508. Minn.—*Burke v. St. Paul M. & M. Ry. Co.*, 35 Minn. 172, 28 N. W. 190. N. Y.—*People v. Keeler*, 25 Barb. 23; *Beach v. Baker*, 25 App. Div. 9, 48 N. Y. Supp. 1042; *People ex rel. Burby v. Howland*, 17 App. Div. 165, 45 N. Y. Supp. 347; *Eisenberg v. Lape*, 52 Misc. 329, 103 N. Y. Supp. 169; *Reid v. Stev-*

ens, 126 N. Y. Supp. 379. Okla.—*Leiber v. Argaubright*, 25 Okla. 177, 105 Pac. 341. Utah.—*State ex rel. Porter v. Ritchie*, 32 Utah 381, 91 Pac. 24; *Love v. Liddle*, 26 Utah 62, 72 Pac. 185, 62 L. R. A. 482. Wyo.—*Ballantyne v. Bower*, 17 Wyo. 356, 362, 99 Pac. 869, 17 Ann. Cas. 821.

8. *Schwartz v. Palm*, 163 App. Div. 7, 147 N. Y. Supp. 1081; *Reid v. Stevens*, 126 N. Y. Supp. 379.

9. *Graham v. City of Fresno*, 151 Cal. 465, 91 Pac. 147; *Wenzler v. People*, 58 N. Y. 516; *Lantz v. Galpin*, 44 Misc. 356, 89 N. Y. Supp. 1096; *Reid v. Stevens*, 126 N. Y. Supp. 379.

10. *Graham v. City of Fresno*, 151 Cal. 465, 91 Pac. 147.

11. *Graham v. City of Fresno*, 151 Cal. 460, 91 Pac. 147.

12. *Eisenberg v. Lape*, 52 Misc. 329, 103 N. Y. Supp. 169; *Reid v. Stevens*, 126 N. Y. Supp. 379; *Love v. Liddle*, 26 Utah 62, 72 Pac. 185, 62 L. R. A. 482, but he is not merely a city officer. But see *People v. Keeler*, 25 Barb. (N. Y.) 23.

13. *Leiber v. Argaubright*, 25 Okla. 177, 105 Pac. 341.

[a] **A Municipal Township Officer.** *Carpenter v. Roth*, 192 Mo. 658, 669, 91 S. W. 540.

[b] While the jurisdiction of the justice is coextensive with the county within which the township which elected him is located, yet he is a township officer under a statute requiring him to reside within his township and hold office therein. *Leiber v. Argaubright*, 25 Okla. 177, 105 Pac. 341. To same effect *Atchison, T. & S. F. Ry. Co. v. Rice*, 36 Kan. 593, 14 Pac. 229.

14. *Territory v. Witt*, 16 N. M. 335, 117 Pac. 860; *Love v. Liddle*, 26 Utah 62, 72 Pac. 185, 62 L. R. A. 482.

cer.¹⁵ He has been held to be a civil officer under the state,¹⁶ and as to debts sued on in his court, a collecting officer.¹⁷

Justices of the peace are sometimes regarded as courts.¹⁸ Except in a few states, however,¹⁹ a justice's court is not a court of record.²⁰ Although a judge in the legal sense of the word,²¹ the term justice of the peace is generally used to contradistinguish it from the term "judge."²²

The term "police courts" ordinarily refers to inferior municipal courts having a limited jurisdiction in criminal cases.²³

II. JURISDICTION, POWERS AND AUTHORITY. — A. NATURE AND EXTENT GENERALLY. — At common law, justices of the peace had minor criminal, but no civil jurisdiction.²⁴ The grant of civil juris-

15. **Colo.**—Thrush *v.* People, 53 Colo. 544, 127 Pac. 937. **N. Y.**—Gurnsey & Knight *v.* Lovell, 9 Wend. 319; Eisenberg *v.* Lape, 52 Misc. 329, 103 N. Y. Supp. 169, citing case. **Tenn.**—Graininger *v.* State, 111 Tenn. 234, 80 S. W. 750. **Wyo.**—Ballantyne *v.* Bower, 17 Wyo. 356, 99 Pac. 869, 17 Ann. Cas. 82.

Contra, Territory *v.* Witt, 16 N. M. 335, 117 Pac. 860, not a county officer under the enabling act.

16. Ballantyne *v.* Bower, 17 Wyo. 356, 362, 99 Pac. 869, 17 Ann. Cas. 82.

17. Higdon *v.* Williamson, 10 Ga. App. 376, 73 S. E. 528; Bryan *v.* Meaders Bros., 9 Ga. App. 326, 71 S. E. 491.

18. Katz *v.* Herschel Mfg. Co., 150 Fed. 684.

[a] "Justices of the peace, when clothed with the judicial power to hear and determine cases and render judgments, must certainly be regarded as courts. It is true they are inferior courts, and not courts of record." Katz *v.* Herschel Mfg. Co., 150 Fed. 684.

[b] Justices of the peace created by a city charter are included in the term "inferior local courts." Murphy *v.* Snitzpan, 15 Misc. 496, 36 N. Y. Supp. 1013, 72 N. Y. St. 286; Reid *v.* Stevens, 126 N. Y. Supp. 379. But see Lantz *v.* Galpin, 44 Misc. 356, 89 N. Y. Supp. 1096.

19. **Conn.**—McVeigh *v.* Ripley, 77 Conn. 136, 58 Atl. 701. **Del.**—Cloud *v.* State, 2 Harr. 361. **Ind.**—Pressler *v.* Turner, 57 Ind. 56. **Ky.**—Robertson *v.* Donelan, 138 Ky. 149, 127 S. W. 754, Ann. Cas. 1912A, 1280. **Miss.**—Brian *v.* Davidson, 25 Miss. 213. **N. J.**—Woodruff *v.* Woodruff, 3 N. J. L. 552. **Ohio.**—Adair's Admr. *v.* Rogers' Admr.,

Wright 428. **Vt.**—Stone *v.* Proctor, 2 Chip. 108.

20. **U. S.**—Searcy *v.* Hogan, Hempst. 20, 21 Fed. Cas. No. 12,584a; Katz *v.* Herschel Mfg. Co., 150 Fed. 684. **Ala.**—Ellis *v.* White, 25 Ala. 540. **Md.**—Weikel *v.* Cate, 58 Md. 105. **Mass.**—Smith *v.* Morrison, 22 Pick. 430. **N. Y.**—Wheaton *v.* Fellows, 23 Wend. 375. **N. C.**—Hamilton *v.* Wright, 11 N. C. 283. **Wash.**—State *ex rel.* Brockway *v.* Whitehead, 88 Wash. 549, 153 Pac. 349. **W. Va.**—Roberts *v.* Hickory Camp C. & C. Co., 58 W. Va. 276, 52 S. E. 182.

21. People *v.* Wilson, 15 Ill. 388; People *ex rel.* Lawrence *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556.

22. **Ill.**—People *v.* Wilson, 15 Ill. 388. **La.**—Andrews *v.* Saucier, 13 La. Ann. 301. **N. Y.**—People *ex rel.* Lawrence *v.* Mann, 97 N. Y. 530, 49 Am. Rep. 556.

[a] A justice of the peace is not a judge under a statute defining a judge to be a judicial officer presiding over a court of record. Center *v.* Hoosiek River Pulp Co., 43 Misc. 247, 88 N. Y. Supp. 548.

23. Graham *v.* City of Fresno, 151 Cal. 465, 91 Pac. 147.

[a] City recorder's courts and mayor's courts are embraced in the term "police courts," but justice's courts are not. Graham *v.* City of Fresno, 151 Cal. 465, 91 Pac. 147.

24. **Ala.**—Horton *v.* Elliott, 90 Ala. 480, 8 So. 103; Ellis *v.* White, 25 Ala. 540. **Ark.**—Whitesides *v.* Kershaw, 44 Ark. 377. **Ind.**—Toledo, W. & W. Ry. Co. *v.* McNulty, 34 Ind. 531; Willey *v.* Strickland, 8 Ind. 453. **Miss.**—Bell *v.* West Point, 51 Miss. 262.

[a] "Justices of the peace were, at common law, subordinate magistrates,

diction is purely of American origin and results from positive law.²⁵

The justice's court is a court of limited statutory or constitutional jurisdiction, and can exercise only such jurisdiction as is expressly conferred or such as may be necessary to make effective²⁶ jurisdiction

appointed by the king's special commission. They were conservators of the peace and their judicial power referred to the administration of the criminal law. 1 Cooley's Blacks. 349. They were not clothed with civil jurisdiction; that is derived from legislative enactment or constitutional grant." Taylor v. Woods, 52 Ala. 474.

25. Bell v. West Point, 51 Miss. 262.

[a] "It has grown out of the necessity and convenience of placing in the several neighborhoods some depository of judicial power to try and decide petty suits speedily and at little expense. To that large class of every community whose transactions are small, and whose means are limited, it would amount almost to a denial of justice not to provide some judicial magistrate near at hand, to hear and decide petty controversies without the delay and expense incident to the superior courts. That want has been met in this country by giving to justices of the peace a limited jurisdiction." Bell v. West Point, 51 Miss. 262, 269.

[b] Justice in another state is not presumed to have civil jurisdiction. Willey v. Strickland, 8 Ind. 453.

26. See the following: Ala.—Horton v. Elliott, 90 Ala. 480, 8 So. 103; Jeffries v. Harbin, 20 Ala. 387. Ark.—Shelton v. Little Rock Auto Co., 103 Ark. 142, 146 S. W. 129; Blass v. Brown, 66 Ark. 79, 48 S. W. 908; Whitesides v. Kershaw, 44 Ark. 377. Colo.—Corthell v. Mead, 19 Colo. 386, 35 Pac. 741. Dak.—Murray v. Burris, 6 Dak. 170, 42 N. W. 25. Del.—Robinson v. Prince, 3 Harr. 389. Ga.—Winn v. Butts, 127 Ga. 385, 56 S. E. 406; Field v. Peel, 122 Ga. 503, 50 S. E. 346; Shearouse v. Wolf, 117 Ga. 426, 43 S. E. 718. Ill.—Bradwell v. Wilson, 158 Ill. 346, 42 N. E. 145; People v. Wilson, 15 Ill. 388. Ind.—Penrose v. McKenzie, 116 Ind. 35, 18 N. E. 384; Second Nat. Bank v. Hut-ton, 81 Ind. 101; Richards v. Reed, 39 Ind. 330; Matlock v. Strange, 8 Ind.

57; Gregg v. Wooden, 7 Ind. 499. Kan.—Hayes v. Green (Kan. App.), 53 Pac. 764; Sims v. Kennedy, 67 Kan. 383, 73 Pac. 51. Me.—Martin v. Fales, 18 Me. 23, 36 Am. Dec. 693. Mass.—Com. v. Foster, 1 Mass. 488. Minn.—Perkins v. Mellicke, 66 Minn. 409, 69 N. W. 220. Miss.—Brian v. Davidson, 25 Miss. 213. Mo.—Williams v. Bower, 26 Mo. 601; Sample v. Verner-Kelly Live Stock Com. Co., 193 Mo. App. 670, 186 S. W. 1125; Bucholz v. Metropolitan L. Ins. Co., 176 Mo. App. 464, 158 S. W. 451; State ex rel. Conrad v. Cotten, 135 Mo. App. 167, 115 S. W. 1064; Brownfield v. Thompson, 96 Mo. App. 340, 70 S. W. 378. Mont.—State ex rel. Collier v. Houston, 36 Mont. 178; State v. Taylor, 33 Mont. 212, 83 Pac. 484; Oppenheimer v. Regan, 32 Mont. 110, 79 Pac. 695. Nev.—Paul & Co. v. Beegan, 1 Nev. 327. N. Y.—People ex rel. Ballin v. Smith, 184 N. Y. 96, 76 N. E. 925; Worden v. Brown, 14 How. Pr. 327; Lattimore v. People, 10 How. Pr. 336. N. D.—Searl v. Shanks, 9 N. D. 204, 82 N. W. 734. Ohio.—Bowers v. Pomeroy, 21 Ohio St. 184; Howell v. Jenkins, 2 Ohio Dec. (Reprint) 552. Okla.—Jeffries v. Newblock, 155 Pac. 1150; St. Louis & S. F. Ry. Co. v. Couch, 28 Okla. 331, 114 Pac. 694; Rhyne v. Manchester Assur. Co., 14 Okla. 555, 78 Pac. 558. Pa.—Eason v. Smith, 8 Serg. & R. 343 (jurisdiction is founded on acts of legislature); Ripple v. Keast, 16 Pa. Co. Ct. 548. S. C.—State v. Weeks, 14 S. C. 400. S. D.—Pyle v. Hand, 1 S. D. 385, 47 N. W. 401. Tenn.—Vanbibber v. Vanbibber, 10 Humph. 53; Gibbs v. Bourland, 6 Yerg. 481. Va.—Martin v. Richmond, 108 Va. 765, 62 S. E. 800; James v. Stokes, 77 Va. 225. W. Va.—Sovereign Coal Co. v. Britton, 87 S. E. 925; Roberts v. Hickory Camp C. & C. Co., 58 W. Va. 276, 52 S. E. 182; Norfolk & W. Ry. Co. v. Pinnacle Coal Co., 44 W. Va. 574, 30 S. E. 196.

[a] "In the exercise of the powers granted, they must pursue the statute, for that is the charter of their powers, not only as to the classes of cases which they may hear and determine,

expressly granted. Jurisdiction cannot be acquired by implication,²⁷ and statutes conferring jurisdiction are to be strictly,²⁸ though fairly,²⁹ construed. On the other hand, a jurisdiction conferred by statute, cannot be limited by the courts, by construction.³⁰ Statutes conferring a special jurisdiction are not to be limited by prior acts conferring general jurisdiction,³¹ and a statute conferring special jurisdiction on a justice of the peace does not operate as a limitation on his general powers.³²

As to matters within his jurisdiction, the action of a justice is as effectual as is the action of a higher court,³³ and when it is made to appear that jurisdiction has been acquired, the same presumptions are

but as to the procedure they must observe." State *ex rel.* Collier *v.* Houston, 36 Mont. 178, 92 Pac. 476.

That justices of the peace are sometimes deemed to exercise general jurisdiction, see 15 STANDARD PROC. 434.

27. Cal.—Van Etten *v.* Jilson, 6 Cal. 19. Kan.—Sims *v.* Kennedy, 67 Kan. 383, 73 Pac. 51. Okla.—Hocker *v.* Carroll, 35 Okla. 290, 129 Pac. 56. Tenn.—Collins *v.* Oliver, 4 Humph. 439.

28. St. Louis & S. F. Ry. Co. *v.* Couch, 28 Okla. 331, 114 Pac. 694.

29. De Laval Separator Co. *v.* Hofberger, 161 Wis. 344, 154 N. W. 387. See also *Ex parte* Boland, 11 Tex. App. 159.

[a] "Courts of justices of the peace are recognized in the constitution and statutes of this state and they are supposed to furnish cheap and convenient tribunals for the determination of petty differences which may arise between parties. It requires no argument to establish that the way to such courts should be smooth and easy. It was long ago declared to be the law that such inferior tribunals must keep strictly within the limits of the jurisdiction conferred upon them; but this does not mean that the superior courts are to be hostile to their judgments or solicitous to trip them up for every petty error. It means that the justices are to exercise only the jurisdiction conferred upon them by statute fairly interpreted." De Laval Separator Co. *v.* Hofberger, 161 Wis. 344, 154 N. W. 387.

30. Dolton *v.* Dolton, 201 Ill. 155, 66 N. E. 323.

31. Savage *v.* Carney, 8 Wis. 162.

[a] Repeals by Implication.—Special, local, statutory provisions regulating the jurisdiction of justices of the peace will not be held to be repealed by implication by later, general laws

unless the intent of the legislature to work a repeal is clearly evident. State *ex rel.* Metcalf *v.* Baker, 114 Minn. 209, 130 N. W. 999.

32. Matthews *v.* Cotten, 83 Miss. 472, 35 So. 937.

33. Del.—Jones *v.* Charles Warner Co., 2 Boyce 566, 83 Atl. 131. Ohio. Howell *v.* Jenkins, 2 Ohio Dec. (Reprint) 552. Tex.—Chicago, R. I. & G. Ry. Co. *v.* Gladish (Tex. Civ. App.), 175 S. W. 863. Wash.—State *ex rel.* Brockway *v.* Whitehead, 88 Wash. 549, 153 Pac. 349.

[a] "Justice courts are no less courts because they are not courts of record. They exercise, within their jurisdiction, the same judicial functions as do courts of record." State *ex rel.* Brockway *v.* Whitehead, 88 Wash. 549, 153 Pac. 349.

[b] Higher Courts Cannot Control in Advance the Action of a Justice's Court.—An agreed case having been submitted to the higher court involving the question whether if defendants were arrested in execution of a civil judgment they would be entitled to receive a discharge from the justice's court, it was said: "It is not for the circuit court, nor for this court, to tell the justice of the peace, in advance, how he is to decide a case of which he has jurisdiction under the statute. Within the limits of his jurisdiction a justice of the peace is free from the control of any other court, except where an appeal is authorized by law. We cannot assume that the justice will not decide the question correctly and we express no opinion as to the remedy if he fails so to do." McGovern *v.* Hoffman, 32 Ky. L. Rep. 74, 105 S. W. 458.

[c] Judgment as Res Judicata. "Where a justice has jurisdiction of the subject-matter and the parties, his

indulged in favor of their proceedings, as in the case of courts of general jurisdiction.³⁴

The test of jurisdiction is whether the court had the power to enter upon the inquiry, and not whether its conclusion was right or wrong.³⁵

A change in the existing law governing the jurisdiction of justices of the peace is usually held to apply to existing causes of action,³⁶ but to be inapplicable to actions which have been commenced,³⁷ or to actions tried but pending on appeal.³⁸

In some states, in particular classes of actions, two justices of the peace must act together in order to acquire jurisdiction.³⁹

Officers who are made by law *ex officio* justices of the peace have the same jurisdiction as regular justices.⁴⁰

B. AS DEPENDENT UPON CONSTITUTIONAL LIMITATIONS.—Where the constitution of a state defines and limits the powers and jurisdiction of justice's courts, a statute which attempts to extend the jurisdiction beyond such limitations is ineffective;⁴¹ nor can a constitutional grant of power be limited by legislation.⁴² A statute cannot modify in any way the amount in controversy over which the court has jurisdiction under a constitutional provision;⁴³ but where constitutional provisions are regarded as a limitation, rather than a grant of powers, the

judgment (until reversed on appeal) is as conclusive between the parties as the judgment of a court of record; and the judgment may be pleaded as such, and proven by an exemplification of his docket entries, etc." *Gates v. Bennett*, 33 Ark. 475, 485. See generally the title "*Res Judicata*."

34. See *infra*, III, Q, 3, a.

35. *Gulf, T. & W. Ry. Co. v. Lunn* (Tex. Civ. App.), 141 S. W. 508.

As to tests of jurisdiction generally, see the title "*Jurisdiction*."

36. *Thompson v. Harbison*, 7 Blackf. (Ind.) 495, statute extending jurisdiction to actions against administrators. But see *Girtman v. Central R. R. & Banking Co.*, 1 Ga. 173.

37. *Lilly & Bro. v. Purcell*, 78 N. C. 82.

38. *Mayor v. Lyon*, 69 Ga. 577.

39. *Behrens v. Mountz*, 37 Pa. Super. 326, in proceedings to evict a tenant.

40. *Ala.*—*Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73, notary public. *Ind.* *Cluggish v. Rogers*, 13 Ind. 538, mayor. *Miss.*—*Nickles v. Kendrick*, 73 Miss. 711, 19 So. 582. *Ore.*—*Craig v. Mosier*, 2 Ore. 323, city recorder.

[a] An officer clothed with the powers of a justice of the peace will be treated as one, regardless of the title

by which he is known. *Deitz v. Central*, 1 Colo. 323.

41. *Ark.*—*McLain v. Taylor*, 4 Ark. 147. *Cal.*—*King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; *Sutherland v. Sweem*, 53 Cal. 48; *Young v. Wright*, 52 Cal. 407. *Ga.*—*Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189. *Miss.* *Heggie v. Stone*, 70 Miss. 39, 12 So. 253, territorial jurisdiction cannot be extended. *W. Va.*—*Bank of Cassaway v. Stalnaker*, 69 W. Va. 85, 71 S. E. 183.

[a] Denomination of the office cannot be changed by the legislature. *Deitz v. Central*, 1 Colo. 323.

42. *Ark.*—*More v. Woodruff*, 5 Ark. 214. *Ky.*—*Guelot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892, territorial jurisdiction cannot be curtailed. *N. C.* *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57. *W. Va.*—*County Court v. Holt*, 53 W. Va. 532, 44 S. E. 887.

43. *Ark.*—*Kilgore Lumb. Co. v. Thomas*, 95 Ark. 43, 128 S. W. 62. *Cal.*—*Small v. Gwinn*, 6 Cal. 447; *Zander v. Coe*, 5 Cal. 230. *Idaho.*—See *Quayle v. Glenn*, 6 Idaho 549, 57 Pac. 308. *Tex.*—*Russell v. Woessner*, 7 Tex. Civ. App. 281, 26 S. W. 1112.

Amount in controversy as a test of jurisdiction, see generally the title "*Jurisdiction*."

legislature may extend the jurisdiction of justices to or reduce it below, the amount specified in the constitution,⁴⁴ or it may alter the territorial jurisdiction of the court,⁴⁵ and may confer jurisdiction upon or restrict it to, any classes of actions which are not expressly regulated by the constitution.⁴⁶

Under a constitution which authorizes the legislative body to establish such inferior courts as may to it seem advisable, the jurisdiction of justice's courts may be altered and extended by the legislature at will,⁴⁷ and this may also be done where the constitution provides that the powers and duties of justices of the peace shall be defined and regulated by law,⁴⁸ though under such a provision the legislature cannot so restrict the jurisdiction of justices of the peace as to work a virtual abrogation of the constitutional office.⁴⁹

Under a constitutional provision conferring general civil jurisdiction, with certain express exceptions, no other exceptions will be implied.⁵⁰ A constitutional provision that the jurisdiction of all justices of the peace shall be uniform is self executing;⁵¹ but does not extend

44. Ala.—Taylor v. Woods, 52 Ala. 474; Pearce v. Pope, 42 Ala. 319. Ia.—Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178. Nev.—Paul & Co. v. Beegan, 1 Nev. 327.

45. *Ex parte* McCollum, 1 Cow. (N. Y.) 550, 566. See Baker v. Irvine, 61 S. C. 114, 39 S. E. 252.

46. Ia.—Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178. Mass.—Wales v. Belcher, 3 Pick. 508. Md.—See Levin v. Hewes, 118 Md. 624, 86 Atl. 233. Mich.—Detroit Lumb. Co. v. The Petrel, 153 Mich. 528, 117 N. W. 80. Miss.—Bell v. West Point, 51 Miss. 262. N. Y.—Crouse v. Walrath, 41 How. Pr. 86.

[a] Principle on Which Rule Based. "But it is said that, as the constitution enumerates the cases of which a justice has jurisdiction, all others are excluded. This overlooks the fundamental idea of a state constitution. Such instrument is not a grant of, but a limitation upon, the powers of the state. In the absence of any constitutional provision, the legislature could create courts and define their jurisdiction. The language we have quoted from the fundamental law is a limitation upon the power of the legislature, and, as it is not inhibited from giving justices of the peace jurisdiction of special or summary proceedings, the power exists and cannot be questioned." Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178.

47. Head v. Hughes, 1 A. K. Marsh. (Ky.) 372.

48. Ill.—Bradwell v. Wilson, 158 Ill. 346, 42 N. E. 145. Mich.—O'Connell v. Menominee Bay Shore Lumb. Co., 113 Mich. 124, 71 N. W. 449. Mont.—Oppenheimer v. Regan, 32 Mont. 110, 79 Pac. 695. Neb.—Hastings v. Mills, 50 Neb. 842, 70 N. W. 381. N. C.—Malloy v. City of Fayetteville, 122 N. C. 480, 29 S. E. 880. Ohio.—Trustees of Burton Twp. v. Tuttle, 30 Ohio St. 62. Ore.—Noland v. Costello, 2 Ore. 57. Tex.—Aulanier v. Governor, 1 Tex. 653. See *Ex parte* McGrew, 40 Tex. 472; Cowan v. Nixon, 28 Tex. 230; Love v. McIntyre, 3 Tex. 10.

[a] A provision authorizing jurisdiction to be conferred where the property in question was not over a specified value, allows the legislature to confer jurisdiction in actions for damages to property to that extent. Malloy v. City of Fayetteville, 122 N. C. 480, 29 S. E. 880.

[b] A limitation on the amount of which justices of the peace shall have jurisdiction, under such a provision, does not operate as a grant of power to that limit, but the existing jurisdiction continues until the legislature modifies it. Paul & Co. v. Beegan, 1 Nev. 327.

49. State *ex rel.* Burke v. Hinkel, 144 Wis. 444, 129 N. W. 393.

50. Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178.

51. Markham v. Heffner, 67 Ill. 101; Phillips v. Quick, 63 Ill. 445.

to or affect statutes regulating the territorial extent of their jurisdiction.⁵²

Class discriminations in statutes conferring jurisdiction are unconstitutional.⁵³

C. CONCURRENT AND EXCLUSIVE JURISDICTION.—The jurisdiction of justices of the peace is not, necessarily, an exclusive one, but it is frequently shared by higher courts,⁵⁴ though in many states, express statutory provisions render their jurisdiction exclusive over various classes of actions,⁵⁵ especially those in which only a small amount is in controversy.⁵⁶ A statute which merely extends the jurisdiction of justices' courts over specified classes of action does not operate to deprive higher courts of their existing jurisdiction over such actions.⁵⁷

[a] **Prior local and special statutes** are abrogated. *Phillips v. Quick*, 63 Ill. 445; *McTigue v. Com.*, 99 Ky. 66, 35 S. W. 121.

52. *Wales v. Belcher*, 3 Pick. (Mass.) 508.

[a] **Uniformity of jurisdiction** required by a constitutional provision, is not violated in such cases since the word "jurisdiction" as there used refers to subject-matter exclusively. *Starnes v. Mutual Loan & Bank. Co.*, 102 Ga. 597, 29 S. E. 452.

53. *Brown v. Alabama G. S. R. Co.*, 87 Ala. 370, 6 So. 295; *O'Connell v. Menominee Bay Shore Lumb. Co.*, 113 Mich. 124, 71 N. W. 449.

[a] **Illustration.**—A general limitation as to the amount over which a justice has jurisdiction in tort actions cannot be altered by a special statute granting jurisdiction over actions against a railroad corporation for killing stock to a larger amount. *Brown v. Alabama G. S. R. Co.*, 87 Ala. 370, 6 So. 295. *Compare Steele v. Missouri Pac. Ry. Co.*, 84 Mo. 57, statute not unconstitutional as special legislation.

54. *Ala.*—*Carew & Sons v. Lillienthal*, 50 Ala. 44. *Conn.*—*Loomis v. Bourn*, 63 Conn. 445, 28 Atl. 569. *Fla.*—*McMillan v. Savage*, 6 Fla. 748. *Ga.*—*McDonald & Co. v. Feagin*, 43 Ga. 360. *Ill.*—*People v. Young*, 72 Ill. 411. *Ind.*—*Witz v. Haynes*, 43 Ind. 470; *Leathers v. Hogan*, 17 Ind. 242; *Chicago & S. E. Ry. Co. v. Spencer*, 23 Ind. App. 605, 55 N. E. 882. *Ia.*—*Hutton v. Drebilbis*, 2 G. Gr. 593. *Kan.*—*Henderson v. Kennedy*, 9 Kan. 163. *Ky.*—*Sams v. Stockton*, 14 B. Mon. 232. *Mich.*—*Craig v. Brown*, 171 Mich. 256, 137 N. W. 126; *Knorr v. Circuit Judge*, 78 Mich. 168, 43 N. W. 1099. *Mo.*—*Murphy v. Campbell*, 36 Mo. 110; *Jesse*

French Piano & O. Co. v. Walker, 76 Mo. App. 558; *Lang v. Calloway*, 68 Mo. App. 393. *N. H.*—*Stevens v. Chase*, 61 N. H. 340; *Rochester v. Roberts*, 29 N. H. 360. *N. M.*—*Romero v. Silva*, 1 N. M. 157. *N. Y.*—*Price v. Grant*, 15 Daly 436, 7 N. Y. Supp. 904, 28 N. Y. St. 422. *N. C.*—*Harvey v. Hambright*, 98 N. C. 446, 4 S. E. 187; *Montague v. Mial*, 89 N. C. 137. *Ohio.*—*Job v. Harlan*, 13 Ohio St. 485. *Pa.*—*Moyer v. Illig*, 52 Pa. 444. *Wash.*—*State v. Hunter*, 3 Wash. 92, 27 Pac. 1076.

55. See generally the statutes, and *Evans v. Stevens*, 8 Ala. 517; *Hardeman & Son v. Morgan*, 48 Tex. 103.

[a] **A statute creating a new right** and prescribing a particular remedy and giving jurisdiction to a justice's court in actions involving such matters confers an exclusive jurisdiction. *Reed v. Omnibus R. Co.*, 33 Cal. 212. See *Partlow v. Lawson*, 2 B. Mon. (Ky.) 46.

56. *Ala.*—*Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705. *Ark.*—*Smith v. Taylor*, 97 Ark. 424, 134 S. W. 634; *Huddleston v. Spear*, 8 Ark. 406; *Wilson v. Mason*, 3 Ark. 494. *Ky.*—*Tudder v. Warren's Admr.*, 6 J. J. Marsh. 93. *Mich.*—*Raymond v. Hinkson*, 15 Mich. 113. *Minn.*—*Castner v. Chandler*, 2 Minn. 86. *Mo.*—*Murphy v. Campbell*, 36 Mo. 110. *N. C.*—*Templeton v. Summers*, 71 N. C. 269.

Amount in controversy as test of jurisdiction, see generally the title "Jurisdiction."

57. *Ala.*—*Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705. *Cal.*—*Hicks v. Bell*, 3 Cal. 219. *Ill.*—*People v. Young*, 72 Ill. 411. *Ind.*—*Brookville v. Gagle*, 73 Ind. 117; *Redden v. Covington*, 29 Ind. 118. *Me.*

D. CONFERRING JURISDICTION BY CONSENT.⁵⁸—Where the subject-matter of the action is not within the jurisdiction of the justice, the consent of the parties cannot confer jurisdiction thereof.⁵⁹ The amount in controversy over which a justice of the peace is given jurisdiction,⁶⁰ cannot, in most states, be increased by the action of the parties,⁶¹ though in a few states the parties may, by their agreement, increase the amount over which a justice's court has jurisdiction to a sum which would otherwise not be within its jurisdiction.⁶² The territorial jurisdiction of a justice's court cannot be extended by the consent of a defendant:⁶³ nor can the parties by their consent give validity to the action of a justice of the peace in presiding over a court held beyond the limits of the territory over which his authority extends,⁶⁴

Abbott v. Knowlton, 31 Me. 77; *Ridlon v. Emery*, 6 Greenl. 261. **Tenn.**—*Taylor, Cole & McLeod v. Pope*, 5 Coldw. 413.

[a] **When Such Statutes Are Unconstitutional.**—Under a constitution authorizing the legislature to confer jurisdiction upon justice's courts which shall not trench upon the jurisdiction of higher courts, if jurisdiction in specially enumerated cases is given by the constitution to the higher courts, the legislature cannot confer concurrent jurisdiction in such cases upon justices of the peace: *State v. Schaffer*, 31 Wash. 305, 71 Pac. 1088; *Moore v. Perrot*, 2 Wash. 1, 25 Pac. 906.

58. As to jurisdiction by consent or waiver, see generally the title "**Jurisdiction.**"

59. Ala.—*Jeffries v. Harbin*, 20 Ala. 387. **Me.**—*Call v. Mitchell*, 39 Me. 465. **Mich.**—*Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688. **Mo.**—*Seeser v. Southwick*, 66 Mo. App. 667. **N. J.**—*Wheeler & Wilson Mfg. Co. v. Carty*, 53 N. J. L. 336, 21 Atl. 851. **N. C.**—*Slocumb v. Cape Fear Shingle Co.*, 110 N. C. 24, 14 S. E. 622; *Hughes v. Mason*, 84 N. C. 472. **Ohio.**—*Place v. Welch*, 2 Ohio Dec. (Reprint) 542. **Tex.**—*Crawford v. Saunders*, 9 Tex. Civ. App. 225, 29 S. W. 102, where title of the justice of the peace to the office did not exist. **Va.**—*Adams v. Jennings*, 103 Va. 579, 49 S. E. 982; *James v. Stokes*, 77 Va. 225. **Wyo.**—*Clendenning v. Guise*, 8 Wyo. 91, 55 Pac. 447.

[a] **Confession of judgment by a defendant in an action not within the jurisdiction of a justice of the peace cannot confer jurisdiction.** *Lawson v. Layton*, 4 Boyce (Del.) 91, 86 Atl. 105.

60. Amount in controversy as a test

of jurisdiction, see the title "**Jurisdiction.**"

61. Cal.—*Feillett v. Engler*, 8 Cal. 76, a judgment by consent is void. **Ga.**—*Yon v. Baldwin*, 76 Ga. 769. **Ind.**—*Horton v. Sawyer*, 59 Ind. 587. **Mich.**—*Spear v. Carter*, 1 Mich. 19, 48 Am. Dec. 688. **Mo.**—*Stone v. Corbett*, 20 Mo. 350. **N. Y.**—*Cook v. Cook*, 56 Misc. 249, 107 N. Y. Supp. 384. **N. C.**—*Carey v. Allegood*, 121 N. C. 54, 28 S. E. 61. **Tex.**—*Hackney v. Schow*, 21 Tex. Civ. App. 613, 53 S. W. 713, where an excessive amount was involved. **Va.**—*James v. Stokes*, 77 Va. 225.

62. Christensen v. Esbeck, 167 Iowa 130, 149 N. W. 76; *Wedgewood v. Parr*, 112 Iowa 514, 84 N. W. 528; *Haworth v. Newell*, 102 Iowa 541, 71 N. W. 404 (such a consent will be presumed); *Brown v. Davis*, 59 Iowa 641, 13 N. W. 861; *Marshalltown Bank v. Kennedy*, 53 Iowa 357, 5 N. W. 508. See *McCleary v. McLain*, 2 Ohio St. 368.

[a] **Consent to increased jurisdiction may be limited to a particular justice or class of justices.** *Brown v. Davis*, 59 Iowa 641, 13 N. W. 861.

[b] **Such a stipulation in each of two notes does not authorize a single action on both of them where the aggregate demand is above the regular jurisdiction of the justice's court.** *Hannasch v. Hoyt*, 127 Iowa 232, 103 N. W. 102. And see *Cole v. Bock* (Iowa), 105 N. W. 331.

63. Phillips v. Thralls, 26 Kan. 780; *Wheeler v. Schulman*, 165 Ky. 185, 176 S. W. 1017.

Waiver of objection of want of territorial jurisdiction, see *infra*, III, D, 1.

64. Ga.—*Bloek v. Henderson*, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325. **Ky.**—See *Wheeler v. Schulman*, 165 Ky. 185, 194, 176

though some authorities refuse to treat this as a jurisdictional question and recognize the power of the parties to clothe a justice of the peace with authority in such cases.⁶⁵ Jurisdiction over the person may be conferred by consent.⁶⁶

E. JURISDICTION AS DEPENDENT UPON ELECTION OF REMEDIES.—A party may waive a tort and recover upon the contract implied by the law,⁶⁷ though it is the rule under some cases that if a justice's court would have had no jurisdiction of the action arising from the wrongful act, it cannot acquire jurisdiction as a result of the act of the plaintiff in converting the action from a tort to a contract action;⁶⁸ and in some jurisdictions there can be no waiver of the tort where property converted has not been turned into money.⁶⁹ A right of action on contract may be waived and recovery sought in tort.⁷⁰ If the cause of action can be fairly treated as based either in tort or on contract, of one

S. W. 1017. **N. Y.**—Eisenberg *v.* Lape, 52 Misc. 329, 103 N. Y. Supp. 1023.

[a] There is a distinction between a justice going beyond the territorial limits of his jurisdiction, and a non-resident defendant submitting to jurisdiction. "Whenever a court has jurisdiction of the subject-matter of a suit, the defendant therein can waive the jurisdiction as to his person but if the court has neither jurisdiction of the subject-matter nor of the person, no waiver by the defendant can give the court jurisdiction. If in this case the magistrate had held his court within the limits of his jurisdiction and the defendant had resided outside of those limits and had gone before the magistrate and waived the jurisdiction as to his person, and the magistrate had entered up judgment against him, that judgment would have bound him. But when the magistrate went outside of the limits of his jurisdiction and undertook to hold his court, he neither had jurisdiction of the subject-matter nor of the person; and no waiver or agreement made before him outside of his jurisdiction could confer jurisdiction upon him. Outside of the limits of his district he was not a judge." Block *v.* Henderson, 82 Ga. 23, 8 S. E. 877, 14 Am. St. Rep. 138, 3 L. R. A. 325.

65. Rogers *v.* Loop, 51 Iowa 41, 50 N. W. 224; Holmes *v.* Igo, 110 Minn. 133, 124 N. W. 974.

66. Ala.—Woolf *v.* McGaugh, 175 Ala. 299, 57 So. 754. **Ariz.**—Parker *v.* Uchida, 14 Ariz. 57, 125 Pac. 715. **Ark.**—Manufacturing Co. *v.* Donahoe, 49 Ark. 318, 5 S. W. 342. **Ga.**—Charles *v.* Pitts, 16 Ga. App. 617, 85 S. E. 939. **Minn.**

Anderson *v.* Hanson, 28 Minn. 400, 10 N. W. 429. **Mo.**—Grimm *v.* Dundee Land & Inv. Co., 55 Mo. App. 457. **Okla.**—Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356. **S. C.**—Dennis *v.* Atlantic Coast Line R. R. Co., 86 S. C. 258, 68 S. E. 465.

See generally the titles "Appearances;" "Jurisdiction."

67. **Ark.**—Harris *v.* Simpson, 50 Ark. 422, 8 S. W. 177, fraudulent misrepresentations inducing a party to take a lease may be waived and a recovery had upon the implied promise of the lessor to return the money wrongfully received. **Ga.**—Rockwell *v.* Proctor, 39 Ga. 105. **Kan.**—Missouri Pacific Ry. Co. *v.* Atchison, 43 Kan. 529, 23 Pac. 610. **N. C.**—Manning *v.* Fountain, 147 N. C. 18, 60 S. E. 645 (where there has been a failure of consideration due to fraudulent representations); White *v.* Eley, 145 N. C. 36, 58 S. E. 437. **Pa.**—Thompson *v.* Chambers, 13 Pa. Super. 213.

As affecting the amount in controversy, see the title "Jurisdiction."

68. Webb *v.* Tweedie, 30 Mo. 488; Edwards *v.* Cowper, 99 N. C. 421, 6 S. E. 792.

[a] "When the action originates in a tortious act the jurisdiction is determined," and a trespass by cutting trees cannot be waived and an action brought for the money for which they were sold. Edwards *v.* Cowper, 99 N. C. 421, 6 S. E. 792.

69. Southern Ry. Co. *v.* Born Steel Range Co., 122 Ga. 658, 50 S. E. 488. And see Bates *v.* Bigby, 123 Ga. 727, 51 S. E. 717; Bullinger *v.* Marshall, 70 N. C. 520.

70. Murphy *v.* Thall, 17 Pa. Super.

of which forms of action the justice's court has jurisdiction, but not of the other, the court will, acting in support of jurisdiction, sustain the election made by the plaintiff.⁷¹ Covenant rather than debt cannot be adopted as the remedy sought by a plaintiff for the purpose of ousting a justice's court of jurisdiction.⁷²

F. JURISDICTION AS DEPENDENT UPON NATURE OF SUBJECT-MATTER.

1. In General.—The subject-matter over which justices of the peace have jurisdiction has been gradually but constantly extended.⁷³ A grant of jurisdiction to justices "in all civil actions" is in terms sufficiently broad to comprehend all actions which are not criminal;⁷⁴ it includes special proceedings.⁷⁵ A constitutional grant of jurisdiction over all "causes," within a specified amount, authorizes the conferring of jurisdiction over tort as well as contract actions.⁷⁶

2. Actions Ex Contractu.—*a. In General.*—The jurisdiction of justices of the peace commonly extends over contract actions, within the amount specified in the particular statute or constitution conferring the jurisdiction.⁷⁷ Where jurisdiction is given over all civil ac-

500, action for recovery for injury to property bailed.

71. Ark.—*St. Louis & N. A. R. Co. v. Wilson*, 85 Ark. 257, 107 S. W. 978, action against carrier to recover for failure to deliver goods shipped. **Ga.**—*William Fine & Bro. v. Southern Exp. Co.*, 10 Ga. App. 161, 73 S. E. 35. **N. C.**—*White v. Eley*, 145 N. C. 36, 58 S. E. 437; *Schulhofer v. Richmond & D. R. R. Co.*, 118 N. C. 1096, 24 S. E. 709 (action for injury to animals transported by a carrier); *Brittain v. Payne*, 118 N. C. 989, 24 S. E. 711.

72. Crabtree v. Moore, 7 Ark. 74.

73. Bell v. West Point, 51 Miss. 262.

[a] Extension Is Favored.—"Furthermore, the jurisdiction of these lower courts, near to the people and inexpensive, is to be favored. In them, matters in difference are settled in the neighborhood by magistrates who know the parties, and without the expense of attending many days at the perhaps distant county seat, with heavy bills of costs and the necessity of employing and paying counsel." *Malloy v. Fayetteville*, 122 N. C. 480, 29 S. E. 880.

[b] Admiralty jurisdiction has been conferred. *The Schooner Louisiana v. Pettyplace, Goodman & Co.*, 21 Ala. 286; *Monroe v. Brady*, 7 Ala. 59. Admiralty jurisdiction generally, see 1 STANDARD PROC. 365, et seq.

[c] Proceedings for the restoration of lost records of the court may be in-

stituted in a justice's court. *State ex rel. Brockway v. Whitehead*, 88 Wash. 549, 153 Pac. 349 (under a statute applying to courts in general). See generally the title "Records."

[d] Actions on lost instruments may be maintained therein. *Moore v. Frame*, 3 Harr. (Del.) 427; *Fisher v. Webb*, 84 N. C. 44. *Compare Baker v. Weaver*, 1 Ohio Cir. Dec. 222, 1 Ohio Cir. Ct. 397.

[e] No jurisdiction exists over a mere moot or abstract question. *Knight v. Wiltberger*, 4 Yeates (Pa.) 127. See generally the title "Jurisdiction."

74. Taylor v. Woods, 52 Ala. 474, but courts are loath to adopt the literal meaning of the phrase and find limitations on such general powers in the common law applicable to justices of the peace.

75. Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178, forcible detainer proceedings.

Jurisdiction over special proceedings in general, see *infra*, II, G, 3.

76. Bell v. West Point, 51 Miss. 262.

77. See generally the constitutions and statutes, and the following: **Ala.** *Pearce v. Pope*, 42 Ala. 319. **Cal.** *Raisch v. Sausalito Land & F. Co.*, 131 Cal. 215, 63 Pac. 346. **Ill.**—*Steamboat Delta v. Walker*, 24 Ill. 233; *Hartley v. Gilhofer*, 109 Ill. App. 527. **Pa.** *Kuhn v. Eggers*, 17 Pa. Co. Ct. 155. **S. C.**—*De Bruhl v. Parker*, 3 Brev. 406, 1 Tread. Const. 475. **Tenn.**—*Couger v. Lancaster*, 6 Yerg. 477.

tions founded on contract as is sometimes the case,⁷⁸ actions for unliquidated damages may be maintained.⁷⁹ Jurisdiction is sometimes conferred "in actions for the recovery of money only,"⁸⁰ or in actions for the payment of money or delivery of goods.⁸¹ On the other hand, jurisdiction is sometimes excluded where the action is one "sounding in damages merely."⁸² Purely consequential damages are not recoverable, under some statutes;⁸³ but damages specially imposed by statute may be recovered,⁸⁴ as may exemplary damages.⁸⁵ Jurisdiction is conferred over actions for which debt or assumpsit would lie,⁸⁶ and over actions on notes or bonds.⁸⁷ It has been held to exist over actions of

Amount in controversy as test of jurisdiction, see the title "Jurisdiction."

78. *Patterson v. Freeman*, 132 N. C. 357, 43 S. E. 904. Under the earlier law jurisdiction was limited to actions to recover money due on "bonds, notes and liquidated accounts." See *Johnson v. Olive*, 60 N. C. 213; *Spencer v. Hunsucker*, 30 N. C. 9; *Wall v. Nelson*, 28 N. C. 300; *Dwyer v. Cutler*, 12 N. C. 312.

79. *Ark.*—*Smith v. Taylor*, 97 Ark. 424, 134 S. W. 634; *Koch v. Kimberling*, 55 Ark. 547, 18 S. W. 1040; *Stanley v. Bracht*, 42 Ark. 210. *Del.*—*Cannon v. Matthews*, 3 Houst. 96. *N. C.* See *Bullinger v. Marshall*, 70 N. C. 520, 526. *Pa.*—*Shannon v. Madden*, 1 Phila. 254.

80. *Kan.*—*Hanson v. Lawson*, 19 Kan. 201, includes action to recover damages for breach of a personal contract. *Mont.*—*Oppenheimer v. Regan*, 32 Mont. 110, 79 Pac. 695, action to recover penalty for misconduct of a public officer cannot be maintained. *S. D.*—*Pyle v. Hand*, 1 S. D. 385, 47 N. W. 401, defining "action for recovery of money."

[a] **An action by a surety against the principal debtor** to compel the payment of the amount of the obligation, which has matured is within such a provision; the judgment "involves nothing in its nature different from any ordinary money judgment except the provision made for the protection of the principal debtor and the holder of the note." *Vincent v. Donnell*, 10 Kan. App. 554, 558, 63 Pac. 24.

81. *Wells v. Wright*, 3 Boyce (Del.) 598, 81 Atl. 507 (action for breach of warranty arising out of covenant for sale of horse cannot be maintained thereunder); *Anderson v. Nutter*, 2 Harr. (Del.) 300; *Howke v. Buford*, 8

B. Mon. (Ky.) 38; *Fortune v. Howard*, 4 J. J. Marsh. (Ky.) 171 (action for unliquidated damages does not lie).

[a] **Action for damages for failure of vendor to deliver property purchased at an auction sale** is within such a statute. *Gruell v. Clark*, 4 Penne. (Del.) 321, 54 Atl. 955.

82. *Cavender v. Funderburg*, 9 Port. (Ala.) 460.

[a] **Test for Application of This Rule.**—"To authorize a justice to take jurisdiction in cases of this description, the contract must itself furnish the measure of damages, or the rule by which they are to be ascertained. If no criterion is established by the parties themselves, or does not necessarily flow from the contract, the action must, in the language of the act, sound in damages merely and the justices' jurisdiction is ousted." *Cavender v. Funderburg*, 9 Port. (Ala.) 460.

83. *Jones v. Charles Warner Co.*, 2 Boyce (Del.) 566, 83 Atl. 131, damages flowing from use of inferior mortar.

84. *Morgan v. St. Louis, I. M. & S. Ry. Co.*, 106 Ark. 74, 152 S. W. 1023 (justice has jurisdiction of action by a discharged employe to recover wages due at time of his discharge and damages given by statute for failure to pay same); *Adamson v. Kay*, 100 Ark. 248, 140 S. W. 13. See *Leep v. St. Louis, I. M. & S. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264.

85. *Leep v. St. Louis, I. M. & S. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 85, 41 Am. St. Rep. 109, 23 L. R. A. 264.

86. *Ill.*—*Dowling v. Stewart*, 4 Ill. 193. *Ind.*—*Steepleton v. McNeely*, 6 Blackf. 76. *Ky.*—*Coleman v. Cason*, 3 J. J. Marsh. 234; *Latham v. Ford*, 1 A. K. Marsh. 410; *Patterson v. Martin*, 1 A. K. Marsh. 348.

87. *Howard v. Clark*, 43 Mo. 344;

covenant,⁸⁸ as well as actions for money had and received,⁸⁹ for goods sold,⁹⁰ on contracts of employment,⁹¹ on contracts of agency,⁹² or of guaranty,⁹³ to recover, under contracts of bailment, the value of the property bailed,⁹⁴ for breach of personal contracts,⁹⁵ for breach of warranty in a contract of sale.⁹⁶ It has also been held to exist in actions on judgments,⁹⁷ in actions against stockholders, to enforce their statutory liability to creditors of the corporation,⁹⁸ as well as in actions to recover a legacy,⁹⁹ against carriers to recover for the loss of goods shipped,¹ against purchasers at judicial sale to recover the amount of the bid,² and against a sheriff for the escape of a prisoner.³ An action

Brady v. Chandler, 31 Mo. 28; Powers v. Nahm, 7 Heisk. (Tenn.) 583.

Jurisdiction in actions on bonds, see *infra*, II, F, 2, c.

[a] An indirect, collateral, or contingent liability, such as the liability of an endorser on a note is not within a statute conferring jurisdiction on all debts and demands "where the balance is due upon any specialty, note, agreement or settled account." Mitchell v. Miller, Meigs (Tenn.) 510.

[b] Destruction of a note owing to threats of the maker, is not an "intentional" destruction, as that term is used in a statute which would prevent a recovery on a note in a justice's court. Leighty v. Murr (Mo. App.), 186 S. W. 734.

88. Colesberry v. Stoops, 1 Harr. (Del.) 448; Farrow v. Summers, 3 Litt. (Ky.) 460.

89. Ill.—Hartley v. Gilhofer, 109 Ill. App. 527. N. C.—Manning v. Fountain, 147 N. C. 18, 60 S. E. 645. Tenn. Ayres v. Moulton, 5 Coldw. 154.

Jurisdiction where the basis of the action is a tort which has been waived, see *supra*, II, E.

90. Deichman v. Brueggestradt, 2 Mo. App. 601.

91. Cannon v. Matthews, 3 Houst. (Del.) 96, by employer against employee who has left his service. See generally the title "Master and Servant."

92. Smith v. Taylor, 97 Ark. 424, 134 S. W. 634, by the principal.

See generally the title "Principal and Agent."

93. Redmond v. Galena & S. W. Ry. Co., 39 Wis. 426.

94. Ala.—Spann v. Boyd, 2 Stew. 480. Ark.—Stanley v. Bracht, 42 Ark. 210. Ga.—Bates v. Bigby, 123 Ga. 727, 51 S. E. 717. Pa.—Todd v. Figley, 7 Watts 542; McCahan v. Hirst, 7 Watts 175.

95. Kan.—Hanson v. Lawson, 19 Kan. 201. Ky.—Howke v. Buford, 8 B. Mon. 38. Pa.—Seldomridge v. Gible, 49 Pa. Super. 498; Kuhn v. Eggers, 17 Pa. Co. Ct. 155.

96. McKibben v. Lester, 9 Ohio St. 627; Caldwell v. Garmany, 3 Hill L. (S. C.) 202; Cohen v. Saddler, 2 McCord (S. C.) 239. Compare Wells v. Wright, 3 Boyce (Del.) 598, 81 Atl. 507.

97. Moore v. Nowell, 94 N. C. 265. See McDonald v. Dickson, 87 N. C. 404. Contra, Baldwin v. Coyle, 7 Houst. (Del.) 327, 32 Atl. 15 (foreign judgment); Eason v. Smith, 8 Serg. & R. (Pa.) 343; Ellsworth v. Barstow, 7 Watts (Pa.) 314; Katch v. Benton Coal Co., 19 Pa. Super. 476.

[a] Scire facias on judgments rendered by other justices of the peace does not lie. Ky.—Clifford v. Cabiness, 31 Dana 384. Mo.—Wilson v. Tiernan, 3 Mo. 577. N. J.—Tindall v. Carson, 16 N. J. L. 94. Vt.—Gibson v. Davis, 22 Vt. 374.

Actions on judgments generally, see the title "Judgments and Decrees, Enforcement of."

98. Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 1031.

99. Woodruff v. Woodruff, 3 N. J. L. 552, a legacy is to be treated as a debt. But see Montgomery v. Heilman, 96 Pa. 44, action to recover distributive share does not lie.

1. Ark.—Midland Val. R. Co. v. Hale, 86 Ark. 483, 111 S. W. 646; St. Louis, I. M. & S. R. Co. v. Heath, 41 Ark. 476. Ga.—William Fine & Bro. v. Southern Exp. Co., 10 Ga. App. 161, 73 S. E. 35; Southern Ry. Co. v. Maddox, 7 Ga. App. 650, 67 S. E. 838. Ind. Ter.—American Express Co. v. Lankford, 1 Ind. Ter. 233, 39 S. W. 817. Pa.—Hunt v. Wynn, 6 Watts 47.

2. Fulton v. Tate, 47 Pa. 532.

3. Lockhart v. Hays, 1 Mo. 271;

lies in justice's court on an implied contract or agreement,⁴ though there is authority to the contrary,⁵ especially as to those contracts which in some states are held to arise out of the compact of government.⁶ Jurisdiction has been held not to exist over actions, for breach of contract to marry,⁷ or against the drawee on a protested bill of exchange.⁸

b. *Accounts*.—Actions to recover balances due on accounts may be maintained in justice's court.⁹

c. *Bonds*.¹⁰—Actions on bonds given to secure the performance of contracts or obligations may be maintained before a justice of the peace;¹¹ and bonds given in the course of judicial proceedings may be enforced in a justice's court.¹² Actions on the bonds of public offi-

Jansen *v.* Stoutenbergh, 9 Johns. (N. Y.) 369. *Contra*, Schaffer *v.* McNamee, 13 Serg. & R. (Pa.) 44, although the remedy is debt the action is founded in tort.

4. Ark.—Adamson *v.* Kay, 100 Ark. 248, 140 S. W. 13 (action based on a statutory liability); Midland Val. R. Co. *v.* Hale, 86 Ark. 483, 111 S. W. 646 (action against a connecting carrier is on an implied contract); Harris *v.* Simpson, 50 Ark. 422, 8 S. W. 177; Thruston *v.* Hinds, 8 Ark. 118 (for use and occupation). Del.—Dougherty *v.* Thompson, 3 Houst. 128. Ga.—Rockwell *v.* Proctor, 39 Ga. 105, action for loss of goods at an inn. Mo.—Meis *v.* Geyer, 4 Mo. App. 404, action by endorsee of note against the endorser. N. C.—Winslow *v.* Weith, 66 N. C. 432; Mitchell *v.* Walker, 30 N. C. 243; Ferrell *v.* Underwood, 13 N. C. 111. S. C. Hyams *v.* Michel, 3 Rich. L. 303, even though the form of action is trespass on the case.

[a] Right to waive a tort and sue on the implied contract, see *supra*, II, E.

5. Oppenheimer *v.* Regan, 32 Mont. 110, 79 Pac. 695, action against public officer to recover penalty for misfeasance in office.

6. Zeigler *v.* Gram, 13 Serg. & R. (Pa.) 102, action to recover a penalty. See Ellmore *v.* Hoffman, 2 Ashm. (Pa.) 159; Birkhead *v.* Ward, 35 Pa. Super. 235; Murphy *v.* Thall, 17 Pa. Super. 500; City of Pittsburgh *v.* Baly, 5 Pa. Super. 528.

[a] This doctrine (1) does not exclude jurisdiction over cases of implied contracts (Conn *v.* Stumm, 31 Pa. 14 [action in assumpsit on the implied contract of an employe to perform work with care and skill]), (2) or of

tort actions in which the foundation of the action is in reality a breach of contract. Croskey *v.* Wallace, 22 Pa. Super. 112; Murphy *v.* Thall, 17 Pa. Super. 500.

7. Huling *v.* Rife, 3 J. J. Marsh. (Ky.) 587, the damages being uncertain. Compare Comstock *v.* Howd, 15 Mich. 237, 243.

8. Lawson *v.* Layton & Layton, 4 Boyce (Del.) 91, 86 Atl. 105, until accepted a draft is not a contract. But see Nimocks *v.* Woody, 97 N. C. 1, 2 S. E. 249, 2 Am. St. Rep. 268, where the drawee had written the drawer that he might draw the bill.

9. Ark.—Brinkley *v.* Barinds, 7 Ark. 165. Conn.—Bulkly *v.* Lewis, 1 Root 217. Ga.—Seaboard Air Line Ry. *v.* Coursey, 1 Ga. App. 662, 57 S. E. 968. Mo.—Stephenson *v.* Porter, 45 Mo. 358; Floyd *v.* Wiley, 1 Mo. 430. N. J. Keep *v.* Kelly, 32 N. J. L. 56. N. Y. Sherry *v.* Cary, 111 N. Y. 514, 19 N. E. 87. Ohio.—Bickett *v.* Garner, 21 Ohio St. 659; Black *v.* Chesser, 12 Ohio St. 621. Tenn.—Ayres *v.* Moulton, 5 Coldw. 154. Tex.—Davis *v.* Pinckney, 20 Tex. 340.

Actions to compel an accounting, see *infra*, II, G, 1, b.

10. See generally the title "Bonds."

11. Ind.—Evans *v.* Shoemaker, 2 Blackf. 237. N. C.—Pittsburgh, J. E. & E. R. Co. *v.* Wakefield Hdw. Co., 135 N. C. 73, 47 S. E. 234, against surety. Tenn.—McFadgen *v.* Eisenmidt, 10 Humph. 567, bond for title. Tex.—Compare Heard *v.* Conly (Tex. Civ. App.), 50 S. W. 1047.

12. Ga.—Lovejoy *v.* Woolfolk, 105 Ga. 252, 31 S. E. 164, bond given to obtain a garnishment. Mo.—Cockrill *v.* Owen, 10 Mo. 287, recognizance on appeal. But see Wimer *v.* Brotherton,

cers,¹³ or of other persons,¹⁴ given to secure the proper performance of duties may ordinarily be maintained in a justice's court; but such actions cannot be maintained where jurisdiction is limited to actions for the payment of money.¹⁵

3. **Actions Ex Delicto.**—a. *In General.*—While, originally, justices of the peace had little, if any, jurisdiction over tort actions, their present jurisdiction over this class of cases is now quite extensive.¹⁶ They still have no jurisdiction of actions on the case in some states,¹⁷ though in other states, such jurisdiction has been conferred upon them.¹⁸ Jurisdiction does not exist in some states over actions for the misfeasance of officers,²⁰ though in other states such actions may be

7 Mo. 264. N. J.—Hughes v. Hughes, 3 N. J. L. 577, *replevin bond*.

[a] **Limitations.**—In some states a bond given in a judicial proceeding can be enforced only before the justice of the peace before whom the action was pending. *Sims v. Kennedy*, 67 Kan. 383, 73 Pac. 51, *attachment bond* cannot be enforced before justice to whom the case had been removed.

13. Ill.—Robertson v. County Comrs., 10 Ill. 559, *constable's bond*. Kan. Dodge v. Kincaid Bros., 30 Kan. 346, 1 Pac. 107. Ky.—Pantlow v. Lawson, 2 B. Mon. 46. Mo.—State v. Muir, 24 Mo. 263. N. Y.—Sutherland v. McKinney, 18 Civ. Proc. 216, 10 N. Y. Supp. 876. Tex.—Lane v. Delta County (Tex. Civ. App.), 109 S. W. 866. Wis.—Cassville v. Morris, 14 Wis. 440.

See generally the title "Officers."

But see, Md.—State v. Tabler, 41 Md. 236, *statute conferring jurisdiction on bonds with a penalty, applies only to money bonds and not to official bonds*. N. C.—Wright v. Kinney, 123 N. C. 618, 31 S. E. 874. Ohio. Collins v. Parker, 63 Ohio St. 16, 57 N. E. 959 (although a general action may be maintained for failure to turn over moneys collected an action on his bond for this purpose does not lie); Hornbuckle v. State, 37 Ohio St. 361; Ford v. Parker, 4 Ohio St. 576 (*postmaster's bond*); Hall v. Strong, 2 Ohio Dec. (Reprint) 168 (*sheriff's bond*); Burrows v. Bliss, 2 Ohio Dec. (Reprint) 228.

14. Livingston v. Allen, 80 Mo. App. 521 (*indemnity bond*); O'Neil v. Martin, 1 E. D. Smith (N. Y.) 404, *administrator's bond*. Contra, Hackworth v. Robinson, 31 Ohio St. 655, *administrator's bond*.

15. Green v. Clawson, 5 Houst. (Del.) 159.

[a] **Guardian's Bond.**—"The bond is not an obligation for the direct payment of money or for any of the objects or purposes which are specified in the statute, but is conditioned for the faithful performance by the guardian of the duties of his office." Green v. Clawson, 5 Houst. (Del.) 159.

16. Brown v. Alabama G. S. R. R. Co., 87 Ala. 370, 6 So. 295; Malloy v. Fayetteville, 122 N. C. 480, 29 S. E. 880.

17. Del.—Duross v. Hobson, 3 Penne. 445, 53 Atl. 438; Guenford v. Loose, 5 Houst. 596, *for loss of time incurred by owner of threshing outfit by reason of having the belt on the thresher cut*. Ill.—Western Union Tel. Co. v. Dubois, 128 Ill. 248, 254, 21 N. E. 4; Underwood v. Ankrum, 190 Ill. App. 365. Pa.—Masteller v. Trimble, 6 Binn. 33; Mann v. Bower, 8 Watts (Pa.) 179; Birkhead v. Ward, 35 Pa. Super. 235; Ripple v. Keast, 16 Pa. Co. Ct. 548; Freedom v. Snowden, 5 Pa. Dist. 73; Thilow v. Philadelphia Traction Co., 4 Pa. Dist. 83; Heineke v. Kohler, 2 Phila. (Pa.) 44; Douglass v. Davidson, 1 Phila. (Pa.) 516. See Northrup v. Smothers, 39 Ill. App. 588.

[a] **In Illinois** actions for the taking, detention or injury of personal property are within the jurisdiction of the justice whether the damages are direct or consequential. Griffith v. Pennington, 158 Ill. App. 314.

18. Kan.—Wilkins v. Lee, 73 Kan. 321, 85 Pac. 140. Ky.—Waggoner v. Highbaugh, 10 B. Mon. 196, *since 1840*. N. Y.—Hasbrouck v. Baker, 10 Johns. 248, *for injury due to failure of witness to attend trial after being subpoenaed*. But see Worden v. Brown, 14 How. Pr. 327.

20. Ark.—Merfield v. Burkett, 56 Ark. 592, 20 S. W. 523. Neb.—Nei-

maintained.²¹ Actions for breach of a public duty cannot be maintained.²²

b. *Torts Against the Person*.—Many limitations exist upon the jurisdiction of justices of the peace over torts affecting the person. In some states no action can be maintained for slander,²³ for an assault and battery,²⁴ for malicious prosecution,²⁵ or false imprison-

hardt v. Kilmer, 12 Neb. 35, 10 N. W. 531. Ohio.—Collins v. Parker, 63 Ohio St. 16, 57 N. E. 959; Hornbuckle v. State, 37 Ohio St. 361. Okla.—*Ex parte* Moody, 3 Okla. Crim. 590, 108 Pac. 431.

[a] Action for false return on and failure to levy an execution cannot be maintained against a constable in justice's court. Merfield v. Burkett, 56 Ark. 592, 20 S. W. 523. See Oppenheimer v. Regan, 32 Mont. 110, 79 Pac. 695.

[b] Neglect of Officer To Return an Execution.—See Humphries v. Webster, 1 Harr. (Del.) 34, the rule is now changed by statute.

*21. Ill.—Skinner v. Morgan, 21 Ill. App. 209, failure of commissioner of highway to keep road in repair causing injury to property. N. Y.—Van Vleck v. Burroughs, 6 Barb. 341 (action against justice of the peace for refusing to issue an execution); Sutherland v. McKinney, 18 Civ. Proc. 216, 10 N. Y. Supp. 876, action for insufficient levy. Ohio.—Powell v. Jones, 12 Ohio 35. Pa.—Bartlett v. Achey, 38 Pa. 273. But see Montgomery v. Poorman, 6 Watts 384.

[a] Action Lies for the Wrongful Seizure and Sale of Property on Execution.—Pressel v. Bice, 142 Pa. 263, 21 Atl. 813 (trespass); Stamer v. Nass, 3 Grant. Cas. (Pa.) 240; Sullivan v. Ellison, 20 S. C. 481, such an action is "an action for damages for injury to rights pertaining to personal property." But see Davenport v. Corley, 1 Bailey (S. C.) 594, action for neglecting to levy an execution does not lie.

[b] Action to recover a penalty for non-performance of public duty is sometimes regarded as an acti ex contractu and maintainable in justice's court. Templeton v. Beard, 159 N. C. 63, 74 S. E. 735.

22. Smith & Simpson Lumb. Co. v. Louisville & N. B. R. Co., 4 Ga. App. 714, 62 S. E. 472 (for failure of railroad to promptly deliver freight to the consignee); Western Union Tel. Co. v.

Cooper, 2 Ga. App. 376, 58 S. E. 517 (action of sendee of telegraph message for breach of duty of prompt delivery); Savannah, F. & W. Ry. Co. v. Snider, 1 Ga. App. 14, 57 S. E. 898 (for failure of railroad to furnish cars to shipper); Pyle v. Hand, 1 S. D. 385, 47 N. W. 401, action by public officer to recover from the county necessary expenditures.

23. Sparks v. Holston, 3 N. J. L. 644; Engelking v. Von Wamel, 26 Tex. 469. See generally the title "Libel and Slander."

[a] Where "damages for injury to the person" may, by statute, be recovered in a justice's court, an action for slander may be maintained. McKenzie v. Doran, 39 Mont. 593, 104 Pac. 677, under an amendment of 1907 such actions can no longer be maintained.

24. N. J.—Bates v. Adams, 3 N. J. L. 984; Carman v. Smock, 2 N. J. L. 111; Marentille v. Oliver, 2 N. J. L. 358. N. Y.—Rich v. Hogeboom, 4 Denio 453; King v. Parks, 19 Johns. 375, justice of the peace in New York had jurisdiction over assaults committed on the high seas or in foreign ports. Ohio. See Schmulback Brew. Co. v. Archer, 42 Ohio St. 213. Tex.—*Contra*, Bumpus v. Fisher, 21 Tex. 561, where no deadly weapon was used.

[a] Action by a father for an assault on his minor child cannot be maintained. Horne v. Mandelbaum, 13 Ill. App. 607.

[b] A trespass on the person is not necessarily an assault and battery, and if it is not, an action may be maintained before a justice of the peace. Schmulback Brew. Co. v. Archer, 42 Ohio St. 213, action for injuries received from being run over by team negligently driven by defendant's employee.

25. Ga.—Williams v. Sulter, 76 Ga. 355, for suing out garnishment maliciously and without probable cause. Neb.—Rice v. Day, 34 Neb. 100, 51 N. W. 464, wrongfully suing out attach-

ment.²⁶ An action to recover for another's death cannot be maintained;²⁷ but under a statute conferring jurisdiction over actions for injuries to persons, actions for injuries to relative rights are included.²⁸ An action by the addressee for delay in delivery of a telegraph message, cannot be maintained.²⁹

c. *Torts Against Property*.—By some statutes jurisdiction is conferred in actions for "all matters of damage,"³⁰ or in "cases of injuries or damages to,"³¹ personal property; by other statutes and constitutional provisions, jurisdiction is conferred in civil actions not founded on contract when the value of the property in controversy does not exceed a specified amount.³² Jurisdiction exists over trover³³

ment. N. J.—*Contra*, Mathews v. Ferguson, 5 N. J. L. 822. N. Y.—Edwards v. Elbert, 12 Johns. 466. Wis.—Baldwin v. Hamilton, 3 Wis. 747.

See generally the title "Malicious Prosecution."

26. Jeffers v. Brookfield, 1 N. J. L. 38.

27. Sponseller v. Cleveland T. & V. Ry. Co., 8 Ohio Dec. 307.

28. Wightman v. Devere, 33 Wis. 570. See Chase v. Hale, 8 Johns. (N. Y.) 461, action lies for enticing away a man's wife.

[a] Action for damages resulting from the intoxication of a person may be maintained under such a statute. Wightman v. Devere, 33 Wis. 570.

29. Western Union Tel. Co. v. Cooper, 2 Ga. App. 376, 58 S. E. 517; Western Union Tel. Co. v. Dubois, 128 Ill. 248, 254, 21 N. E. 4, the action is in case and not assumpsit.

30. St. Louis, I. M. & S. Ry. Co. v. Briggs, 47 Ark. 59, 14 S. W. 464; Stanley v. Bracht, 42 Ark. 210; Saint Louis, I. M. & S. Ry. Co. v. Heath, 41 Ark. 476.

31. Blocker v. Boswell, 109 Ga. 230, 34 S. E. 289; Dorsey v. Miller, 105 Ga. 88, 31 S. E. 736.

[a] Definition.—"The words 'injuries or damages' were evidently intended to be synonymous; and, when applied to property they mean some physical injury to the property itself, some trespass upon it, by virtue of which its value has become diminished or destroyed. Conversion implies no such injury. An action of trover, therefore, has no reference to any injury or damage which the property itself may have sustained." Blocker v. Boswell, 109 Ga. 230, 34 S. E. 289.

[b] Total destruction of personal property is included within the phrase "injuries or damages" to personal property. Seaboard Air Line Ry. v. Smith, 3 Ga. App. 644, 60 S. E. 353.

[c] Detention of personal property does not give rise to an action for damage to the property; the injury is to the owner. White Star Line Steamboat Co. v. Gordon, 81 Ga. 47, 7 S. E. 231.

[d] Action for fraudulent removal of property subject to plaintiff's lien cannot be maintained. Dorsey v. Miller, 105 Ga. 88, 31 S. E. 736.

32. Const. of North Carolina, art. IV, §27; Code, §887. Under the earlier law no jurisdiction in tort existed. See Nance v. Carolina Cent. R. Co., 76 N. C. 9 (trover); Heptinstall v. Rue, 75 N. C. 78 (negligent loss of property); Bullinger v. Marshall, 70 N. C. 520.

[a] Phrase "value of the property in controversy" has been construed as meaning the damages claimed from injury to or loss of the property. Duckworth v. Mull, 143 N. C. 461, 55 S. E. 850.

Amount in controversy and value of property as test of jurisdiction, see the title "Jurisdiction."

33. Ala.—Burns v. Henry, 67 Ala. 209, the law was formerly otherwise. See Williams v. Hinton, 1 Ala. 297. Ark.—Parks v. Webb, 48 Ark. 293, 3 S. W. 521. Mo.—Smith v. Grove, 12 Mo. 51. Neb.—Spielman v. Flynn, 19 Neb. 342, 27 N. W. 224; Neihardt v. Kilmer, 12 Neb. 35, 10 N. W. 531. N. J. Anonymous, 3 N. J. L. 930.

Contra, Southern Ry. Co. v. Born Steel Range Co., 122 Ga. 658, 50 S. E. 488; Watson v. Pearre, 110 Ga. 320, 35 S. E. 316; McHenry v. Mays, 110

and actions of replevin, or claim and delivery,³⁴ trespass against personal property,³⁵ actions against a carrier for nondelivery or delay in delivery or damages to property shipped,³⁶ for loss of or injury to personal property by reason of negligence,³⁷ and of actions to recover damages occasioned by a nuisance.³⁸ No jurisdiction exists over

Ga. 299, 34 S. E. 1010; *Blocker v. Boswell*, 109 Ga. 230, 34 S. E. 289, *distinguishing James v. Smith*, 62 Ga. 345.

[a] **Conversion by officer by wrongful execution** gives a cause of action maintainable in a justice's court. *Spielman v. Flynn*, 19 Neb. 342, 27 N. W. 224; *Neihardt v. Kilmer*, 12 Neb. 35, 10 N. W. 531; *Miller v. Roby*, 9 Neb. 471, 4 N. W. 65.

34. **Ind.**—*Rodman v. Kelly*, 13 Ind. 377; *Perkins v. Smith*, 4 Blackf. 299. **Mass.**—*Jordan v. Dennis*, 7 Met. 590, jurisdiction in replevin exists only for beasts distrained for going at large. **Mich.**—*Bostwick v. Wayne Circ. Judge*, 115 Mich. 363, 73 N. W. 427 (a replevin action is not within a statute enlarging jurisdiction in civil actions for the recovery of a debt or damages); *Cook v. Bossett*, 1 Mich. N. P. 299. **Mo.**—*McKnight v. Crinnion*, 22 Mo. 559; *Varney v. Jackson*, 66 Mo. App. 348, where right of possession and title is claimed under a chattel mortgage. **N. Y.**—*Crouse v. Walrath*, 41 How. Pr. 86; *Delin v. Stohl*, 2 Civ. Proc. 222. **N. C.**—*Thomas v. Cooksey*, 130 N. C. 148, 41 S. E. 2, by vendor to recover possession of property sold conditionally. **S. C.**—*Dillard v. Samuels*, 25 S. C. 318. **Tenn.**—*Hockaday v. Wilson*, 1 Head 113. **Vt.**—*Tripp v. Leland*, 39 Vt. 63. **Wis.**—*Zitske v. Goldberg*, 38 Wis. 216.

[a] **Title deeds** may be recovered. *Wilson v. Rybolt*, 17 Ind. 391, 79 Am. Dec. 486. But see *Simmons v. Curtis*, 43 Minn. 539, 45 N. W. 1135.

35. *Hobbs v. Geiss*, 13 Serg. & R. (Pa.) 417; *Dolph v. Ferris*, 7 Watts & S. (Pa.) 367, 42 Am. Dec. 246. But see *State v. Weeks*, 14 S. C. 400.

36. **Ark.**—*St. Louis, I. M. & S. Ry. Co. v. Heath*, 41 Ark. 476. **Ill.**—*Cleveland, C. C. & St. L. Ry. Co. v. McNutt*, 138 Ill. App. 66. **N. C.**—See *Brick v. Atlantic Coast L. R. Co.*, 142 N. C. 358, 55 S. E. 194.

37. **Ark.**—*Wells v. Steele*, 31 Ark. 219, in operating and maintaining a ferry. **Del.**—*Conner v. Reardon*, 8

Houst. 19, 31 Atl. 878. **Ill.**—*Griffith v. Pennington*, 158 Ill. App. 314; *Cleveland, C. C. & St. L. Ry. Co. v. McNutt*, 138 Ill. App. 66; *Smithley v. Snowden*, 120 Ill. App. 86; *Kellar v. Shippee*, 45 Ill. App. 377; *Northrup v. Smothers*, 39 Ill. App. 588; *Gallery v. Davis*, 35 Ill. App. 619; *Skinner v. Morgan*, 21 Ill. App. 209; *Workman v. Neal*, 21 Ill. App. 293. **Kan.**—*Loring v. Rockwood*, 13 Kan. 178, loss by fire negligently set out. **Pa.**—*Porter v. Butchers' Ice & Coal Co.*, 11 Pa. Co. Ct. 256, trespass. But see *Freedom Twp. v. Snowden*, 5 Pa. Dist. 73, where the cause of action is trespass on the case no jurisdiction exists.

[a] **Consequential damages** may be recovered in such actions in some states. *Griffith v. Pennington*, 158 Ill. App. 314; *Cleveland, C. C. & St. L. Ry. Co. v. McNutt*, 138 Ill. App. 66.

[b] **Actions against (1) railroads for the killing of stock on the tracks** may be brought in justices' courts where the value of the stock is in an amount within their jurisdiction (*Western & Atlantic R. R. Co. v. Brown*, 58 Ga. 534; *Seaboard Air Line Ry. Co. v. Smith*, 3 Ga. App. 644, 60 S. E. 353; *See Malloy v. City of Fayetteville*, 122 N. C. 480, 29 S. E. 880 (*distinguishing Nance v. Carolina Cent. R. Co.*, 76 N. C. 9), (2) and, in some jurisdictions irrespective of the value of the property. *Steele v. Missouri Pac. Ry. Co.*, 84 Mo. 57; *Hudson v. St. Louis K. C. & N. R. R. Co.*, 53 Mo. 525. *Contra*, *Brown v. Alabama G. S. R. Co.*, 87 Ala. 370, 6 So. 295, but see *Kansas City, M. & B. R. Co. v. Whitehead*, 109 Ala. 495, 19 So. 705.

38. *Will v. Sinkwitz*, 41 Cal. 588; *Hastings v. Mills*, 50 Neb. 842, 70 N. W. 381, injury to the person.

Contra, Ohio.—*Harrington v. Heath*, 15 Ohio 483; *Nichol v. Patterson*, 4 Ohio 200; *Maeller v. Flowers*, 7 Ohio (pt. 2) 230. **Pa.**—*Heisey v. Witmer*, 4 Pa. Dist. 290, since the action is trespass on the case. **Vt.**—*Whitney v. Bowen*, 11 Vt. 250, since title to real property may be invaded.

actions for fraud and deceit.³⁹ Jurisdiction over actions for injuries to real property ordinarily exists except where title to the land is involved.⁴⁰

4. **Actions Relating to Real Estate.** — a. *In General.* — The general rule is that justices of the peace have no jurisdiction over actions involving the title to real property,⁴¹ and a judgment rendered in such a case is void.⁴² Statutes have conferred such jurisdiction in a limited class of cases, however.⁴³

Tests To Determine Whether Jurisdiction Exists. — Considerable diversity of opinion exists concerning the rules applicable to a determination of the question as to when title to real estate is involved or so concerned that the jurisdiction of the justice's court will be ousted, due in part, to the varying language of the statutory provisions govern-

39. *State v. Taylor*, 33 Mont. 212, 83 Pac. 484.

40. See *infra*, II, F, 4, g.

41. *Ala.*—*Webb v. Carlisle, Jones & Co.*, 65 Ala. 313. *Ark.*—*Minton v. Minton*, 81 Ark. 192, 98 S. W. 976; *Cunningham v. Holland*, 40 Ark. 556; *Bush v. Visant*, 40 Ark. 124. *Cal.*—*Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718; *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, 35 Pac. 633. *Colo.*—*Klopper v. Keller*, 1 Colo. 410. *Conn.*—*Bundy v. Sabin*, 2 Root 54. *Ga.*—*Dougherty v. Marsh*, 11 Ga. 277. *Idaho.*—*Hamner v. Garrett*, 15 Idaho 657, 99 Pac. 124. *Ind.*—*Bridges v. Branam*, 133 Ind. 488, 33 N. E. 271; *Maxam v. Wood*, 4 Blackf. 297. *Ia.*—*Delzell v. Burlington, C. R. & N. Ry. Co.*, 89 Iowa 208, 56 N. W. 433. *Kan.*—*Douglass v. Easter*, 32 Kan. 496, 4 Pac. 1034. *Ky.*—*Ackerson v. Semple*, 163 Ky. 395, 173 S. W. 1153. *Md.*—*Josselson v. Sonneborn*, 110 Md. 546, 73 Atl. 650; *Cole v. Hynes*, 46 Md. 181. *Mass.*—*Kelley v. Taylor*, 17 Pick. 218. *Mich.*—*Orris v. Kempton*, 105 Mich. 229, 63 N. W. 68. *Minn.*—*Tordsen v. Gimmer*, 37 Minn. 211, 24 N. W. 20. *Mo.*—*McMurray v. Garnett* (Mo. App.), 182 S. W. 128. *Neb.*—*Stone v. Blanchard*, 87 Neb. 1, 126 N. W. 766; *Galligher v. Connell*, 23 Neb. 391, 36 N. W. 566. *N. H.*—*Bartlett v. Prescott*, 41 N. H. 493. *N. J.*—*Bloom v. Stenner*, 50 N. J. L. 59, 11 Atl. 131; *Osborne v. Butcher*, 28 N. J. L. 308. *N. Y.*—*Willoughby v. Jenks*, 20 Wend. 96; *Doughty v. Kingsley*, 69 Misc. 142, 126 N. Y. Supp. 285. *N. C.*—*Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693; *Campbell v. Potts*, 119 N. C. 530, 26 S. E. 50. *N. D.*—*Hegar v. De Groat*, 3 N. D. 354, 56 N.

W. 150. Ohio.—*Crafts v. Prior*, 51 Ohio St. 21, 36 N. E. 1070; *Bowers v. Pomerooy*, 21 Ohio St. 184; *Bridgmans v. Wells*, 13 Ohio 43. *Okla.*—*McHenry v. Gregory*, 156 Pac. 1158. *Ore.*—*Malarky v. O'Leary*, 34 Ore. 493, 56 Pac. 521. *Pa.*—*Rhoades v. Patrick*, 27 Pa. 323; *Birkhead v. Ward*, 35 Pa. Super. 235. *R. I.*—*Carroll v. Rigney*, 15 R. I. 81, 23 Atl. 46. *Vt.*—*Heath v. Robinson*, 75 Vt. 133, 53 Atl. 995 (except in trespass to \$20); *Thayer v. Montgomery*, 26 Vt. 491; *Haven v. Needham*, 20 Vt. 183, even a possessory title. *Va.*—*Martin v. Richmond*, 108 Va. 765, 62 S. E. 800; *Warwick v. Mayo*, 15 Gratt. (56 Va.) 528; *Miller v. Marshall*, 1 Va. Cas. (3 Va.) 158. *W. Va.*—*Belcher v. Gaston*, 4 W. Va. 639. *Wis.*—*Huddleston v. Johnson*, 71 Wis. 336, 37 N. W. 407; *Lowitz v. Leverentz*, 57 Wis. 596, 15 N. W. 842.

[a] **Actions against railroads for loss of stock due to failure of railroad to maintain fence necessarily involve title to land as plaintiff must aver his ownership of the land along which the fence should have been erected.** *Boyd v. Southern California Ry. Co.*, 126 Cal. 571, 58 Pac. 1046. *Compare Oregon Short Line R. Co. v. District Court*, 30 Utah 371, 85 Pac. 360.

42. *Cal.*—*King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10. *Ga.*—*Music v. Barber*, 99 Ga. 799, 27 S. E. 164. *Ind.*—*Bernhamer v. Hoffman*, 23 Ind. App. 34, 54 N. E. 132. *Minn.*—*Tordsen v. Gimmer*, 37 Minn. 211, 34 N. W. 20. *Tex.*—*Hillman v. Baumbach*, 21 Tex. 203.

43. See generally the statutes, and *Fulton v. Tate*, 47 Pa. 532; *Heath v. Robinson*, 75 Vt. 133, 53 Atl. 995.

ing the matter. Whenever title to or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defense, such matter is properly considered as "involved" in the action;⁴⁴ it is not necessary that an issue in regard to the title be raised by the pleadings.⁴⁵ In some jurisdictions, however, unless title is directly in issue, the jurisdiction of the justice is not ousted;⁴⁶ where title or possession is a fact incidentally or collaterally brought into the action, it is not considered to be so involved or in issue as to oust the justice's court of jurisdiction.⁴⁷ In

[a] But such statutes are unconstitutional unless they limit the actions to those in which the value of the land involved is within the amount specified in the constitution as the maximum sum over which jurisdiction may extend. *Webb v. Carlisle, Jones & Co.*, 65 Ala. 313. Amount in controversy or value of property as test of jurisdiction, see generally the title "Jurisdiction."

44. *Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718; *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, 35 Pac. 633; *Holman v. Taylor*, 31 Cal. 338; *Wyman v. Felker*, 18 Colo. 382, 33 Pac. 157.

[a] "It is difficult to define with precision the word 'involve' as it is employed in that section. Its primary signification is to 'roll up or envelop' and it also means 'to comprise, to contain, to include by rational or logical construction,' but none of these express the precise idea, and its exact synonym may not be found in a single word. The idea intended to be embodied in the phrase, 'cases at law which involve the title or possession of real property' may be expressed by the paraphrase: 'cases at law in which the title or possession of real property is a material fact in the case, upon which the plaintiff relies for a recovery or the defendant for a defense.'"*Holman v. Taylor*, 31 Cal. 338, 339.

[b] "The phrases 'called in question,' and 'put in issue,' evidently are intended to have the same meaning and application, and that is, that justices' courts have no jurisdiction of an action in which the title to real property must necessarily be determined." *Hammer v. Garrett*, 15 Idaho 657, 663, 99 Pac. 124.

[c] Even if title be admitted to be in a third person, if plaintiff seeks to recover from defendant a portion of the purchase money received by him from such party, a justice's court has

no jurisdiction under a statute prohibiting jurisdiction where title "shall in any wise come in issue." *Richer v. Carlson*, 136 Wis. 353, 117 N. W. 815.

[d] Criminal proceedings involving real property are not covered by a constitutional limitation referring to "cases at law which involve the title or the right of possession to, or the possession of, real property." *State v. Rising*, 10 Nev. 97, charge of malicious mischief.

45. *Boyd v. Southern California Ry. Co.*, 126 Cal. 571, 58 Pac. 1046.

[a] "May" does not mean "shall" in a statute declaring that a higher court has exclusive jurisdiction of actions in which title to land may come in question. *Camp v. Walker*, 5 Watts. (Pa.) 482.

46. Md.—*Legum v. Blank*, 105 Md. 126, 65 Atl. 1071; *Randle v. Sutton*, 43 Md. 64. Mich.—*Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670. Mo.—*McMurray v. Garnett* (Mo. App.), 182 S. W. 128, pointing out that under the law prior to 1879 the rule was otherwise.

[a] Where the title to land is involved but not disputed, the judgment is not void, but voidable merely. *Koon v. Mazuzan*, 6 Hill (N. Y.) 44.

[b] Action for Recovery of Money Only.—"Unless otherwise provided by statute, the test as to whether title is so directly involved as to deprive a justice of the peace of jurisdiction, is whether the issues to be litigated demand a judgment affecting title. Where the issues demand a judgment for the recovery of money only, title is not directly involved." *Pankey v. Modglin*, 116 Ill. App. 6, an action for breach of covenant.

47. Ark.—*Commercial Bank of Alma v. Yoes*, 122 Ark. 611, 183 S. W. 180. Cal.—*Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256; *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737; *Holman v. Taylor*, 31 Cal. 338. Colo.

other states, the allegations of the complaint are alone considered.⁴⁸

No jurisdiction over actions of ejectment exists.⁴⁹ The validity of execution,⁵⁰ or of trustee's⁵¹ sales cannot be determined; and the claims of third persons to real property which has been attached or levied upon as property of a debtor cannot be tried.⁵² A homestead right, while not strictly an estate, is a matter of title over which a justice of

Hamill v. Bank of Clear Creek County, 22 Colo. 384, 45 Pac. 411. **Ga.**—*Moore v. O'Barr*, 87 Ga. 205, 13 S. E. 464. **Ill.**—*Dolton v. Dolton*, 201 Ill. 155, 66 N. E. 323 (action for obstructing a highway); *Pankey v. Modglin*, 116 Ill. App. 6, title only incidentally involved in action for breach of covenant. See *Herman v. Comrs. of Highways*, 197 Ill. 94, 64 N. E. 337, action to recover statutory penalty for failure to trim hedge along a highway. **Tex.**—*San Marcos v. International & G. N. Ry Co.* (Tex. Civ. App.), 167 S. W. 292.

[a] **Action to recover penalty for failure of a railroad to place its track over a city street in proper repair is an action for a money judgment in which title is only incidentally in issue.** *San Marcos v. International & G. N. Ry. Co.* (Tex. Civ. App.), 167 S. W. 292.

[b] **An action to recover a statutory penalty for failure to trim a hedge along a public highway, may be maintained before a justice of the peace, as it involves only incidentally, a right to a freehold.** *Herman v. Comrs. of Highways*, 197 Ill. 94, 64 N. E. 337.

[c] **Action for money had and received, brought by claimant out of possession, against one in possession claiming adversely, to recover money received by the latter from a tenant, as rent, does not involve the question of title.** *Phoenix Ins. Co. v. Hoyt*, 3 Neb. (Unof.) 94, 91 N. E. 186.

48. *Bridgmans v. Wells*, 13 Ohio 43; *Heath v. Robinson*, 75 Vt. 133, 53 Atl. 995.

[a] "The rule is this, as we understand it: Where, the plaintiff, in order to sustain his case, is compelled in the first instance to prove certain facts, or to disprove them, and those facts, or either of them, is title to lands or tenements, the jurisdiction is excluded, except in trespass; but where it is unnecessary for the plaintiff to introduce such proof, the defendant cannot, by its introduction, take away

the jurisdiction." *Bridgmans v. Wells*, 13 Ohio 43.

[b] **Action against owner of premises for damages for sale of liquor in violation of law cannot be maintained as the plaintiff must prove in the first instance that defendant was the owner of the premises.** *Bowers v. Pomeroy*, 21 Ohio St. 184.

[c] **Action for damages for burning fences and crops cannot be maintained as plaintiff would be compelled to prove his own title to the premises.** *Erie R. Co. v. Furry*, 18 Ohio Cir. Ct. 880, 9 Ohio Cir. Dec. 850.

[d] **Action for injury to personal property by the flow of water from defendant's premises due to the bursting of water pipes, cannot be maintained as plaintiff would be required to prove some title by possession or otherwise, in the defendant.** *Coles v. Reiger*, 2 Ohio Cir. Ct. 50, 1 Ohio Cir. Dec. 355.

49. **Ind.**—*Bernhamer v. Hoffman*, 23 Ind. App. 34, 54 N. E. 132; *Blair v. Porter*, 12 Ind. App. 296, 38 N. E. 874. **Mont.**—*State v. District Court*, 33 Mont. 356, 83 Pac. 597. **N. Y.**—*McMahon v. Howe*, 40 Misc. 546, 82 N. Y. Supp. 984. **Vt.**—*Sartwell v. Sowles*, 72 Vt. 270, 48 Atl. 11, 82 Am. St. Rep. 943.

Jurisdiction of possessory actions generally, see *infra*, II, G, 6.

50. *Dougherty v. Marsh*, 11 Ga. 277, after sale of bond under execution a justice's court cannot make an examination to determine whether there was any personal property to which resort should have been first made.

[a] **Actions to set aside sales of land under execution cannot be maintained even though the execution issued from the justice's court.** *Smith v. Perkins*, 81 Tex. 152, 16 S. W. 805, 26 Am. St. Rep. 794; *Weaver v. Nugent*, 72 Tex. 272, 10 S. W. 458.

51. *Seeser v. Southwick*, 66 Mo. App. 667.

52. *Moody v. McDaniel*, 3 Stew. (Ala.) 314.

the peace has no jurisdiction;⁵³ and an action to enforce a mechanic's lien on real estate is prohibited.⁵⁴ But the fact that a judgment may be satisfied by execution against real property, in the absence of sufficient personal property, does not make the action a land controversy;⁵⁵ and attachment proceedings are not prohibited.⁵⁶ Actions to condemn land may be maintained,⁵⁷ as may actions to determine whether conveyances have been made fraudulently and with intent to defeat executions on judgments.⁵⁸

b. *Actions Based on Contracts To Purchase and Sell Real Property.*⁵⁹—A justice of the peace has no jurisdiction to enforce a vendor's lien.⁶⁰ But an action by the vendor to recover the purchase money of land sold does not necessarily involve the title to the land so as to oust the court of jurisdiction,⁶¹ though where a failure of consideration is pleaded, due to a want of title in the vendor, the rule is otherwise.⁶² An action by a vendee to recover a part payment or deposit on account of a defect in the title involves title;⁶³ but title

53. *Riggs v. Sterling*, 51 Mich. 157, 16 N. W. 320. But see *Moore v. O'Barr*, 87 Ga. 205, 13 S. E. 464, where claim of homestead is made to establish exemption from execution, title is not directly involved.

54. *Cotton v. Penzel & Co.*, 44 Ark. 484, under a provision that no jurisdiction shall exist where a lien on land is involved. See *Bell v. Rich*, 73 Ga. 240; also *infra*, II, G, 1, c.

55. *Willis v. Ruddock Cypress Co.*, 108 La. 255, 32 So. 386.

56. *Cunningham v. Holland*, 40 Ark. 556; *Bush v. Visant*, 40 Ark. 124.

[a] Want of jurisdiction where "a lien on land or title or possession thereof is involved," does not prevent a justice from issuing attachments. *Bush v. Visant*, 40 Ark. 124.

57. *Musick v. Kansas City, S. & M. R. Co.*, 124 Mo. 544, 28 S. W. 72.

[a] Proceedings for the assessment of damages for the taking of property for a turnpike road do not involve the title to the property, since the owner's title is admitted in such proceedings. *Norristown, H. & St. L. Turnpike Co. v. Burket*, 26 Ind. 53.

58. *Smith v. Newlon*, 62 Miss. 230.

59. *As Real Contracts.*—Contracts involving the purchase and sale of lands are of course, real contracts, and actions based thereon cannot be maintained in those jurisdictions where a justice of the peace has no jurisdiction over real contracts. See *infra*, II, G, 3

60. *Ark.*—*Quertermous v. Hatfield*, 54 Ark. 16, 14 S. W. 1096. *Ky.*—*Bush*

v. Williams, 6 Bush 405. *Tex.*—*Houston v. Musgrove*, 35 Tex. 594; *Lane v. Howard*, 22 Tex. 7.

Jurisdiction to enforce liens generally, see *infra*, II, G, 1, c.

61. *Adas Yeshurun Soc. v. Fish*, 117 Ga. 345, 43 S. E. 715; *Davis v. Evans*, 142 N. C. 464, 55 S. E. 344 (action on purchase money note); *McPeters v. English*, 141 N. C. 491, 54 S. E. 417; *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683.

[a] If the vendee is in possession, he is estopped from denying the vendor's title. *Bramble v. Beidler*, 38 Ark. 200, holding that an answer merely averring that defendant was not in possession would not of itself oust the court of jurisdiction.

[b] Where the deed to the property has been executed and accepted, such an action may be maintained. *Cole v. Hynes*, 46 Md. 181; *Green v. Sewell*, 8 Ohio Dec. 69.

[c] Action on note given for executory contract to convey may be maintained where the only defense is certain payments on the note. *Patterson v. Freeman*, 132 N. C. 357, 43 S. E. 904.

62. *Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718. But see *Rogers v. Perdue*, 7 Blackf. (Ind.) 302; *Drake v. Bagley*, 69 Mo. App. 39.

63. *Cal.*—*Copertini v. Oppermann*, 76 Cal. 181, 18 Pac. 256 (*distinguishing*, *Schroder v. Wittram*, 66 Cal. 636, 6 Pac. 737); *Bates v. Ferrier*, 19 Cal. App. 79, 124 Pac. 889. *Md.*—*Legum v. Blank*, 105 Md. 126, 65 Atl. 1071, where

is not involved where the claim made in such an action is that defendant abandoned the contract by conveying the land to a third person,⁶⁴ or where recovery of the payment is sought after a rescission of the contract.⁶⁵ In an action to recover damages for failure to convey property, title is not necessarily involved;⁶⁶ and an action for damages merely for delay in executing a conveyance may be maintained,⁶⁷ as may an action for fraudulent misrepresentations inducing the purchase of land.⁶⁸ Where contracts to purchase land are merely incidentally involved in an action, a justice of the peace may exercise jurisdiction.⁶⁹

c. *Actions on Covenants and Other Real Contracts.*—An action for a breach of covenant of warranty of title involves the question of title, so as to prevent a justice from exercising jurisdiction,⁷⁰ though upon

the status of ground rents as original or subrents was involved. Pa.—Campbell v. Gallagher, 2 Watts 135.

[a] "The words 'good title' import that the owner has the title, legal and equitable, to all the land, and the words 'defective title' mean that the party claiming to own has not the whole title, but some other person has title to a part or portion of the land. Now, as plaintiff could not recover if defendants had title to the property and could recover if they had not, it would seem that the title of real property was a material fact in the case and was directly involved." Copertini v. Oppermann, 76 Cal. 181, 186, 18 Pac. 256.

64. Davis v. Creamer, 179 Mo. App. 374, 166 S. W. 819; Adams v. Ellis, 86 Mo. App. 343.

[a] "The fact that it was necessary to prove that defendant had sold the land to another did not involve a question of title. It was merely a matter of evidence in proof of a fact." Adams v. Ellis, 86 Mo. App. 343.

65. Benton v. Marshall, 47 Ark. 241, 1 S. W. 201.

66. Hammer v. Garrett, 15 Idaho 657, 99 Pac. 124.

[a] *Basis of the Rule.*—"If the agreement is as alleged in the complaint and the plaintiff complied in full with her part of the agreement, and the defendant failed to comply with his part of said agreement and failed to convey the property purchased, and by reason of such failure the plaintiff has been damaged, then the plaintiff would be entitled to recover such damages, and it could make no difference whether the de-

fendant had title to the property which he agreed to convey." Hammer v. Garrett, 15 Idaho 657, 664, 99 Pac. 124.

67. Fisher v. Gossett, 36 Okla. 261, 128 Pac. 293.

68. Dano v. Sessions, 63 Vt. 405, 21 Atl. 922; Bird v. Kleiner, 41 Wis. 134.

[a] *Fraudulent Representation of Title.*—In an action to recover damages for such a misrepresentation, the plaintiff must prove the falsity of the representation and therefore the question of title is involved. Brooks v. Delrymple, 1 Mich. 145.

69. Fry v. Dunn, 70 Kan. 333, 78 Pac. 814 (where vendee had been unable to secure a contemplated loan and sought to recover a partial payment); Duff v. Morrison, 44 Kan. 562, 24 Pac. 1105, action to recover costs chargeable to the vendor but paid by the vendee.

70. Ark.—Hinkle v. Powell, 95 Ark. 182, 128 S. W. 863 (encumbrance against taxes to accrue in the future); Naylor v. McNair, 92 Ark. 345, 122 S. W. 662; Sanders v. Brown, 65 Ark. 498, 47 S. W. 461, covenant against encumbrances. Mich.—Parkinson v. Woulds, 125 Mich. 325, 84 N. W. 292. Mo.—Hillhouse v. Houts, 1 S. W. 752; Patterson v. Yancy, 81 Mo. 379; Bredwell v. Loan & Inv. Co., 76 Mo. 321; Coleman v. Clark, 80 Mo. App. 339; Birks v. Russell, 1 Mo. App. 335. N. J. Burrough v. Vanderveer, 5 N. J. L. 809. N. C.—Brown v. Southerland, 142 N. C. 225, 55 S. E. 108, covenant of seisin. Ohio.—Van Dyke v. Rule, 49 Ohio St. 530, 31 N. E. 882. Vt.—Hastings v. Webber, 2 Vt. 407.

this proposition there are authorities to the contrary.⁷¹ Actions based on personal covenants relating to land may be maintained.⁷² In some jurisdictions the statutes expressly declare that no jurisdiction shall be exercised over real contracts,⁷³ in which case a cause of action based on a contract to purchase or sell real property cannot be prosecuted in a justice's court.⁷⁴ All contracts in which real property is mentioned or incidentally affected do not necessarily involve the real property so as to exclude the jurisdiction of a justice's court.⁷⁵

71. *III.*—Pankey v. Modglin, 116 Ill. App. 6 (covenant of warranty); North Chicago Hebrew Congregation v. Garibaldi, 70 Ill. App. 33, covenant against encumbrances. *Neb.*—Dafoe v. Keplinger, 1 Neb. (Unof.) 440, 95 N. W. 674. *Vt.*—See Flannery v. Hinkson, 40 Vt. 485 (jurisdiction exists unless the declaration tenders an issue upon the covenant); Judevine v. Holton, 41 Vt. 351.

72. *III.*—Martin v. Murphy, 16 Ill. App. 283, covenant by vendor to pay taxes. But see Kennedy v. Pennick, 21 Ill. 597, covenant to build fences. *Ky.*—Fortune v. Howard, 4 J. J. Marsh. 171. *Neb.*—Holmes v. Seaman, 72 Neb. 300, 100 N. W. 417, covenant for quiet enjoyment, title not being drawn in question.

[a] Covenant to surrender land in good tenantable repair is not a real contract. Bridgmans v. Wells, 13 Ohio 43.

[b] Action to recover damages for failure of tenant to repair fences as required by the terms of his lease, is an action on the contract and not an action for damages to the land. Von Berg v. Goodman, 85 Ark. 605, 109 S. W. 1006.

73. Crafts v. Prior, 51 Ohio St. 21, 36 N. E. 1070; Lauchner v. Rex, 20 Pa. 464.

74. Crafts v. Prior, 51 Ohio St. 21, 36 N. E. 1070; Carlile v. Cain, 9 Ohio Dec. 464 (action by vendor to recover damages for breach of contract to purchase real property); McNickle v. Hickox, 4 Ohio Dec. (Reprint) 240 (action by vendee to recover a payment); Lauchner v. Rex, 20 Pa. 464; Sechrist v. Connellee, 3 Penr. & W. (Pa.) 388 (action for balance of purchase price); Goddard v. McKean, 6 Watts (Pa.) 237 (action on note given in consideration of right to dig a mill-race); Campbell v. Gallagher, 2 Watts (Pa.) 135 (vendee cannot recover a part payment after rescission); Hunsicker v. Miller, 5 Pa. Dist. 107.

Jurisdiction of actions based on contracts to purchase and sell real property, see *supra*, II, F, 4, b.

[a] Indorsee of Purchase Money Note May Sue.—“It is not perceived how the title to the land which was the consideration of the note can come in question. The holder of a negotiable note has nothing to do with the original consideration; he takes it discharged of all equities between the maker and payee.” Camp v. Walker, 5 Watts (Pa.) 482. See Hunsicker v. Miller, 14 Pa. Co. Ct. 261; Packer v. Taylor, 12 Pa. Co. Ct. 521; Gruber v. Sheetz, 2 Woodw. Dec. (Pa.) 63.

75. Bridgmans v. Wells, 13 Ohio 43. See Wilson & Co. v. Morgan, 121 Ark. 633, 180 S. W. 469.

[a] Whether the contract in suit is a sale or lease is a question which does not involve title, but merely the status of the parties. Quertermous v. Hatfield, 54 Ark. 16, 14 S. W. 1096.

[b] Contract (1) by which defendant was authorized to enter and cut timber on plaintiff's land does not involve title so as to prevent a justice of the peace from trying an action to recover the balance due under the contract. Woodson v. Hubbard, 45 Mo. App. 359. And see Herrick v. Newell, 49 Minn. 198, 51 N. W. 819. (2) And where the issue is whether the plaintiff gave such a license, the fact that the declaration is in form, in trespass, does not bring the title in issue. Dolahanty v. Lucey, 101 Mich. 113, 59 N. W. 415.

[c] “A contract for the produce of land does not concern the realty. A man who sues another for a load of coal is not obliged to show his right to the land from which it was mined. A claim for the price of wheat cannot be defeated by setting up an outstanding title in a third person to the field where it grew. A person who has bargained with one in possession for a license to dig and carry away minerals cannot, after enjoying the privilege, refuse to pay on the ground that

d. *Actions for Rent or Value of Use.*—Title is not so involved in an action to recover rent under a written lease as to prevent the justice from taking jurisdiction, since a tenant is estopped from denying his landlord's title.⁷⁶ The fact that defendant pleads that title and right to possession were in another, under whom he claims, does not alter the general rule,⁷⁷ though there are authorities which do not recognize this principle.⁷⁸ An answer denying the existence of the tenancy and the plaintiff's ownership of the land, does not of itself oust the court of jurisdiction, as plaintiff is entitled to recover if he proves that defendant is his tenant.⁷⁹ But if the action is for use and occupation and the issues or evidence present the question of title, no jurisdiction exists in the justice's court.⁸⁰ An action for mesne profits, after a recovery in ejectment, involves title to land within the rule.⁸¹

e. *Possessory Actions.*—Where a mere possessory right is involved, a justice of the peace has jurisdiction in many states.⁸² Thus, in most

somebody else had a better right to the possession. In these cases the title to lands and tenements may not and cannot come in question." Rhoades v. Patrick, 27 Pa. 323.

[d] Contract to purchase a judgment which was a lien on real property, is not a real contract. Helfenstein v. Hurst, 15 Pa. 358.

[e] Location Contract.—An action to recover on a contract to locate the plaintiff on vacant government land involves title. Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 633.

76. Ark.—Crigler v. Sloss, 124 Ark. 599, 186 S. W. 85; Matthews v. Morris, 31 Ark. 222. Cal.—Ghiradelli v. Greene, 56 Cal. 629. Md.—Randle v. Sutton, 43 Md. 64. N. J.—See Smith v. Layton, 1 N. J. L. 177. N. C.—DeLoatch v. Coman, 90 N. C. 186. See Durant v. Taylor, 89 N. C. 351. Pa.—Beatty v. Rankin, 139 Pa. 358, 21 Atl. 74; Jacobs v. Haney, 18 Pa. 240; Williams v. Smith, 3 Clark. 22. Tex.—Standley v. Currey (Tex. Civ. App.), 161 S. W. 416.

[a] Attachment for rent may be issued. Smith v. Jones, 65 Miss. 276, 3 So. 740.

[b] But a title acquired subsequent to the execution and termination of the lease may be pleaded and title is then involved. Van Etten v. Van Etten, 69 Hun 499 23 N. Y. Supp. 711, 52 N. Y. St. 624, Lane v. Young, 66 Hun 563, 21 N. Y. Supp. 838, 50 N. Y. St. 623. See Presstman v. Siljacks, 52 Md. 647.

77. Ghiradelli v. Greene, 56 Cal. 629; Johnson v. Doss, 1 White & W. Civ. Cas. (Tex.) §1075.

[a] Disputing validity of assignments does not involve title. Louer v. Hummel, 21 Pa. 450.

[b] Purchaser at foreclosure sale may maintain an action for rent against the tenant. Topping v. Davis, 67 Mo. App. 510.

78. Ind.—Smith v. Harris, 3 Blackf. 416, action by assignee of landlord. Mo.—Meier v. Thieman, 90 Mo. 433, 2 S. W. 435; State v. Ganzhorn, 52 Mo. App. 220. N. J.—Messler v. Fleming, 41 N. J. L. 108. N. Y.—Main v. Cooper, 26 Barb. 468, in an action by the assignee of the landlord, denial of plaintiff's title is permissible and raises a question of title.

79. Jansen v. Strayhorn, 59 Ark. 330, 27 S. W. 230; Bramble v. Beidler, 38 Ark. 200; Jordon v. Henderson, 37 Ark. 120; Nolen v. Royston, 36 Ark. 561. See Hudson v. Hodge, 139 N. C. 308, 51 S. E. 955.

80. Minton v. Minton, 81 Ark. 192, 98 S. W. 976; Thruston v. Hinds, 8 Ark. 118 (lies if title is not in controversy); Fitzgerald v. Beebe, 7 Ark. 305, 46 Am. Dec. 285; Tordsen v. Gimmer, 37 Minn. 211, 34 N. W. 20. But see Clough v. Horton, 42 Vt. 10, where jurisdiction is determined from the allegations of the complaint.

81. Pickle v. Covenhoven, 4 N. J. L. 319, 364. See Gregory v. Kanouse, 11 N. J. L. 62, 66.

82. Ind.—Melloh v. Demott, 79 Ind. 502. La.—Richardson v. Scott, 6 La.

jurisdictions, justices of the peace have power to try forcible entry and unlawful detainer actions,⁵³ on the theory that the right to possession and not the title is the sole question involved,⁵⁴ especially where that form of remedy is given a landlord against a tenant who wrongfully holds over after the expiration of his term,⁵⁵ or until it is made

54. **N. Y.**—*Fredonia & S. Plank Road Co. v. Wait*, 27 Barb. 214.

[a] **Basis of This Rule.**—"Undoubtedly, possession is a necessary ingredient in a complete title to land, for such title has several stages or degrees, viz. 1st. Mere possession or actual occupation, without pretence of right; 2d. The right of possession, which one man may have while another has the possession in fact; and 3d. The mere right of property which may exist without possession or the right of possession. (2 Black Comm. 195 to 199). These being united constitute what Blackstone calls a 'completely legal' title. (Id. 199). But the term 'title,' as used in the statute under consideration, does not embrace these different degrees or stages of right. It is limited to the *right of possession*; for where that is in question before a justice, he has no jurisdiction of the case; . . . In short, I understand the word 'title,' as used in the statute to mean precisely what it means in reference to the common law action of ejectment. It is synonymous with the *right of possession*." *Ehle v. Quackenboss*, 6 Hill (N. Y.), 537, 539.

[b] **Locator of a mine, having merely a possessory right, may maintain an action for the recovery of its possession.** *Duffey v. Mix*, 24 Ore. 265, 33 Pac. 807.

83. **Ala.**—*Cobb v. Garner*, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; *Beck v. Glenn*, 69 Ala. 121, value of the premises is immaterial. **Colo.** *Hamill v. Bank of Clear Creek County*, 22 Colo. 384, 45 Pac. 411; *Kelley v. Andrew*, 3 Colo. App. 122, 32 Pac. 175. **Ga.**—*Music v. Barber*, 99 Ga. 799, 27 S. E. 164, proceedings of forcible entry and unlawful detainer may be maintained but not proceedings for the ejection of intruders. **Ill.**—*Phelps v. Randolph*, 147 Ill. 335, 35 N. E. 243. **Ind.**—*Bridges v. Branam*, 133 Ind. 488, 33 N. E. 271; *Sturgeon v. Hitchens*, 22 Ind. 107, unlimited in amount. **Kan.** *Armour Packing Co. v. Howe*, 62 Kan. 587, 64 Pac. 42. **Ky.**—See *Check v. Reiter*, 31 Ky. L. Rep. 249, 102 S. W.

287. **Miss.**—*Ragan v. Harrell*, 52 Miss. 818. **Mo.**—*Graham v. Conway*, 91 Mo. App. 391. **Mont.**—*Sheehy v. Flaherty*, 8 Mont. 365, 20 Pac. 687. See *State v. District Court*, 33 Mont. 356, 83 Pac. 597. **Neb.**—*Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401. **N. M.**—*Patten v. Balch*, 15 N. M. 276, 106 Pac. 388. **N. Y.**—*People ex rel. Baldwin v. Goldfogle*, 23 Civ. Proc. 417; *Matter of White*, 12 Abb. N. C. 348 (summary proceeding for removal of squatter); *People ex rel. Hill v. Kelsey*, 82 Misc. 491, 144 N. Y. Supp. 135; *Wetterer v. Soubrious*, 22 Misc. 739, 49 N. Y. Supp. 1043. **Ohio.**—*Brown v. Burdick*, 25 Ohio St. 260, even though it is necessary for him to prove his title. **Okla.**—*Burrus v. Funk*, 29 Okla. 677, 119 Pac. 976; *McQuiston v. Walton*, 12 Okla. 130, 69 Pac. 1048; *McDonald v. Stiles*, 7 Okla. 327, 54 Pac. 487. **Ore.**—*Duffey v. Mix*, 24 Ore. 265, 33 Pac. 807. **S. C.** *Lynch v. Ball*, 79 S. C. 243, 60 S. E. 691. **S. D.**—*Browne v. Haseltine*, 9 S. D. 524, 70 N. W. 648. **Tex.**—*Smith v. Ryan*, 20 Tex. 661; *Renfro v. Harris*, 28 Tex. Civ. App. 58, 66 S. W. 460. **Wis.**—*Platteville v. Bell*, 66 Wis. 326, 28 N. W. 404; *Winterfield v. Stauss*, 24 Wis. 394; *Savage v. Carney*, 8 Wis. 162; *Gates v. Winslow*, 1 Wis. 650. **Wyo.**—*Jenkins v. Jeffrey*, 3 Wyo. 669, 29 Pac. 186.

See also 8 STANDARD PROC. 1108.

84. **Ind.**—*Bridges v. Branam*, 133 Ind. 488, 33 N. E. 271. **N. M.**—*Patten v. Balch*, 15 N. M. 276, 106 Pac. 388. **Okla.**—*Burrus v. Funk*, 29 Okla. 677, 119 Pac. 976.

[a] **Evidence of title is admissible, but only as proof of the right of possession.** *McDonald v. Stiles*, 7 Okla. 327, 54 Pac. 487. See *Dineen v. Olson*, 73 Kan. 379, 85 Pac. 538; *Armour Packing Co. v. Howe*, 62 Kan. 587, 64 Pac. 42; also 5 ENC. OF EV. 783, et seq.

85. **Ala.**—*Beck v. Glenn*, 69 Ala. 121. **Cal.**—*Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657; *Richmond v. Superior Court*, 9 Cal. App. 62, 98 Pac. 57. **Ill.**—*Schumann Piano Co. v. Mark*,

to appear that the title to real property is involved in the action,⁸⁶ when the case may be removed to a higher court under the practice in some states.⁸⁷ But in a few states, no jurisdiction exists in justice's courts over such actions,⁸⁸ and they do not ordinarily have jurisdiction where it appears that the action is resorted to by a vendor

208 Ill. 282, 70 N. E. 226. **Ia.**—Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178. **Ky.**—Ackerson v. Semple, 163 Ky. 395, 173 S. W. 1153. **La.**—State v. Mayer, 52 La. Ann. 255, 26 So. 823. **Minn.**—Radley v. O'Leary, 36 Minn. 173, 30 N. W. 457. **Mont.**—State v. Votaw, 13 Mont. 403, 34 Pac. 315. **N. J.**—Watson v. Idler, 54 N. J. L. 467, 24 Atl. 554. **N. Y.**—Miner v. Burling, 32 Barb. 540. **N. C.**—Credle v. Gibbs, 65 N. C. 192. **S. D.**—Chicago, M. & St. P. R. Co. v. Nield, 16 S. D. 370, 92 N. W. 1069 (even though the allegation of title in the complaint is denied); Browne v. Haseltine, 9 S. D. 524, 70 N. W. 648. **Tex.**—Juneman v. Franklin, 67 Tex. 411, 3 S. W. 562 (justice of the peace has concurrent jurisdiction with the district court); Walther v. Anderson, 52 Tex. Civ. App. 360, 114 S. W. 414. **Wis.**—Menominee River Lumb. Co. v. Philbrook, 78 Wis. 142, 47 N. W. 188; Newton v. Leary, 64 Wis. 190, 25 N. W. 39.

Contra, Vinson v. Flynn, 64 Ark. 453, 43 S. W. 146, 46 S. W. 186, 39 L. R. A. 415; Prather v. Brandon, 44 Ind. App. 45, 88 N. E. 700.

Remedies of landlord, see the title "Landlord and Tenant."

[a] The value of the premises is wholly immaterial, as it does not constitute the amount in controversy in such cases. Beck v. Glenn, 69 Ala. 121; Herkimer v. Keeler, 109 Iowa 680, 81 N. W. 178.

[b] Grantee of the landlord may maintain the action against the tenant although the latter denies the validity of the conveyance to the plaintiff. McManus v. Maloy, 30 S. D. 373, 138 N. W. 963. See Watson v. Idler, 54 N. J. L. 467, 24 Atl. 554; Burrus v. Funk, 29 Okla. 677, 119 Pac. 976.

86. **U. S.**—Langford v. Monteith, 102 U. S. 145, 26 L. ed. 53. **Colo.**—Bonnell v. Gill, 41 Colo. 59, 92 Pac. 13. **Dak.**—Murray v. Burris, 6 Dak. 170, 42 N. W. 25. **Ia.**—Jordan v. Walker, 56 Iowa 686, 10 N. W. 232. **Miss.**—Ragan v. Harrell, 52 Miss. 818. **Neb.**—Stone v. Blanchard, 87 Neb. 1, 126 N. W. 766; Clark v. Tukey Land Co., 75 Neb.

326, 106 N. W. 328, a specious claim of ownership does not oust the justice of jurisdiction. **N. D.**—Hegar v. De Groat, 3 N. D. 354, 56 N. W. 150. **Okla.**—McHenry v. Gregory, 156 Pac. 1158. **Ore.**—German Evangelical Church v. Schindler, 56 Ore. 247, 108 Pac. 178. But see Heiney v. Heiney, 43 Ore. 577, 73 Pac. 1038. **W. Va.**—Frum v. Prickett, 71 W. Va. 273, 76 S. E. 453; Watson v. Watson, 45 W. Va. 290, 31 S. E. 939; Hughes v. Mount, 23 W. Va. 130.

[a] **Statement of the Rule.**—If the justice "can find and determine the right of possession without at the same time determining the rights of the parties, legal or equitable in the property itself, it cannot be said that the title is drawn in question. If, however, possession is held under and by virtue of some right in the property so that the right of possession cannot be determined without adjusting the right in the property itself, then the title to real estate is drawn in question within the meaning of the statute." Stone v. Blanchard, 87 Neb. 1, 126 N. W. 766.

[b] An equitable title and possession pursuant thereto is a defense and ousts the justice court of jurisdiction. Stone v. Blanchard, 87 Neb. 1, 126 N. W. 766. Compare Brumbaugh v. Sterringer, 48 W. Va. 121, 35 S. E. 854, vendee in possession.

87. See *infra*, III, R.

88. **Ark.**—McLain v. Taylor, 4 Ark. 147. **N. C.**—Atlantic, T. & O. R. Co. v. Sharpe, 70 N. C. 509. **Ohio.**—See Bridwell v. Barcroft, Beaver & Co., 2 Ohio Dec. (Reprint) 697.

[a] The basis for this rule is that, in these jurisdictions, justice's have jurisdiction over only contract actions and "an action of forcible entry and detainer in no sense of the term can be said to be a matter of contract. The idea of a contract, so far from entering into, or forming any part of the action, is expressly excluded by the form and substance of the action. The party's right to recover is based upon the ground of wrong and injury done

to recover possession from a defaulting vendee,⁸⁹ or by a partner who has obtained a renewal lease from the landlord and claims to be entitled to sole possession.⁹⁰

Special actions given to a landlord for the recovery of possession against a tenant unlawfully holding over are triable in justice's court under some statutes.⁹¹ But jurisdiction over actions in the nature of ejectment cannot be given by statutes designating them as actions of unlawful detainer.⁹²

or accompanied with violence or force." *McLain v. Taylor*, 4 Ark. 147.

89. **Kan.**—*Bramwell v. Trower*, 92 Kan. 144, 139 Pac. 1018; *Linder v. Warnock*, 91 Kan. 272, 137 Pac. 962. But see *Dineen v. Olson*, 73 Kan. 379, 85 Pac. 538, where the facts were admitted. **Neb.**—*Chicago, B. & Q. R. Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393. **Okl.**—*Smith v. Kirchner*, 7 Okla. 166, 54 Pac. 439.

90. *Knapp v. Reed*, 88 Neb. 754, 130 N. W. 430.

91. **Ind.**—*Scott v. Willis*, 122 Ind. 1, 22 N. E. 786; *Dougherty v. Thompson*, 7 Blackf. 277; *Miller v. Citizen's Bldg. & Loan Assn.*, 50 Ind. App. 132, 98 N. E. 70 (the jurisdiction is unlimited as to amount); *Blair v. Porter*, 12 Ind. App. 296, 38 N. E. 874; *Millikan v. Davenport*, 5 Ind. App. 257, 31 N. E. 1122. **Md.**—*Josselson v. Sonneborn*, 110 Md. 546, 73 Atl. 650. **N. C.**—*McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627 (summary proceedings in ejectment); *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693; *Davis v. Davis*, 83 N. C. 71. **Pa.**—*Mohan v. Butler*, 112 Pa. 590, 4 Atl. 47 (applying the act of 1830 and *distinguishing* *Brown v. Gray*, 5 Watts 17, 20; *Debozeur v. Butler*, 2 Grant Cas. 417; *Koontz v. Hammond*, 62 Pa. 177, 181; cases arising under other statutes); *Heritage v. Wilfong*, 58 Pa. 137 (under the act of 1863, a tenant cannot defend on an outstanding title in a stranger); *Daly v. Barrett*, 4 Phila. 350, intervention by a third person claiming title is not allowed. **S. C.**—*Swygert v. Goodwin*, 32 S. C. 146, 10 S. E. 933; *State ex rel. Nesbitt v. Marshall*, 24 S. C. 507; *State ex rel. O'Neale v. Fickling*, 10 S. C. 301, the summary proceeding is not an "action."

See generally the title "Landlord and Tenant."

[a] Limitations of Such Statutes.

(1) "The remedy by summary proceedings in ejectment given by the landlord and tenant act (Revisal, sec. 2001, et seq.), is not coextensive with the doctrine of estoppel arising where one enters and holds land under another, but is restricted to the cases expressly specified in the act, and where the relation between the parties is simply that of landlord and tenant; and when, on the trial of such a proceeding, it is made to appear that the relation existing is that of mortgagor and mortgagee, giving the right to an account, or vendor and vendee, requiring an adjustment of equities, a justice's court has no jurisdiction of such questions and the proceedings should be dismissed." *Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693. And see *Parker v. Allen*, 84 N. C. 466. (2) This rule has been applied in actions involving the relation of vendor and vendee (*Hauser v. Morrison*, 146 N. C. 248, 59 S. E. 693; *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677; *Boone v. Drake*, 109 N. C. 79, 13 S. E. 724; *Parker v. Allen*, 84 N. C. 466), (3) mortgagor and mortgagee (*McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627; *Smith v. Garriss*, 131 N. C. 34, 42 S. E. 445; *Forsythe v. Bullock*, 74 N. C. 135), (4) as well as a claimant under a will. *Wright v. Harris*, 116 N. C. 460, 21 S. E. 693.

[b] Mere allegation of want of title in the plaintiff, made in defendant's answer does not oust the court of jurisdiction; proof must be introduced in support of such allegation. *Hahn v. Guilford*, 87 N. C. 172; *Foster v. Penry*, 77 N. C. 160.

[c] Intervention by a third person claiming title, is not permitted in such actions. *Davis v. Davis*, 83 N. C. 71.

92. *Beck v. Glenn*, 69 Ala. 121; *Webb v. Carlisle, Jones & Co.*, 65 Ala. 313.

Actions by purchasers under execution,⁹³ or other judicial sales,⁹⁴ to recover possession necessarily involve the title to land, and a justice of the peace has no jurisdiction, unless it is specially conferred by statute, as is sometimes the case.⁹⁵

f. *Actions Involving Boundaries, Division Fences and Party Walls.* Actions involving boundaries are, by some statutes, expressly taken from the jurisdiction of justices of the peace,⁹⁶ though in the absence of such a statute a controversy concerning the true boundary line of property does not necessarily involve title to property.⁹⁷ Disputes concerning fences erected on the division line of property,⁹⁸ and party walls,⁹⁹ are usually held not to be within the jurisdiction of a justice of the peace.

g. *Actions for Injuries to Land.*¹—Actions for injuries to real property, based on the plaintiff's right to possession, may be maintained in a justice's court,² though upon this proposition there are

93. *Credle v. Gibbs*, 65 N. C. 192. See *Downs v. McAllister*, 184 Pa. 372, 39 Atl. 230.

94. *Goenen v. Schroeder*, 8 Minn. 387. But see *Green v. Morse*, 57 Neb. 391, 77 N. W. 925, 73 Am. St. Rep. 518, holding that jurisdiction exists until evidence is produced affecting the question of title.

[a] Action by mortgagee who has foreclosed under a power of sale and purchased the property, the mortgagor claiming that he redeemed and the point in issue being whether the redemption was made within the proper time, involves title to real property. *Goenen v. Schroeder*, 8 Minn. 387.

95. See generally the statutes, *Cobb v. Garner*, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136 (purchaser at administrator's sale); *Grand Rapids Nat. Bank v. Kritzer*, 116 Mich. 688, 75 N. W. 90, jurisdiction is conferred where no commissioner resides in the township.

[a] Such jurisdiction may be divested by the filing of an affidavit by the defendant that he claims title but not through or under the defendant as whose property the same was sold on execution, under some statutes. *O'Neil v. Soles*, 3 Pa. Co. Ct. 172; *Wilson v. Downing*, 40 Wkly. Notes Cas. (Pa.) 342, considering the form of and essential averments in the affidavit.

96. See the statutes, and *Smith v. Schlink*, 6 Colo. App. 228, 40 Pac. 478.

97. *La Rue v. Smith*, 153 N. Y. 428, 47 N. E. 796.

98. *Murray v. Van Derlyn*, 24 Wis. 67.

[a] *Moving a Fence.*—In an action for taking land by moving a fence which had marked the apparent boundary line between two premises, a mere invasion of actual possession is made and the action does not involve a boundary line. *Smith v. Schlink*, 6 Colo. App. 228, 40 Pac. 478. *Contra*, *Reilly v. Howe*, 101 Wis. 108, 76 N. W. 1114.

[b] An action to recover one-half of the cost of a partition fence, under a statute giving such right, involves real property. *Holman v. Taylor*, 31 Cal. 338. And see *Hinds v. Page*, 6 Abb. Pr. N. S. (N. Y.) 58. *Foster v. Bennett*, 33 Vt. 66; *Shaw v. Gilfillan*, 22 Vt. 565. *Contra*, *Stephens v. Shriver*, 25 Pa. 78.

99. *Hawkins v. Mendenhall*, 3 Houst. (Del.) 216, action to recover from adjoining landowner the cost of repairs.

1. Actions for torts against property, see *supra*, II, F, 3, c.

2. *Cobine v. McKittrick*, 186 Ill. 324, 57 N. E. 880; *Pitts v. Looby*, 142 Ill. 534, 32 N. E. 519; *Taylor v. Koshetz*, 88 Ill. 479; *Lachman v. Deisch*, 71 Ill. 59; *Ridge v. Railroad Transfer Co.*, 56 Mo. App. 133.

[a] *Action Involving Fixtures.*—An action by the beneficiary in a deed of trust against the holder of a chattel mortgage on property on the premises, in form an action for injuries to the land may be maintained before a justice of the peace, the point in issue being whether such property was so attached to the land as to have become a fixture. *Vaughn v. Grigsby*, 8 Colo. App. 373, 46 Pac. 624.

authorities to the contrary.³ An action of trespass may be maintained in justice's court,⁴ unless the title to real property is drawn in issue.⁵ Even under statutes which deprive a justice's court of jurisdiction where the right of possession is involved, if no issue is made as to the plaintiff's right to possession, jurisdiction exists over actions of trespass on real property.⁶ An action of trespass based on the forcible disturbance of peaceable possession does not involve the question of title;⁷ but if the plaintiff is not in actual possession of the

3. *Bagley v. Columbus Southern Ry. Co.*, 98 Ga. 626, 25 S. E. 638, 58 Am. St. Rep. 325, 34 L. R. A. 286, for negligence of railroad in setting fire to fences and crops. See *Mayor v. Lyon*, 69 Ga. 577, the law was otherwise under the constitution of 1868.

4. *Del.*—*Duross v. Hobson*, 3 Penne. 445, 53 Atl. 438 (under the earlier law the action did not lie); *Draper v. Draper*, 3 Harr. 39. *Ill.*—*Ames v. Carlton*, 41 Ill. 261; *Reed v. Johnson*, 14 Ill. 257. *Mo.*—*Papin v. Ruelle*, 2 Mo. 28; *Schergens v. Wetzell*, 12 Mo. App. 596. *Pa.*—*Lauchner v. Rex*, 20 Pa. 464; *Hall v. Kreider*, 55 Pa. Super. 483; *House v. Ziegler*, 11 Pa. Co. Ct. 159; *Curry v. Gilroy*, 3 Phila. 424.

5. *Ark.*—*Cockrum v. Williamson*, 53 Ark. 131, 13 S. W. 592; *School Dist. No. 11 v. Williams*, 38 Ark. 454; *Halpern v. Burgess*, 13 S. W. 763. *N. H.*—*Morse v. Davis*, 24 N. H. 159; *Flagg v. Gotham*, 7 N. H. 266. *Tex.*—*Heath v. Robinson*, 75 Tex. 133, 53 Atl. 995, trespass for cutting down growing trees can not be maintained. *W. Va.*—*Belcher v. Gaston*, 4 W. Va. 639, trespass for cutting trees.

6. *Cornett v. Bishop*, 39 Cal. 319; *Pollock v. Cummings*, 38 Cal. 683; *State ex rel. Launiza v. Justice Court*, 29 Nev. 191, 87 Pac. 1, 89 Pac. 24. See *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; *Van Eiten v. Jilson*, 6 Cal. 19; *Fisch v. Nice*, 12 Cal. App. 60, 106 Pac. 598.

[a] **Trespass by Animals.**—Under a statute giving a right of action to the owner or person in lawful possession of land trespassed on by animals of another person, neither title nor the right to possession is necessarily involved. "The 'lawful possession' mentioned in the statute referred to is entitled to a construction by which it may be said that it means only 'peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but

actually so.' " *Fisch v. Nice*, 12 Cal. App. 60, 106 Pac. 598. See *Wilkins v. Lee*, 73 Kan. 321, 85 Pac. 140.

7. *Colo.*—*Patrick v. Brown*, 36 Colo. 298, 85 Pac. 325; *Smith v. Schlunk*, 6 Colo. App. 228, 40 Pac. 478. *Ind.*—*Maxam v. Wood*, 4 Blackf. 297, plea of not guilty does not show that title was involved. *Kan.*—*Duncan v. Yordy*, 27 Kan. 348. See *Wilkins v. Lee*, 73 Kan. 321, 85 Pac. 140. *Mich.*—*Dolabanty v. Lucey*, 101 Mich. 113, 59 N. W. 415; *Jacklin v. Soutier*, 82 Mich. 648, 46 N. W. 1027; *Newcombe v. Irwin*, 55 Mich. 620, 22 N. W. 66. *Neb.*—*Dold v. Knudsen*, 70 Neb. 373, 97 N. W. 482. *N. J.*—*Garcin v. Roberts*, 69 N. J. L. 572, 55 Atl. 43; *Bloom v. Stenner*, 50 N. J. L. 59, 11 Atl. 131; *Edgar v. Anness*, 47 N. J. L. 465, 2 Atl. 246; *Hill v. Carter*, 16 N. J. L. 87; *Gregory v. Kanouse*, 11 N. J. L. 62. *N. Y.*—*La Rue v. Smith*, 153 N. Y. 428, 47 N. E. 796; *Ehle v. Quackenboss*, 6 Hill 537. *Ore.*—*Sweek v. Galbreath*, 5 Pac. 749.

[a] Evidence by defendant that he was in actual possession at the time of the alleged trespass does not involve the question of title. *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537.

[b] **Extent of Injury No Test of Jurisdiction.**—"There is no doubt that the action of trespass *quare clausum fregit* is cognizable in a justice's court, and that it can be maintained by one who can show himself to be in actual possession. There is no distinction in point of jurisdiction arising from the extent or character of the injury sought to be redressed, and no test of that character has been applied in the adjudicated cases." *Bloom v. Stenner*, 50 N. J. L. 59, 11 Atl. 131.

[c] **Defence of entry by vendor upon land in possession of vendee in executory contract of sale**, does not involve question of title since the right of possession in the vendee is a mere license. *Dolittle v. Eddy*, 7 Barb. (N. Y.) 74.

premises he can only recover in trespass by proving actual title from which would follow a constructive possession, and in such cases title is necessarily involved, and the justice's court has no jurisdiction.⁸ Actions in the nature of waste involve title to land,⁹ and an action by a remainderman or reversioner for an injury to lands reaching beyond the rights of the person in actual possession, is excluded, as proof of title is necessary to the maintenance of the action.¹⁰ An action for the flowage of lands, cannot be maintained.¹¹

Actions of trespass on the case are not ordinarily within the jurisdiction of a justice of the peace.¹²

h. Actions for Interference With and Obstruction of Easements. Actions involving the existence of either a public¹³ right of way or

[d] Under the general issue, in trespass, the plaintiff being in possession, the defendant is not allowed to prove title in a stranger under whom he did not justify. *Beach v. Livergood*, 15 Ind. 496; and title is not shown to be in issue by the introduction of a deed in which title is in another until it is further shown that defendant claims under such other person. *Beach v. Livergood*, 15 Ind. 496.

8. *Mich.*—*Maynard v. Reynolds*, 137 Mich. 42, 100 N. W. 174; *Orris v. Kempton*, 105 Mich. 229, 63 N. W. 68; *Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670. *Neb.*—*Dold v. Knudsen*, 70 Neb. 373, 97 N. W. 482. *N. J.*—*Ely v. Schanek*, 52 N. J. L. 119, 18 Atl. 692; *Hillman v. Stanger*, 49 N. J. L. 191, 6 Atl. 434; *Edgar v. Anness*, 47 N. J. L. 465, 2 Atl. 246; *Jeffrey v. Owen*, 41 N. J. L. 260; *Dickerson v. Wadsworth*, 33 N. J. L. 357; *Osborne v. Butcher*, 26 N. J. L. 308; *Campfield v. Johnson*, 21 N. J. L. 83; *Hill v. Carter*, 16 N. J. L. 87; *Gregory v. Kanouse*, 11 N. J. L. 62. *N. Y.*—*Hubbell v. Rochester*, 8 Cow. 115, trespass for cutting timber on wild land.

[a] Title deeds as evidence merely of the fact, or the extent of possession, are inadmissible, since "their validity must necessarily be liable to be assailed" in such cases. *Jeffrey v. Owen*, 41 N. J. L. 260.

[b] Rule applies to trespasses on highways, plaintiff claiming to own to the center of the road. *Mich.*—*Maynard v. Reynolds*, 137 Mich. 42, 100 N. W. 174; *Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670. *N. J.*—*Vanatta v. Jones*, 42 N. J. L. 561. *N. Y.*—*Willoughby v. Jenks*, 20 Wend. 96; *Whiting v. Dudley*, 19 Wend. 373; *Randall*

v. Crandall, 6 Hill 342. *Wis.*—*State v. Doane*, 14 Wis. 483.

9. *Snyder v. Beyer*, 3 E. D. Smith (N. Y.) 235; *Bandlow v. Thieme*, 53 Wis. 57, 9 N. W. 920.

10. *Gregory v. Kanouse*, 11 N. J. L. 62, 66, dictum. *Contra*, *Lachman v. Deisch*, 71 Ill. 59, injuries due to construction of a drain.

11. *Dixon v. Scott*, 18 N. J. L. 430; *Vantyl v. Marsh*, 5 N. J. L. 507 (trespass on the case); *Haven v. Needham*, 20 Vt. 183. But see *Bischmann v. Boehl*, 30 Ill. App. 455 (flowage by a drain); *Chicago & A. R. Co. v. Calkins*, 17 Ill. App. 55.

12. *French v. Holt*, 57 Vt. 187 (for leaving open a gate by which cattle entered and did damage), *s. c.*, 51 Vt. 544; *Burlington & L. R. Co. v. Brush*, 57 Vt. 472 (for diversion of water into plaintiff's cellar); *Haven v. Needham*, 20 Vt. 183 (for obstructing a stream and causing its overflow); *Whitney v. Bowen*, 11 Vt. 250, for erecting a fence which obstructs plaintiff's windows. But see *Polhans v. Atchison*, T. & S. F. Ry. Co., 45 Mo. App. 153, action for negligently setting fire to crops.

[a] *Encroachment by Overhanging Eaves.*—An action involving such an injury, permanent in its nature and necessarily depriving plaintiff of actual possession of a portion of his property, necessarily involves the title to land. *Blackwell v. Leslie*, 4 N. J. L. 112.

In tort actions generally, see *supra*, II, F, 3.

13. *N. Y.*—*Willoughby v. Jenks*, 20 Wend. 96; *Whiting v. Dudley*, 19 Wend. 373; *Randall v. Crandall*, 6 Hill 342. *Vt.*—*Whitman v. Pownal*, 19 Vt. 223. *Va.*—*Martin v. Richmond*, 108 Va. 765, 62 S. E. 800; *Warwick v. Mayo*, 15

other easement, or a private one,¹⁴ affect and involve title to land within the meaning of the rule; but actions based on the improper and illegal obstruction of a public highway, are sometimes held to involve a freehold only incidentally, and jurisdiction over such actions is given to a justice of the peace.¹⁵

i. *Actions for the Conversion or Recovery of Possession of Personal Property Taken From Real Property, etc.*—Where the cause of action involves rights in or the ownership of buildings attached to land or crops or timber grown on but removed from the land, title to the land is not ordinarily considered to be involved within meaning of rule preventing justices from exercising jurisdiction.¹⁶ An action of replevin

Gratt. (56 Va.) 528. Wis.—State v. Doane, 14 Wis. 483.

14. Mich.—Fowler v. Hyland, 48 Mich. 179, 12 N. W. 26, under an express statute. Mo.—Williams v. Browning, 45 Mo. 475, action for obstruction of a drain. N. H.—Bartlett v. Prescott, 41 N. H. 493. N. J.—Osborne v. Butcher, 26 N. J. L. 308; Randolph v. Montfort, 16 N. J. L. 226. N. Y. Striker v. Mott, 6 Wend. 465; Alleman v. Dey, 49 Barb. 641. Wis.—Lowitz v. Leverentz, 57 Wis. 596, 15 N. W. 842; Stoppenbach v. Zohrlaut, 21 Wis. 385.

15. Ill.—Dolton v. Dolton, 201 Ill. 155, 66 N. E. 323; Keyser v. Mann, 36 Ill. App. 596. But see Underwood v. Ankrum, 190 Ill. App. 365. Ky.—Walker v. Floyd, 4 Bibb 237. Mich.—La Barre v. Bent, 154 Mich. 520, 118 N. W. 6 (action to recover statutory penalty); Knorr v. Macomb Cir. Judge, 78 Mich. 168, 43 N. W. 1099 (action for damages); La Blanc v. Kruger, 75 Mich. 561, 42 N. W. 980, suit to remove the obstruction. See Ramsby v. Bigler, 129 Mich. 570, 89 N. W. 344. But see Gregory v. Knight, 50 Mich. 61, 14 N. W. 700. N. Y.—Parker v. Van Houten, 7 Wend. 145; Fleet v. Youngs, 7 Wend. 291; Chapman v. Swan, 65 Barb. 210. Ohio.—Trustees of Burton Twp. v. Tuttle, 30 Ohio St. 62, jurisdiction expressly conferred by statute. Vt.—Bell v. Prouty, 43 Vt. 279, action for obstruction of public way.

Compare Coulson v. Chronister, 4 Pa. Co. Ct. 521.

[a] **Reason of the Rule.**—"The jurisdiction of the justice of the peace extended no further than to determine, incidentally, whether the defendant was the owner in fee of the land, for the purpose of finding whether or not he had violated the ordinance. The judgment of the justice of the peace did not deprive him of his freehold."

Dolton v. Dolton, 201 Ill. 155, 162, 66 N. E. 323. See also 11 STANDARD PROC. 161 et seq.

16. Ark.—Commercial Bank of Alma v. Yoes, 122 Ark. 611, 183 S. W. 180; Cline v. Cline, 101 Ark. 250, 142 S. W. 167. Ind.—Deacon v. Powers, 57 Ind. 489, replevin for timber cut on land. Md.—Deitrich v. Swartz, 41 Md. 196 (replevin for timber); Presstman v. Silljacks, 52 Md. 647, replevin for property seized under distress for rent. Mich.—Hart v. Hart, 48 Mich. 175, 12 N. W. 33. Vt.—French v. Freeman, 43 Vt. 93, trover for manure. Wis. Verbeck v. Verbeck, 6 Wis. 159. See Abbott v. Cremer, 118 Wis. 377, 95 N. W. 387, removal of ice from stream. Compare Huddleston v. Johnson, 71 Wis. 336, 37 N. W. 407, conversion of timber.

[a] **Chattel mortgagee of cotton** may sue in justice's court for its conversion although the point in issue is whether the person who raised the crop was the tenant of the mortgagor or of a third person who interpleads and claims ownership. Commercial Bank of Alma v. Yoes, 122 Ark. 611, 183 S. W. 180.

[b] **Frame Building.**—An action in replevin to recover such a building does not show want of jurisdiction on its face. "Whether the building was attached to the realty and constituted a part of it, or was a mere personal chattel, was a point to be settled by the evidence and not by an examination of the pleading." Elliott v. Black, 45 Mo. 372.

[c] **In an action to recover ore** claimed to have been taken from plaintiff's mine, the fact in issue being whether such ore was taken from a vein on plaintiff's location, no question of title is involved. Driscoll v. Dunwoody, 7 Mont. 394, 16 Pac. 726.

or claim and delivery, for title deeds may be maintained, if the controversy does not involve the determination of title to land.¹⁷

j. *Raising and Determining Whether Questions of Title Involved.*¹⁸

(I.) **In General.** — A plaintiff by alleging in his complaint that the title or right to possession of real property is involved, and setting forth the facts out of which the question arises, is entitled to invoke the jurisdiction of the higher court,¹⁹ and the defendant cannot oust the jurisdiction of that court by interposing an answer which admits the plaintiff's title,²⁰ though in some states, if the plaintiff's claim of title in an action instituted in a justice's court is admitted by the defendant, the trial may proceed before the justice of the peace.²¹ Ordinarily, the question of jurisdiction cannot be raised by demurrer,²² but if the complaint discloses on its face that it is necessary for the justice's court to receive evidence as to title or determine the question of title, a want of jurisdiction is apparent and a demurrer should be interposed and sustained.²³ If no claim of title is made in the

17. *Pasterfield v. Sawyer*, 133 N. C. 42, 45 S. E. 524; *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799.

18. Procedure to raise and determine jurisdictional questions generally, see *infra*, II, P.

19. *Raisch v. Sausalito Land & Ferry Co.*, 131 Cal. 215, 63 Pac. 346.

[a] Jurisdiction is sometimes determined solely from the allegations of the declaration and if from that it does not appear that title is necessarily involved, the justice of the peace has jurisdiction even though a plea and the evidence brings title in question. *Heath v. Robinson*, 75 Vt. 133, 53 Atl. 995; *French v. Holt*, 57 Vt. 187; *Flannery v. Hinkson*, 40 Vt. 485; *Jake-way v. Barrett*, 38 Vt. 316, trespass for carrying away grass not alleged to be growing when taken may be maintained.

20. *Brown v. Southerland*, 142 N. C. 225, 55 S. E. 108.

[a] "It is clear that the complaint alleges a state of facts which, if true, involves the title to land. Defendants, by moving to dismiss on the pleadings, cannot oust the jurisdiction, provided the complaint sets forth facts which present a case in which the title to real estate is in controversy. The fact, if it be conceded, that the answer admits the plaintiff's right to recover, cannot affect the question of jurisdiction." *Brown v. Southerland*, 142 N. C. 225, 55 S. E. 108.

21. *Maynard v. Reynolds*, 137 Mich. 42, 100 N. W. 174. See *Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670.

[a] **What Constitutes a Claim of Title.**—(1) A claim set up in plaintiff's declaration which can be proved by possession is not a claim of title. *Maynard v. Reynolds*, 137 Mich. 42, 100 N. W. 174; *Ehle v. Quackenboss*, 6 Hill (N. Y.) 537. (2) A claim of trespass on "the close of said plaintiff" is not a claim of title (*Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670), (3) nor does an allegation that defendant broke and entered "the lands and premises of the said plaintiff" (*Orris v. Kempton*, 105 Mich. 229, 63 N. W. 68), (4) or that plaintiff cut down and carried off trees standing "on the land of the said plaintiff" constitute a claim of title. *Maynard v. Reynolds*, 137 Mich. 42, 100 N. W. 174.

[b] Plaintiff's title established by defendant's own testimony, is not "involved" in the action. *Hastings v. Glenn*, 1 E. D. Smith (N. Y.) 402.

22. **Conn.**—*French v. Potter*, 2 Root 359. **Ia.**—*Delzell v. Burlington, C. R. & N. Ry. Co.*, 89 Iowa 208, 56 N. W. 433. **Mich.**—*Stout v. Keyes*, 2 Dougl. 184, 43 Am. Dec. 465. **Wis.**—*Stoppenbach v. Zohrlaut*, 21 Wis. 385.

Manner of raising jurisdictional questions generally, see *infra*, II, P.

23. *Hammer v. Garrett*, 15 Idaho 657, 99 Pac. 124. See also *Bridgmans v. Wells*, 13 Ohio 43.

[a] "The elementary rule is, that the facts constitute the test of jurisdiction upon any cause brought in the court, and if the facts as disclosed by the complaint show that the court has no jurisdiction of the subject matter,

complaint but defendant sets up in his answer that title is involved, the jurisdiction of the justice of the peace ceases.²⁴ In other states, however, the objection that title to real property is involved may be raised at the trial when evidence of title is tendered,²⁵ even though the answer was unverified or the required undertaking not given.²⁶ If, however, on the pleadings title does not appear to be involved, but at the trial it appears that plaintiff can recover only by proving his title, then also the jurisdiction of the justice ceases, if the objection to trying the title is properly presented by the defendant at that time;²⁷ but if no objection is made and the plaintiff's title is not disputed, the justice of the peace may proceed with the action.²⁸

and a demurrer is addressed to the complaint upon that ground, it should be sustained and the court is not required to wait until a verified answer is filed in order to determine the question of jurisdiction." *Hammer v. Garrett*, 15 Idaho 657, 665, 99 Pac. 124.

24. Me.—*Low v. Ross*, 3 Greenl. 256, plea of title divests the court of jurisdiction; replication by plaintiff is not required. Mass.—*Kelley v. Taylor*, 17 Pick. 218, jurisdiction cannot be restored by pleading over and joining issue on a matter not involving title. Mich.—*Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670. N. Y.—*Van Etten v. Van Etten*, 69 Hun 499, 23 N. Y. Supp. 711, 52 N. Y. St. 624; *Randall v. Crandall*, 6 Hill 342; *People v. Onondaga Common Pleas*, 2 Wend. 263. W. Va.—*Frum v. Prickett*, 71 W. Va. 273, 76 S. E. 453. Wis.—*Manny v. Smith*, 10 Wis. 509.

[a] Intervenor may file the plea and affidavit which ousts the justice's court of jurisdiction. *Bibbler v. Walker*, 69 Ind. 362.

[b] If no claim of title is made in the answer, the justice of the peace has jurisdiction. *Main v. Cooper*, 25 N. Y. 180.

25. Del.—*Legates v. Lingo*, 8 Houst. 154. Ia.—*Cox v. Graham*, 3 Iowa 347. Minn.—*Sorenson v. Torvestad*, 94 Minn. 410, 103 N. W. 15; *Herrick v. Newell*, 49 Minn. 198, 51 N. W. 819; *Radley v. O'Leary*, 36 Minn. 173, 30 N. W. 457; *Goenen v. Schroeder*, 8 Minn. 387. N. C.—*Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799; *Pasterfield v. Sawyer*, 133 N. C. 42, 45 S. E. 524; *McDonald v. Ingram*, 124 N. C. 272. Pa.—*Essler v. Johnson*, 25 Pa. 350. See *Mohan v. Butler*, 112 Pa. 590, 4 Atl. 47. Vt.—*Thayer v. Montgomery*, 26 Vt. 491.

[a] "There must be something besides the mere answer, for, if this is all that is required, any defendant can put an end to the jurisdiction of the court of his own will. The law requires, therefore, in addition to the answer, some proof in order that it may appear in a proper way to the court that there is a genuine controversy concerning the title to real estate." *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799.

26. Cal.—*King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10, holding that the statutory provision is mandatory. But see *Raisch v. Sausalito Land & Ferry Co.*, 131 Cal. 215, 63 Pac. 346; *Boyd v. Southern California Ry. Co.*, 126 Cal. 571, 58 Pac. 1046. Ind.—*Parker v. Bussell*, 3 Blackf. 411. S. D.—*Chicago, M. & St. P. R. Co. v. Nield*, 16 S. D. 370, 92 N. W. 1069.

27. *Maynard v. Reynolds*, 137 Mich. 42, 100 N. W. 174; *Ostrom v. Potter*, 71 Mich. 44, 38 N. W. 670; *Ely v. Schanck*, 52 N. J. L. 119, 18 Atl. 692; *Bloom v. Stenner*, 50 N. J. L. 59, 11 Atl. 131; *Edgar v. Anness*, 47 N. J. L. 465, 2 Atl. 246; *Vanatta v. Jones*, 42 N. J. L. 561; *Messler v. Fleming*, 41 N. J. L. 108.

28. *Koon v. Mazuzan*, 6 Hill (N. Y.) 44; *Bellows v. Sackett*, 15 Barb. (N. Y.) 96; *Browne v. Seofield*, 8 Barb. (N. Y.) 239 (general motion for a nonsuit for want of jurisdiction is not sufficient); *Ryan v. Harrigan*, 9 Hun (N. Y.) 520.

[a] "If the party will entitle himself to a dismissal, he must call the justice's attention specifically to the objection by at least disputing the title claimed. If he omit this, it is a waiver and a virtual assent that the evidence of title shall be received, and that the title as made out shall pass without being drawn into dispute. . . .

An amendment to the complaint changing the cause of action from one involving title to real estate to one in which title is not involved cannot be allowed either in the justice's court,²⁹ or on appeal.³⁰

(II.) **Form and Sufficiency of Answer.**³¹ — The answer must be in writing,³² and must state facts showing affirmatively that title to real property is involved;³³ the general allegation that defendant holds title is insufficient.³⁴ In many states the answer must be verified,³⁵

The statute is founded on the impropriety of a title to land being tried and determined by a justice's court. If it be conceded, or be assumed by both parties, thus passing without dispute on the trial, the plaintiff does not in the words of the statute show it to be in question. There is in fact no question about it; and the evil of trying title does not arise." *Koon v. Mazuzan*, 6 Hill (N. Y.) 44.

29. See *Blair v. Porter*, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81.

[a] If defendant appears and answers to the amended complaint, the justice's court acquires jurisdiction. *Blair v. Porter*, 12 Ind. App. 296, 38 N. E. 874, 40 N. E. 81.

30. *Kiphart v. Brennemmen*, 25 Ind. 152.

31. **Form and sufficiency of answer in justice's court generally**, see *infra*, III, K, 3.

32. *Coffee v. City of Chippewa Falls*, 36 Wis. 121. But see *Legates v. Lingo*, 8 Houst. (Del.) 154.

33. *Colo.*—*Bonnell v. Gill*, 41 *Colo.* 59, 92 *Pac.* 13, general denial is insufficient. *Ind.*—*Parker v. Bussell*, 3 *Blackf.* 411. *Mass.*—*Strout v. Berry*, 7 *Mass.* 385, general issue in trespass is insufficient. See *Kelley v. Taylor*, 17 *Pick.* 218 (special plea is required); *Blood v. Kemp*, 4 *Pick.* 169. *N. J.* See *Garcin v. Roberts*, 69 *N. J. L.* 572, 55 *Atl.* 43. *N. Y.*—*La Rue v. Smith*, 153 *N. Y.* 428, 47 *N. E.* 796 (general denial is insufficient); *People ex rel. Hill v. Kelsey*, 82 *Misc.* 491, 144 *N. Y. Supp.* 135, denial of allegation of ownership insufficient.

[a] "It should be remembered that a plea of title means some unequivocal assertion by defendant of title to the premises or some part thereof . . . and not a mere denial of the allegation of ownership. . . . A denial of an allegation of a complaint or petition is not a setting forth of facts; it simply challenges the truth of the al-

legation and puts the plaintiff or petitioner to his proofs, while the requirement of the law is that there shall be an affirmative issue; a declaration of facts which show that the defendant claims title to the real property." *People ex rel. Hill v. Kelsey*, 82 *Misc.* 491, 144 *N. Y. Supp.* 135.

[b] Mere allegation that entry was rightful and lawful is insufficient. *Garcin v. Roberts*, 69 *N. J. L.* 572, 55 *Atl.* 43.

[c] Answer stating facts which may be confessed and avoided does not place title in issue. *Melloh v. Demott*, 79 *Ind.* 502.

[d] Plea of public highway is sufficient. *Spear v. Bicknell*, 5 *Mass.* 125.

34. *Jordan v. Walker*, 56 *Iowa* 686, 10 *N. W.* 232.

[a] **Statement of Legal Conclusion Insufficient.**—"The mere statement of the opinion of the affiant that the title to real estate would be brought into issue on the trial is not sufficient. Facts should be stated from which such conclusion would follow." *McAllister v. Tindal*, 1 *Cal. App.* 236, 81 *Pac.* 1117.

[b] A statement that title is outstanding in another under whom the defendant holds possession is a denial by implication of plaintiff's title and was held sufficient. *State ex rel. Huston v. Ganzhorn*, 56 *Mo. App.* 519.

[c] Plea that defendant entered his adjoining close is not a plea denying plaintiff's title. *Wood v. Prescott*, 2 *Mass.* 174.

35. **U. S.**—*Langford v. Monteith*, 102 *U. S.* 145, 26 *L. ed.* 53. *Cal.*—*Dungan v. Clark*, 159 *Cal.* 30, 112 *Pac.* 718. See *King v. Kutner-Goldstein Co.*, 135 *Cal.* 65, 67 *Pac.* 10. *Conn.*—*Lay v. King*, 5 *Day* 72. *Idaho.*—*Hammer v. Garrett*, 15 *Idaho* 657, 99 *Pac.* 124. *Md.*—See *Josselson v. Sonneborn*, 110 *Md.* 546, 550, 73 *Atl.* 650, requirement applies only to a limited class of actions. *Nev.*—*State ex rel. Launiza v.*

or accompanied by an affidavit,³⁶ otherwise the jurisdiction of the justice of the peace is not ousted.³⁷ Under some statutes, the defendant must also furnish an undertaking or bond,³⁸ and serve notice, if the general issue was pleaded, of his claim of title;³⁹ if these provisions of the statute are not complied with, the justice's court retains jurisdiction over the case and the defendant is precluded from raising the question of title.⁴⁰

Time for Interposing. — An answer alleging title to real property may be interposed after issue joined.⁴¹

(III.) Method of Determining. — The determination of the question of whether title to real property is in truth involved is left to the justice; and the mere fact that the claim is made that such is the case does not oust him of jurisdiction.⁴² He must pass on the question

Justice Court, 29 Nev. 191, 87 Pac. 1, 89 Pac. 24, oral or unverified answer is insufficient.

Necessity for verification generally, see the title "Verification."

36. *Colo.*—Bonnell *v.* Gill, 41 *Colo.* 59, 92 *Pac.* 13. *Ind.*—Bridges *v.* Branam, 133 *Ind.* 488, 33 *N. E.* 271; Wall *v.* Albertson, 18 *Ind.* 145. *Pa.*—Lauchner *v.* Rex, 20 *Pa.* 464. *W. Va.*—Frum *v.* Prickett, 71 *W. Va.* 273, 76 *S. E.* 453.

[a] **Form of affidavit,** by tenant claiming that title was in another than the plaintiff, under whom he held possession, see Bennett *v.* McCaffery, 28 *Mo. App.* 220.

[b] **Informalities in the plea and affidavit** will be disregarded. *State ex rel. Huston v. Ganzhorn*, 56 *Mo. App.* 519.

[c] **Time for Filing Affidavit.**—The affidavit may be filed at any time before trial, but not on an appeal. *Lauchner v. Rex*, 20 *Pa.* 464.

37. Wall *v.* Albertson, 18 *Ind.* 145; Delzell *v.* Burlington, C. R. & N. Ry. Co., 89 *Iowa* 208, 56 *N. W.* 433; Ford *v.* Ball (W. Va.), 86 *S. E.* 562.

[a] **Jurisdiction Is Not Thus Conferred by Consent.**—The statute "gives the right to the justice to try such causes, except when the defendant makes oath of a certain fact. The jurisdiction is derived from the statute. Though it was liable to be defeated, the omission of the defendant to do so is not its origin." *Lauchner v. Rex*, 20 *Pa.* 464.

38. *N. J.*—Edgar *v.* Anness, 47 *N. J. L.* 465, 2 *Atl.* 246; Messler *v.* Fleming, 41 *N. J. L.* 108; Randolph *v.* Montfort, 16 *N. J. L.* 226. *N. Y.*—People *ex rel. Hill v. Kelsey*, 82 *Misc.* 491, 144 *N. Y. Supp.* 135; Randall *v.*

Crandall, 6 *Hill* 342; Ehle *v.* Quackenboss, 6 *Hill* 537; Ryan *v.* Harrigan, 9 *Hun* 520; Fredonia & S. Plank Road Co. *v.* Wait, 27 *Barb.* 214. *Wis.*—Lowitz *v.* Leverentz, 57 *Wis.* 596, 15 *N. W.* 842; Coffee *v.* Chippewa Falls, 36 *Wis.* 121; State *v.* Huck, 29 *Wis.* 202; Barteau *v.* Appleton, 23 *Wis.* 414.

39. Ramsby *v.* Bigler, 129 *Mich.* 570, 89 *N. W.* 344; Jacklin *v.* Soutier, 82 *Mich.* 648, 46 *N. W.* 1027. See Lowitz *v.* Leverentz, 57 *Wis.* 596, 15 *N. W.* 842.

[a] **Oral notice** is insufficient. Randall *v.* Crandall, 6 *Hill* (N. Y.) 342.

40. *Mich.*—Ramsby *v.* Bigler, 129 *Mich.* 570, 89 *N. W.* 344; Parkinson *v.* Wouds, 125 *Mich.* 325, 84 *N. W.* 292. *Mont.*—State *v.* District Court, 33 *Mont.* 356, 83 *Pac.* 597. *N. J.*—Ely *v.* Schanck, 52 *N. J. L.* 119, 18 *Atl.* 692 (title in defendant or some person under whom he claims); Edgar *v.* Anness, 47 *N. J. L.* 465, 2 *Atl.* 246; Vanmater *v.* Real, 3 *N. J. L.* 357. *Wis.*—Lowitz *v.* Leverentz, 57 *Wis.* 596, 15 *N. W.* 842; Ashbough *v.* Walter, 24 *Wis.* 466; Barteau *v.* Appleton, 23 *Wis.* 414.

41. Barnard *v.* Clark, 33 *Misc.* 330, 68 *N. Y. Supp.* 624, by way of amendment and on an adjourned day; the early statute required the answer to be made when issue was joined.

42. *Colo.*—Hamill *v.* Bank of Clear Creek County, 22 *Colo.* 384, 45 *Pac.* 411. *Kan.*—Duncan *v.* Yordy, 27 *Kan.* 348. *Neb.*—Stone *v.* Blanchard, 87 *Neb.* 1, 126 *N. W.* 766; Green *v.* Morse, 57 *Neb.* 391, 77 *N. W.* 925, 73 *Am. St. Rep.* 518; Lipp *v.* Hunt, 25 *Neb.* 91, 41 *N. W.* 143; Smith *v.* Kaiser, 17 *Neb.* 184, 22 *N. W.* 368; Pettit *v.* Black, 13 *Neb.* 142, 12 *N. W.* 841. *Pa.*—Heritage *v.* Wilfong, 58 *Pa.* 137.

as it is presented by the pleadings,⁴³ or, in some states, by the evidence introduced at the trial.⁴⁴

(IV.) **Effect of Determination That Jurisdiction Lacking.** — Upon its appearing that the title to real property is necessarily involved, the jurisdiction of the justice of the peace ceases,⁴⁵ and he must either dismiss the action,⁴⁶ or, where statutory authority for the practice exists, certify the cause and transmit the papers to the higher court;⁴⁷ this court thereupon acquires original jurisdiction of the action.⁴⁸ Certification of the proceedings, in a proper case, may be enforced by mandamus.⁴⁹

(V.) **Effect of Error in Determination.** — An erroneous decision to the

S. D.—McManus *v.* Maloy, 30 S. D. 373, 138 N. W. 963, 967; Chicago, M. & St. P. R. Co. *v.* Nield, 16 S. D. 370, 92 N. W. 1069.

[a] A denial of plaintiff's title, the complaint not alleging title, is not responsive and raises no issue of title. Jordan *v.* Walker, 56 Iowa 686, 10 N. W. 232.

[b] Filing a plea of title in an action in which such a plea is not germane to the issues which can properly be raised, does not oust the justice's court of jurisdiction. Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271 (in forcible detainer proceedings); Graham *v.* Conway, 91 Mo. App. 391. See Fleet *v.* Youngs, 7 Wend. (N. Y.) 291.

[c] The good faith of the plaintiff in interposing a claim of title may be passed on by the court. Warwick *v.* Mayo, 15 Gratt. (56 Va.) 528, 545.

43. German Evangelical Church *v.* Schindler, 56 Ore. 247, 108 Pac. 178, distinguishing Malarkey *v.* O'Leary, 34 Ore. 493, 56 Pac. 521, decided under an earlier and different statute; Sweek *v.* Galbreath, 11 Ore. 516, 6 Pac. 220.

[a] Counter affidavit (1) filed by plaintiff, denying that title is involved, authorizes the court to retain the case, in some jurisdictions (Watson *v.* Watson, 45 W. Va. 290, 31 S. E. 939); (2) at least unless and until it is made to appear from the evidence that title is actually involved. Hughes *v.* Mount, 23 W. Va. 130.

44. Stone *v.* Blanchard, 87 Neb. 1, 126 N. W. 766. See also *supra*, II, F, 4, j, (I).

45. Magoun *v.* Lapham, 19 Pick. (Mass.) 419.

46. Fitzgerald *v.* Beebe, 7 Ark. 305, 46 Am. Dec. 285.

47. Cal.—Dungan *v.* Clark, 159 Cal.

30, 112 Pac. 718; King *v.* Kutner-Goldstein Co., 135 Cal. 65, 67 Pac. 10. Colo.—Smith *v.* Schlink, 6 Colo. App. 228, 40 Pac. 478. Idaho.—Hammer *v.* Garrett, 15 Idaho 657, 99 Pac. 124, the statute is mandatory. Ind. Deane *v.* Robinson, 34 Ind. App. 468, 83 N. E. 169. N. D.—Johnson *v.* Erickson, 14 N. D. 414, 105 N. W. 1104.

[a] A dismissal of the action under such statutes is improper. "There can be no possible state of facts which authorizes a justice of the peace to dismiss the action on the ground that it involves the title to real estate." Delzell *v.* Burlington, C. R. & N. Ry. Co., 89 Iowa 208, 56 N. W. 433.

[b] An appeal taken from an erroneous dismissal, where the justice should have certified the case, places it in the same position as though it had been certified. Johnson *v.* Erickson, 14 N. D. 414, 105 N. W. 1104.

[c] So, if a case is appealed on its merits, the fact that the justice's court had no jurisdiction and should have certified the case up instead of passing on it does not affect the jurisdiction of the higher court. Hart *v.* Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 633.

[d] Improper certification ousts both courts of jurisdiction; the higher court cannot remand the case. Sorenson *v.* Torvestad, 94 Minn. 410, 103 N. W. 15.

As to transfer of causes to superior court, see *infra*, III, R.

48. Raisch *v.* Sausalito Land & Ferry Co., 131 Cal. 215, 63 Pac. 346; Meier *v.* Thieman, 90 Mo. 433, 2 S. W. 435; Westport *v.* Hawk, 92 Mo. App. 364.

49. State *ex rel.* Huston *v.* Ganzhorn, 56 Mo. App. 519; Bennett *v.* McCaffery, 28 Mo. App. 220.

effect that title was not involved renders the judgment voidable for error, but not void for want of jurisdiction.⁵⁰ Error on the part of the justice of the peace in determining that title to real property was involved does not affect the jurisdiction of the higher court;⁵¹ nor does a finding by the higher court adverse to the answer which raised the question of title.⁵²

On appeal, the nature of the evidence cannot be considered in determining the question of jurisdiction of the justice's court,⁵³ and if, under the issues made by the pleadings, evidence of title may or may not have been given at the trial, and the record is silent on the matter, it will be presumed that no such evidence was offered.⁵⁴ The fact that, on the appeal, the trial being *de novo*, title does come in question is immaterial, where it was not involved in the justice's court.⁵⁵ Costs are sometimes made to depend, where judgment has been in favor of the defendant, upon the issuing of a certificate that title to real property came in question on the trial.⁵⁶

k. *Waiver of Objection of Want of Jurisdiction.*—Jurisdiction over an action involving title to real property cannot be conferred by consent.⁵⁷ Failure on the part of the defendant to file a verified answer from which it would appear that the title to real property was involved in the action is not always a waiver of the objection.⁵⁸

50. *State v. Mayer*, 52 La. Ann. 255, 26 So. 823 (error may be corrected by an appeal); *Koon v. Mazuzan*, 6 Hill (N. Y.) 44.

51. Mo.—*Westport v. Hauk*, 92 Mo. App. 364. Mont.—*Compare State v. District Court*, 33 Mont. 356, 83 Pac. 597. N. Y.—*La Rue v. Smith*, 153 N. Y. 428, 47 N. E. 796. Wis.—*Verbeck v. Verbeck*, 6 Wis. 159.

[a] *Effect of Error.*—"When an action of this character has been improperly dismissed by a justice of the peace under an erroneous view as to what constitutes a plea of title and the plaintiff submits to the decision and files his complaint in the Supreme Court, he must be regarded as voluntarily abandoning the suit before the justice, and the action in the Supreme Court should be treated as originally commenced there, since that court has general jurisdiction of all such actions." *La Rue v. Smith*, 153 N. Y. 428, 47 N. E. 796.

52. *Dungan v. Clark*, 159 Cal. 30, 112 Pac. 718.

53. *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, 35 Pac. 633.

[a] *Evidence may be referred to in illustration of the test relied upon and applied by the court.* *Hart v. Carnall-Hopkins Co.*, 101 Cal. 160, 35 Pac. 633.

54. *Deacon v. Powers*, 57 Ind. 489; *Wall v. Albertson*, 18 Ind. 145; *Rogers v. Perdue*, 7 Blackf. (Ind.) 302.

55. *Wall v. Albertson*, 18 Ind. 145.

56. *Taylor v. Wright*, 36 App. Div. 568, 55 N. Y. Supp. 761.

[a] *When Title Is in Question.* "Whenever under the pleadings, it becomes necessary for the plaintiff to prove, and he does upon the trial give evidence of title, it may be fairly said that such title came in question upon the trial. Those matters come in question upon the trial that are alleged in the complaint, controverted by the answer, and which the plaintiff gives evidence of to maintain his cause of action. The fact that the plaintiff gives insufficient evidence to maintain his complaint, and that thus the defendant is relieved from the necessity of giving any evidence to contradict that given by the plaintiff, does not change the situation and remove those matters which have been pleaded and evidence of given, from the category of matters that came in question upon the trial." *Taylor v. Wright*, 36 App. Div. 568, 55 N. Y. Supp. 761.

57. *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10.

58. *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10. See *supra*, II, F, 4, j, (I).

5. Actions Involving Taxes, Assessments and Licenses.—Actions to recover taxes or assessments, the amount involved being within the court's jurisdiction, may usually be instituted in justice's courts.⁵⁹ But, where it appears on the face of the record that the determination of the action would necessarily involve the validity of the tax or assessment, the justice can proceed no further with the action,⁶⁰ and a justice has no jurisdiction over actions in which the enforcement of the tax lien by the sale of the property for the unpaid taxes is a part of the relief sought.⁶¹ This latter rule is applicable in actions to collect and enforce special assessments.⁶²

6. Actions Involving Penalties.—Jurisdiction over actions to recover a fine, penalty, or forfeiture, imposed by statute or municipal ordinance, within a specified limit as to amount usually exists.⁶³ Where a justice of the peace is given jurisdiction over civil actions, actions

59. Cal.—*People v. Mier*, 24 Cal. 61. **La.**—*Willis v. Ruddock Cypress Co.*, 108 La. 255, 32 So. 386. **Tenn.**—*Mayor v. McKee*, 2 Yerg. 167. **Utah.**—*Pleasant Grove City v. Holman*, 18 Utah 338, 54 Pac. 1013. **Wis.**—*Hancock v. Merriman*, 46 Wis. 159, 49 N. W. 970. **Contra**, *Aulanier v. Governor*, 1 Tex. 653.

60. Cal.—*Monterey v. Abbott*, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73; *People v. Mier*, 24 Cal. 61. **Nev.**—See *Inda v. McInnis*, 25 Nev. 235, 59 Pac. 2. **Utah.**—*Pleasant Grove City v. Holman*, 18 Utah 338, 54 Pac. 1013. See *Willard City v. Woodland*, 7 Utah 192, 26 Pac. 284.

Certification of pleadings to higher court, see *infra*, III, D, 2, b, (II).

61. Cal.—*People v. Mier*, 24 Cal. 61. **Mo.**—*Buford v. Moore*, 177 S. W. 865; *Southwest Land & Orchard Co. v. Barnett*, 240 Mo. 370, 144 S. W. 780; *McVey v. Carr*, 159 Mo. 648, 60 S. W. 1034; *Harwood v. Toms*, 130 Mo. 225, 32 S. W. 666; *State v. Hopkins*, 87 Mo. 519. But see *State v. Van Every*, 75 Mo. 530; *Kansas City v. Winner*, 58 Mo. App. 299; *Kansas City v. Summerwell*, 58 Mo. App. 246, holding that such jurisdiction exists under special statutes. **Tenn.**—*State v. Covington*, 4 Lea 51.

Jurisdiction of justice's court to enforce liens, see *infra*, II, G, 1, 3.

62. Pleasant Hill v. Dasher, 120 Mo. 675, 25 S. W. 566; *Westport v. Hauk*, 92 Mo. App. 364.

63. See the following: U. S.—*Washington v. Eaton*, 4 Cranch (C. C.) 352, 29 Fed. Cas. No. 17,228; *Hall v. Washington*, 4 Cranch C. C. 722, 11 Fed. Cas. No. 5,953. **Ala.**—*Reagh v. Spann*, 3

Stew. 100. **Cal.**—*Thomas v. Justice's Court*, 80 Cal. 40, 22 Pac. 80; *Williams v. McCartney*, 69 Cal. 556, 11 Pac. 186. **Del.**—*Collins v. Brittingham*, 5 Boyce 89, 90 Atl. 420, for removal of boundary mark. **Ill.**—*Village of Dolton v. Dolton*, 201 Ill. 155, 66 N. E. 323 (for obstructing a highway); *Herman v. Comrs. of Highways*, 197 Ill. 94, 64 N. E. 337; *Town of Chatham v. Mason*, 53 Ill. 411. **Ia.**—*Incorporated Town of Scranton v. Hensen*, 163 Iowa 457, 144 N. W. 1024, action to recover license from transient merchant cannot be maintained in district court. **Ky.** *Gleason v. Weber*, 155 Ky. 431, 159 S. W. 976 (outside of cities or towns having police courts); *Blackwood v. Tanner*, 112 Ky. 672, 66 S. W. 500 (for failure to operate a ferry); *Louisville & N. R. Co. v. Com.*, 102 Ky. 300, 43 S. W. 458 (failure of railroad to keep ticket office open); *Walker v. Floyd*, 4 Bibb 237, for obstructing highway. **Mich.**—*La Barre v. Bent*, 154 Mich. 520, 118 N. W. 6, for obstruction of highway. **Miss.**—*Matthews v. Cotton*, 83 Miss. 472, 35 So. 937. **Mo.**—*O'Brien v. Union Fire Co.*, 7 Mo. 38, fine imposed under by-laws of a private corporation. **Mont.**—*Reynolds v. Smith*, 48 Mont. 149, 135 Pac. 1190. **N. Y.** *Hallock v. Dominy*, 69 N. Y. 238; *Walker v. Cruikshank*, 2 Hill 296, under by-law of private corporation. **Ohio.** *Trustees of Burton Twp. v. Tuttle*, 30 Ohio St. 62. **Pa.**—*Garman v. Gamble*, 10 Watts 382; *McConahy v. Courtney*, 7 Watts 491. **S. C.**—*Jenkins v. Atlantic Coast Line R. Co.*, 84 S. C. 343, 66 S. E. 409. **Va.**—*Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296, 13 S. E. 421; *Ex parte Marx*, 86 Va. 40, 9 S. E.

to recover penalties are embraced within his jurisdiction,⁶⁴ and this is also the rule, where jurisdiction is conferred over actions in which debt or assumpsit would lie,⁶⁵ though there are some authorities to the contrary.⁶⁶ Frequently, however, jurisdiction in such cases is ousted where it is made to appear that the defendant raises an issue as to the legality of the fine or penalty.⁶⁷

7. Enforcement of Awards.—In the absence of express statutory authority, a justice of the peace has no authority to enforce an award made by arbitrators,⁶⁸ or to submit a case pending before him to arbitration.⁶⁹ Statutes conferring the power to enter judgment on an award

475. *W. Va.*—*West v. Rawson*, 40 W. Va. 480, 21 S. E. 1019. *Wis.*—*Stoltzman v. Lake*, 124 Wis. 462, 102 N. W. 920; *State v. Nohl*, 113 Wis. 15, 88 N. W. 1004.

Action to recover penalties on bonds, see *supra*, II, F, 2, c.

[a] Where the action involves title to real property, no jurisdiction exists. *Martin v. Richmond*, 108 Va. 765, 62 S. E. 800. See also *supra*, II, F, 4.

Amount in controversy as test of jurisdiction, see generally the title "Jurisdiction."

64. *Clevenger v. Town of Rushville*, 90 Ind. 258.

65. *Colo.*—*Dwyer v. Smelter City State Bank*, 30 Colo. 315, 70 Pac. 323. *Ill.*—*Indianapolis & St. L. R. Co. v. People*, 91 Ill. 452; *City of Chicago v. Quimby*, 38 Ill. 274; *De Wolf v. Chicago*, 26 Ill. 443; *Ferris v. Ward*, 9 Ill. 499. But see *Bowers v. Green*, 2 Ill. 42. *Miss.*—*Western Union Tel. Co. v. Sullivan*, 70 Miss. 447, 12 So. 460. *Mo.*—*O'Brien v. Union Fire Co.*, 7 Mo. 38, fine imposed by private corporation on member for breach of by-law. *N. J.* See *New Jersey S. P. C. A. v. Russ*, 83 N. J. L. 450, 83 Atl. 961. *N. C.* *Templeton v. Beard*, 159 N. C. 63, 74 S. E. 735; *Katzenstein v. Raleigh & G. R. Co.*, 84 N. C. 688; *Wilmington v. Davis*, 63 N. C. 582. *Pa.*—*Garman v. Gamble*, 10 Watts 382; *McConahy v. Courtney*, 7 Watts 491, where statute directed penalty to be "recovered as debts of the same amount are recoverable." But see *Zeigler v. Gram*, 13 Serg. & R. 102; *Ellmore v. Hoffman*, 2 Ashm. 159.

66. *Ark.*—*Merfield v. Burkett*, 56 Ark. 592, 20 S. W. 523; *Baltimore & O. Tel. Co. v. Lovejoy*, 48 Ark. 301, 3 S. W. 183 (penalty for non-delivery of telegraph message); *Gibson v. Emer-*

son, 7 Ark. 172. *Ga.*—*Atlanta, K. & N. Ry. Co. v. Shippen*, 126 Ga. 784, 55 S. E. 1031; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 11 S. E. 396, 8 L. R. A. 189. *S. C.*—*State v. Marshall*, 2 McCord 63. *Tenn.*—*Stover v. Lasater*, 8 Lea 631; *Duncan v. Maxey*, 5 Sneed 114. *Tex.*—*Aulanier v. Governor*, 1 Tex. 653.

[a] But if the so-called penalty is in its nature merely a provision for exemplary damages for breach of contract, the justice has jurisdiction. *Leep v. St. Louis, I. M. & S. Ry. Co.*, 58 Ark. 407, 25 S. W. 75, 41 Am. St. Rep. 109, 23 L. R. A. 264, penalty for non-payment of employee's wages.

67. *Thomas v. Justice's Court*, 80 Cal. 40, 22 Pac. 80; *Culbertson v. Kinevan*, 68 Cal. 490, 9 Pac. 455. *Contra*, *Hallock v. Dominay*, 69 N. Y. 238.

[a] A distinction is sometimes made between attacks on the legality of penalties created by statute and those created by municipal ordinance; in the former case a justice may proceed with the case,—in the latter he cannot. *Thomas v. Justice's Court*, 80 Cal. 40, 22 Pac. 80.

68. *Conn.*—*Desborough v. Desborough*, 1 Root 126; *Mills v. Borrowghs*, 1 Root 99. *Del.*—*Carey v. Russel*, 2 Harr. 280. *Ind.*—*Richards v. Reed*, 39 Ind. 330. *Ia.*—*Contra*, *Whitis v. Culver*, 25 Iowa 30; *Van Horn v. Bellar*, 20 Iowa 255. *Mass.*—*Kingsley v. Bill*, 9 Mass. 198. *Mo.*—*Bowles v. Abrahams*, 65 Mo. App. 10, 2 Mo. App. Rep. 1140. *Pa.*—*Yates v. Demmer*, 9 Pa. Co. Ct. 80, the remedy is in equity. *Contra*, *Scott v. Barnes*, 7 Pa. 134; *Weidimor v. Drissel*, 1 Yeates 77. *Tenn.* See *Collins v. Oliver*, 4 Humph. 439.

69. *Richards v. Reed*, 39 Ind. 330.

made upon a submission of an action pending before the justice are not uncommon.⁷⁰

8. Suits To Abate Nuisances.—Justices of the peace sometimes have jurisdiction of suits to abate nuisances which affect the public generally.⁷¹ As a general rule, however, no such jurisdiction exists.⁷²

G. JURISDICTION AS DEPENDENT UPON NATURE OF RELIEF SOUGHT.

1. Jurisdiction in Equity.—**a. In General.**—In general, no equitable powers or jurisdiction exists in justice's courts,⁷³ though they may apply equitable principles to the determination of the cases brought

70. *Shirk v. Trainer*, 20 Ill. 301; *Weinz v. Dopler*, 17 Ill. 111; *Hyatt v. Harmon*, 6 Ill. 379.

71. *Hart v. Taylor*, 61 Ga. 156; *Wetter v. Campbell*, 60 Ga. 266; *Macon & B. R. Co. v. State*, 50 Ga. 156.

[a] Exception.—No such power exists, in some jurisdictions, where city officers are given power to act in such cases. *South Carolina R. Co. v. Ells*, 40 Ga. 87.

72. *State v. Schafer*, 31 Wash. 305, 71 Pac. 1088. See *Lastings v. Mills*, 50 Neb. 842, 70 N. W. 381.

73. *Ala.*—*Hall v. Cannte*, 22 Ala. 650. *Ark.*—*Whitesides v. Kershaw*, 44 Ark. 377, cannot compel an interpleader. *Cal.*—*Garniss v. Superior Court*, 88 Cal. 413, 26 Pac. 351. *Ga.*—*Woodruff v. McDonald Furn. Co.*, 96 Ga. 86, 23 S. E. 195. *Kan.*—*Griffin v. O'Neil*, 47 Kan. 116, 27 Pac. 826, no action for reformation of a contract would lie. *Mo.*—*Ridgley v. Stillwell*, 28 Mo. 400 (specific performance cannot be granted); *Close v. Independent Gravel Co.*, 156 Mo. App. 411, 138 S. W. 81; *Boyce v. Bowman*, 15 Mo. App. 578. *Mont.*—*Mettler v. Adamson*, 38 Mont. 198, 99 Pac. 441. *Neb.*—*Grimm v. Kucera*, 16 Neb. 349, 20 N. W. 396. *N. M.*—*Munis v. Herrera*, 1 N. M. 362. *N. Y.*—*Coon v. Brook*, 21 Barb. 546. *N. C.*—*Fidelity & Deposit Co. v. Jordan*, 134 N. C. 236, 46 S. E. 496; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770; *Dougherty v. Sprinkle*, 88 N. C. 300; *Fisher v. Webb*, 84 N. C. 44. *Ohio.*—*Moore v. Freeman*, 50 Ohio St. 592, 35 N. E. 502; *Carey v. Richards*, 2 Ohio Dec. (Reprint) 630. *S. C.*—*Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449.

[a] Injunction cannot be issued. *Crawford v. Sandridge*, 75 Tex. 383, 12 S. W. 853; *Poe v. Ferguson* (Tex. Civ. App.), 168 S. W. 459. See also 12 STANDARD PROC. 1009, et seq.

[b] Specific performance of contracts cannot be awarded. *Enlow v. Newland*, 22 Mo. App. 581; *Munis v. Herrera*, 1 N. M. 362. See also the title "Specific Performance."

[c] Cancellation of instruments cannot be effected. *Snyder v. Crutcher*, 137 Mo. App. 121, 118 S. W. 489. See also the title "Rescission and Cancellation."

[d] Action on trustee's debt, to be enforced out of trust property, cannot be maintained. *Smith v. Taylor*, 34 Ind. App. 194, 72 N. E. 651.

[e] Interpleader and substitution of defendants, who claim the property sought to be reached by plaintiff, does not change a legal cause of action into an equitable one and a justice's court continues to have jurisdiction over the action. *Mettler v. Adamson*, 38 Mont. 198, 99 Pac. 441; *Anderson v. Red Metal Min. Co.*, 36 Mont. 312, 93 Pac. 44.

[f] Recovery of illegal preference made by a bankrupt cannot be had in a justice's court. *Starbuck v. Gebro*, 59 Misc. 332, 112 N. Y. Supp. 312.

[g] Rights arising by subrogation cannot be enforced in a justice's court. *Fidelity & Deposit Co. v. Jordan*, 134 N. C. 236, 46 S. E. 496. But see *United States Fidelity & Guaranty Co. v. A. F. Messick Grocery Co.*, 147 N. C. 510, 61 S. E. 375.

[h] An action to charge the separate property of married women in equity does not lie. *N. Y.*—*Coon v. Brook*, 21 Barb. 546. *N. C.*—*Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881; *Berry v. Henderson*, 102 N. C. 525, 9 S. E. 455; *Dougherty v. Sprinkle*, 88 N. C. 300. *Ohio.*—*Allison v. Porter*, 29 Ohio St. 136; *Schultz v. Myer*, 6 Ohio Dec. (Reprint) 1086. *Tenn.*—*Flanagan v. Grocery Co.*, 98 Tenn. 599, 40 S. W. 1079.

before them,⁷⁴ and in some states an equitable defense,⁷⁵ or title,⁷⁶ may

74. *Whitesides v. Kershaw*, 44 Ark. 377; *Crawford v. Sandridge*, 75 Tex. 383, 12 S. W. 853; *Gibson v. Moore*, 22 Tex. 611.

[a] **Rule Stated.**—"A justice of the peace court is not a chancery court. The justice may apply equitable doctrines to the solution of questions in cases properly coming within his jurisdiction, but, he does not possess the machinery and appliances of a court of equity, and cannot administer the flexible remedies of that court. . . . These courts were not designed for complicated matters. They have been aptly called the people's courts, and the object of their organization was to afford to every one a convenient, expeditious and cheap method for the settlement of the small, everyday affairs of life. It was the design that these tribunals should be presided over by worthy and practical men, versed in ordinary business matters, but not learned in the law; and, in keeping with this design, no equitable powers have been conferred upon them." *Whitesides v. Kershaw*, 44 Ark. 377.

[b] **Basis of this principle** is to be found in the statutes abolishing the distinction between actions at law and suits in equity and establishing but one form of action: "No good reason is perceived why these provisions should not be held applicable to actions before justices of the peace where they have jurisdiction of the subject-matter of the action. . . . It was the evident design of the code to abolish, in practice, all distinction between law and equity, and to invest every court having jurisdiction of a civil action with a power to hear and determine the same in accordance with equitable as well as legal principles." *Snell v. Mohan*, 38 Ind. 494.

[c] **Extent of Their Power.**—"It must be admitted that a justice of the peace has no jurisdiction to declare an equity or to enforce an equitable lien, while on the other hand it seems to us that it must be admitted that a justice of the peace has the jurisdiction to enforce the collection of money which equitably belongs to a party. The distinction between the two is clear to our minds." *Markham v. McCown*, 124 N. C. 163, 166, 32 S. E. 494.

[d] **Statutes conferring such power are not to be construed as giving to justices of the peace any jurisdiction over equitable remedies.** *State v. Covington*, 4 Lea (Tenn.) 51; *Putnam v. Bentley*, 8 Baxt. (Tenn.) 84; *Bryan v. Buckholder*, 8 Humph. (Tenn.) 561.

[e] **Estoppel in pais** (1) is not strictly equitable in nature and may be the basis of an action in a justice's court. *Pitman v. Sixteen to One Min. Co.*, 78 Mo. App. 438, *overruling Kelchner v. Morris*, 75 Mo. App. 588; *Sandige v. Hill*, 70 Mo. App. 71, and other cases. See also *Kansas City Star Pub. Co. v. Standard Warehouse Co.*, 123 Mo. App. 13, 99 S. W. 765. (2) Such an estoppel "had its origin in equity principles and it doubtless is most frequently termed an equitable estoppel. But it has become incorporated into the common law and applied in actions at law. . . . It is never necessary to go into a court of equity jurisdiction for the purpose of obtaining the benefit of an equitable estoppel when the case is not otherwise of equitable jurisdiction." *Pitman v. Sixteen to One Min. Co.*, 78 Mo. App. 438, 440.

75. *Barbee v. Greenberg*, 144 N. C. 430, 57 S. E. 125; *Levin v. Gladstein*, 142 N. C. 482, 55 S. E. 371; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770; *Bell v. Howerton*, 111 N. C. 69, 15 S. E. 891; *Lutz v. Thompson*, 87 N. C. 334; *McAdoo v. Callum Bros. & Co.*, 86 N. C. 419.

[a] **Covenant to renew a lease** (1) may be set up as a defense to an action for possession (*Barbee v. Greenberg*, 144 N. C. 430, 57 S. E. 125), for (2) while such a provision "is not itself a renewal so as to vest an estate in the defendants for the successive term, it gave them an equity, which, while it cannot be specifically enforced in the court of a justice, will be recognized as a defense to a proceeding for the ejectment of the defendants." *McAdoo v. Callum*, 86 N. C. 419.

[b] **In an action on a judgment**, fraud in its rendition may be set up. *Levin v. Gladstein*, 142 N. C. 482, 55 S. E. 371. Compare *Caffery v. Choctaw Coal & M. Co.*, 95 Mo. App. 174, 68 S. W. 1049.

76. *Gibson v. Moore*, 22 Tex. 611.

[a] **The owner of an equitable title may sue in a justice's court.** *Walker*

be adjudicated, though this is not the universal practice.⁷⁷ They have no jurisdiction to foreclose mortgages.⁷⁸

b. *Accountings*.—Justices of the peace generally have no jurisdiction in actions for an accounting.⁷⁹ No jurisdiction exists to settle partnership accounts;⁸⁰ but unless the action necessarily involves an accounting, it may be maintained.⁸¹

Until parties to a joint adventure have had an accounting, a justice of the peace has no jurisdiction of an action to recover the share of one party.⁸²

c. *Enforcement of Liens*.—Where justice's courts have no jurisdiction in equity, they cannot enforce liens on either real,⁸³ or personal

v. Miller, 139 N. C. 448, 52 S. E. 125, 111 Am. St. Rep. 805, 1 L. R. A. (N. S.) 157. This is because the court recognizes a distinction "between an equitable cause of action and an equitable assignment of a legal cause of action." See *United States Fidelity & Guaranty Co. v. Messick Grocery Co.*, 147 N. C. 510, 61 S. E. 375.

77. *Caffery v. Choctaw Coal & Min. Co.*, 95 Mo. App. 174; *Orr v. McCurdy*, 34 Mo. App. 418; *Holliday v. Poston*, 60 S. C. 103, 38 S. E. 449.

[a] Parties defendant who have been substituted in a case cannot deprive the court of jurisdiction by interposing an equitable defense. *Mettler v. Adamson*, 38 Mont. 198, 99 Pac. 441.

78. *Snell v. Mohan*, 38 Ind. 494 (a chattel mortgage); *Murphy v. McNeill*, 82 N. C. 221, on real property. See generally the title "Mortgages."

79. *Crow v. Mark*, 52 Ill. 332 (between cotenants); *Steffen v. Hartzell*, 5 Whart. (Pa.) 448, between cotenants. *Contra*, *Bulkly v. Lewis*, 1 Root (Conn.) 217; *Chadwick & Co. v. Divol*, 12 Vt. 499. *Compare* *La Point v. Scott*, 36 Vt. 633, no jurisdiction exists where three or more persons are involved.

Actions to recover balance due on account, see *supra*, II, F, 2, b.

80. Colo.—*Starrett v. Ruth*, 51 Colo. 583, 119 Pac. 690; *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754. Ia.—*Erret v. Pritchard*, 121 Iowa 496, 96 N. W. 963. Mo.—*Somerville v. Missouri Glass Co.*, 160 Mo. App. 565, 140 S. W. 933; *Rankin v. Fairley*, 29 Mo. App. 587. N. Y.—*Rickey v. Bowne*, 18 Johns. 131; *Thornton v. Barber*, 48 App. Div. 298, 62 N. Y. Supp. 527; *Rosenfeld v. Marcus*, 36 Misc. 772, 74 N. Y. Supp. 870. N. C.—*Love v. Rhyne*, 86 N. C. 576.

[a] But see *Clarke v. Mills*, 36 Kan. 393, 13 Pac. 569, holding that where there are no debts and the affairs are not complicated the action may be maintained.

[b] *Action Equitable in Its Nature*. "That an action of one partner against another on an unsettled account of more than a single item is strictly an equitable action is settled law. The remedy in such cases is in equity." *Rankin v. Fairley*, 29 Mo. App. 587, 593.

81. *Hooks v. Houston*, 109 N. C. 623, 14 S. E. 49.

[a] *Action to recover partnership assets concealed by one partner at the time of an accounting may be maintained* as "no settlement of partnership affairs is necessary in order to determine the right of plaintiff to recover and hence there is no necessity for the intervention of a court of equity." *Erret v. Pritchard*, 121 Iowa 496, 96 N. W. 963. And see *Hartness v. Wallace*, 106 N. C. 427, 11 S. E. 259, an action to recover partnership assets used by one partner individually.

[b] *A personal transaction between partners, even though connected with the partnership business, is a subject-matter over which a justice of the peace has jurisdiction*. *Rude v. Sisack*, 44 Colo. 21, 96 Pac. 976.

[c] *Action to charge a person as a general partner in spite of the existence of purported articles creating a limited partnership may be maintained*. *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815.

82. *O'Rourke v. Edwards*, 11 Ohio Cir. Ct. N. S. 124. But *compare* *Miller v. Pepperling*, 185 Mo. App. 222, 170 S. W. 328.

83. Ark.—*Hoye Coal Co. v. Colvin*, 83 Ark. 528, 104 S. W. 207; *Whitesides v. Kershaw*, 44 Ark. 377; *Cotton*

property,⁸⁴ or mere equitable liens of any character.⁸⁵ The enforcement of mechanic's liens is not within their authority,⁸⁶ except where express statutory authority is given.⁸⁷ In some jurisdictions liens of various sorts may under statutory authority, be enforced.⁸⁸

2. Counterclaims, Cross-Demands, and Set-Offs.⁸⁹—A justice of the peace is ordinarily given jurisdiction over counterclaims, set-offs, and cross-demands which may be held by the defendant against the plaintiff,⁹⁰ whether they arise out of the transaction which is the subject-matter of the action, or not,⁹¹ and irrespective of whether or

v. Penzel & Co., 44 Ark. 484. **Ga.** McAuliffe *v. Baum*, 142 Ga. 590, 83 S. E. 239; McAuliffe *v. Baum*, 15 Ga. App. 369, 83 S. E. 448. **Ind.**—Ainsworth *v. Atkinson*, 14 Ind. 538. **Mo.** Pleasant Hill *v. Dasher*, 120 Mo. 675, 25 S. W. 566. **Tex.**—Lane *v. Howard*, 22 Tex. 7.

[a] **Dower right** cannot be enforced against the land. Perkins *v. Cartmell*, 2 Harr. (Del.) 201.

Power to enforce vendor's lien, see *supra*, II, F, 4, c.

84. Cal.—Sutherland *v. Sweem*, 53 Cal. 48; Young *v. Wright*, 52 Cal. 407. **Mo.**—Compare Varney *v. Jackson*, 66 Mo. App. 348, 2 Mo. App. Rep. 1374, liveryman's lien—held to be a legal lien. **Tex.**—Texas & P. R. Co. *v. McMullen*, 1 White & W. Civ. Cas., §§160, 162; Lewis *v. Warren & C. P. Ry. Co.* (Tex. Civ. App.), 97 S. W. 104. **Wis.**—Battis *v. Hamlin*, 22 Wis. 669.

[a] **Sale of Trespassing Animals.** An action brought under a statute giving the owner of land authority to take up and sell trespassing animals though it is "designated as a proceeding in rem, and is so in form, it is in substance and effect a proceeding in equity to enforce the lien," and cannot be maintained. Young *v. Wright*, 52 Cal. 407, 409.

[b] **A claimant given a preferential right** to enforce his claim against property of a debtor which has been attached or levied upon, cannot enforce his claim in a justice's court. Shea *v. Regan*, 29 Mont. 308, 74 Pac. 737.

85. Close v. Independent Gravel Co., 156 Mo. App. 411, 138 S. W. 81 (equitable lien arising out of an assignment of wages); Littlefield *v. Lemley*, 75 Mo. App. 511 (equitable mortgage on crops not in esse); Weathers *v. Borders*, 124 N. C. 610, 32 S. E. 881. See Markham *v. McCown*, 124 N. C. 163, 32 S. E. 494.

86. Ark.—White *v. Millbourne*, 31 Ark. 486. **Ga.**—McAuliffe *v. Baum*, 142 Ga. 590, 83 S. E. 239. **Ind.**—Ainsworth *v. Atkinson*, 14 Ind. 538. **Mich.**—Smith *v. Pearce*, 52 Mich. 370, 18 N. W. 111. See generally the title "Mechanics' Liens."

87. Ala.—Tolbert *v. Falkenberry*, 147 Ala. 204, 40 So. 120, since 1896. **Ill.**—O'Brien *v. Gooding*, 194 Ill. 466, 62 N. E. 898. **Mo.**—Stamps *v. Bridwell*, 57 Mo. 22.

88. Southern Ry. Co. v. Sarratt, 58 S. C. 93, 36 S. E. 504, lien warrant for rent may be issued.

[a] **Laborer's lien** may be enforced. Dexter *v. Glover*, 62 Ga. 312.

[b] **Liveryman's Lien.**—Varney *v. Jackson*, 66 Mo. App. 348, 2 Mo. App. Rep. 1374, where it is treated as a legal lien.

[c] **Agister's lien** may be enforced. First Nat. Bank *v. Wilson* (Okla.), 153 Pac. 172.

89. See generally the title "Set-Off, Counterclaim and Recoupment."

90. Ill.—Howell *v. Goodrich*, 69 Ill. 556, recoupment. **Mo.**—Green *v. Beebe*, 39 Mo. App. 465, prior to 1879 no counterclaim could be interposed. **N. Y.** M'Cumber *v. Goodrich*, 1 Johns. 56. **N. C.**—Heyser *v. Gunter*, 118 N. C. 964, 24 S. E. 712. **Pa.**—Rafferty *v. Clark*, 2 Pa. Co. Ct. 301. **Wis.**—Hartel *v. Kite*, 70 Wis. 396, 36 N. W. 7.

[a] **Malpractice** may be set up in recoupment, in an action by a physician for services rendered. Howell *v. Goodrich*, 69 Ill. 556.

Jurisdiction as dependent upon the amount of the counterclaim, see the title "Jurisdiction."

[b] **Plaintiff cannot set up a counterclaim**, in reply to a counterclaim set up by the defendant. Boyett *v. Vaughan*, 85 N. C. 363. But see Talbot *v. Robinson*, 42 Vt. 698.

91. Heenan Merc. Co. v. Welter, 144

not they are for liquidated or unliquidated demands.⁹² By statute in some states, a defendant having a counterclaim or set-off, which he may urge against the plaintiff, is required to do so or be forever barred from recovering on it.⁹³ Such a statute is inapplicable to matters in recoupment, where that term is employed to cover matters in defense, in whole or in part, to plaintiff's cause of action,⁹⁴ and also where the defendant's claim is for unliquidated damages.⁹⁵

3. Special Proceedings.—No jurisdiction exists to issue writs of mandamus.⁹⁶ Election contests involving minor offices may be tried by a justice of the peace in some states,⁹⁷ and jurisdiction over forcible entry and unlawful detainer proceedings is commonly conferred.⁹⁸

4. Summary Proceedings.—Jurisdiction exists in some states over various classes of summary proceedings,⁹⁹ though in other states the existence of such power is denied.¹

II. PARTIES OVER WHOM JURISDICTION EXTENDS.—**1. In General.** As a general rule, all persons are now subject to the jurisdiction of the justice's court where the cause is properly before it.² Jurisdiction

Ill. App. 279; *Williams v. Wieting*, 3 Thomp. & C. (N. Y.) 439.

[a] Counterclaim in tort cannot be pleaded in a contract action where it does not arise out of the same transaction. *Christy v. Jones*, 39 Kan. 183, 18 Pac. 56.

92. *McWilliams v. Lavell*, 175 Ill. App. 165.

93. Del.—See *Jones v. Charles Warner Co.*, 2 Boyce 566, 83 Atl. 131. Ill.—*McWilliams v. Lavell*, 175 Ill. App. 165; *Heenan Merc. Co. v. Welter*, 144 Ill. App. 279. Mont.—*Walter v. Cox*, 36 Mont. 20, 91 Pac. 1063.

[a] A claim arising after action brought, is not required to be pleaded. *Cobb v. Curtiss*, 8 Johns. (N. Y.) 470.

94. *Jones v. Charles Warner Co.*, 2 Boyce (Del.) 566, 83 Atl. 131.

95. *Bush v. Kindred*, 20 Ill. 93. But see *McWilliams v. Lavell*, 175 Ill. App. 165.

96. *Wright v. Kinney*, 123 N. C. 618, 31 S. E. 874; *Robinson v. Howard*, 84 N. C. 151. See generally the title "Mandamus."

97. *Sublett v. Bedwell*, 47 Miss. 266, 12 Am. Rep. 338.

98. See *supra*, II, F, 4, e.

99. *Thompson v. Acree*, 69 Ala. 178; *McDowell & Co. v. Morgan*, 33 Mo. 555, judgment may be entered on motion on a forthcoming bond. See generally the title "Summary Proceedings."

[a] Summary judgment on motion against constables, may be obtained for misconduct in office. *Thompson v. Acree*, 69 Ala. 178 (but not against

sheriffs); *Evans v. Stevens*, 8 Ala. 517.

[b] Summary proceedings by surety against a cosurety, (1) for contribution (*Cating v. Stewart*, 6 Blackf. [Ind.] 372), (2) or against the principal for reimbursement, may be maintained. *Cannon v. Wood*, 2 Sneed (Tenn.) 177 (if the fact of suretyship appears on the face of the instruments); *Vanbibber v. Vanbibber*, 10 Humph. (Tenn.) 53.

1. *Lane v. Young*, 1 Litt. (Ky.) 40 (followed in *Abbey v. Thomas*, 2 Litt. [Ky.] 166); *Erkman v. Carnes*, 101 Tenn. 136, 45 S. W. 1067, no relief by motion for failure of constable to levy and return an attachment.

2. See *infra*, this section.

[a] An action may be maintained by or against a minor or his guardian. Nev.—*Killgrove v. Morris*, 156 Pac. 686. N. Y.—*Mockey v. Grey*, 2 Johns. 192. Pa.—*Young v. Trunkley*, 22 Pa. Co. Ct. 127.

[b] *Guardian Ad Litem May Be Appointed.*—"The power of appointing a guardian, ad litem, is incident to every court and a justice must possess this power." *Mockey v. Grey*, 2 Johns. (N. Y.) 192. See *Bullard v. Spoor*, 2 Cow. (N. Y.) 430. See also 10 STANDARD PROC. 719.

[c] An assignee may sue in his own name. *Layton v. Kirkendall*, 20 Colo. 236, 38 Pac. 55; *Forsyth v. Ryan*, 17 Colo. App. 511, 68 Pac. 1055.

[d] *Combination of Claims.*—Under a statute authorizing holders of liens

exists over public officers,³ though whether they can be sued for misconduct in office is a controverted question.⁴ The United States may sue before a justice of the peace.⁵

2. Corporations.—a. *Private Corporations.*—Jurisdiction over actions by or against private corporations commonly exists in justice's court,⁶ even where the corporation is a foreign corporation.⁷

b. *Public.*—It is sometimes provided that actions against municipal corporations shall not be instituted in justice's courts,⁸ though in other states such actions may be maintained.⁹ Actions may be maintained by them in a justice's court, however.¹⁰

against timber products to combine their claims into one claim, such a combination, which does not amount to an assignment, may be made in a justice's court. *Craig v. Brown*, 171 Mich. 256, 137 N. W. 126.

3. Sutherland v. McKinney, 18 Civ. Proc. 216, 10 N. Y. Supp. 876.

[a] But a public officer who is treated as and considered to be a municipal corporation cannot be sued in a jurisdiction where such corporations are not within the jurisdiction of a justice's court. *Commissioners of Highways v. Supervisors*, 77 Mich. 228, 43 N. W. 870. See also *infra*, II, H, 2, b.

4. See *supra*, II, F, 1.

5. McNamee v. United States, 11 Ark. 148. See generally the title "United States."

6. Ark.—*Woodruff v. Griffith*, 5 Ark. 354; *More v. Woodruff*, 5 Ark. 214. **Mich.**—*O'Connell v. Menominee Bay Shore Lumb. Co.*, 113 Mich. 124, 71 N. W. 449, discrimination against corporation rendered statute unconstitutional. **Miss.**—*Loomis v. Commercial Bank*, 4 How. 660. **Mo.**—*Grannahan v. Hannibal & St. J. R. Co.*, 30 Mo. 546, over railroad corporations. See *Hudson v. St. Louis, K. C. & N. Ry. Co.*, 53 Mo. 525; *Fatehell v. St. Louis & I. M. R. Co.*, 28 Mo. 178; *Mooney v. Hannibal & St. J. R. Co.*, 28 Mo. 570. **Okla.**—*Western Paving Co. v. Binion*, 150 Pac. 898. **S. C.**—*Dennis v. Atlantic Coast Line R. R. Co.*, 86 S. C. 258, 68 S. E. 465. **W. Va.**—*Speidel Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

Compare *Hotchkiss v. First Religious Society*, 7 Johns. (N. Y.) 356 (can sue but cannot be sued); *Ministers, Elders and Deacons v. Adams*, 5 Johns. (N. Y.) 347, cannot be sued.

[a] A statute depriving justices of such jurisdiction in the face of a gen-

eral constitutional grant of power is void. *More v. Woodruff*, 5 Ark. 214.

7. Mich.—*McLean v. Prudential Ins. Co.*, 130 Mich. 591, 90 N. W. 405 (*distinguishing* *Reath v. Western Union Tel. Co.*, 89 Mich. 22, 50 N. W. 817, decided under an earlier statute); *Gallagher v. American Express Co.*, 56 Mich. 13, 22 N. W. 96, *distinguishing* *Hartford Fire Ins. Co. v. Owen*, 30 Mich. 441; *Brigham v. Eglinton*, 7 Mich. 291. **N. J.**—*Contra*, *Wheeler & Wilson Mfg. Co. v. Carty*, 53 N. J. L. 336, 21 Atl. 851. **Ohio.**—*Boley v. Ohio Life Ins. & Tr. Co.*, 12 Ohio St. 139, attachment may issue against a foreign but not against a domestic corporation. **S. C.**—*Best v. Seaboard Air Line Ry.*, 72 S. C. 479, 52 S. E. 223, at least if the plaintiff is not a nonresident. **Tenn.**—*Union Bank v. Lowe*, Meigs 225.

8. Mich.—*Mason v. Muskegon*, 109 Mich. 456, 67 N. W. 692; *School Dist. No. 4 v. Gage*, 39 Mich. 484, 33 Am. Rep. 421 (garnishee proceedings); *Gurney v. Mayor*, 11 Mich. 202; *Root v. Mayor*, 3 Mich. 433. **N. J.**—*Trustees of School Dist. No. 28 v. Stocker*, 42 N. J. L. 115; *Townsend v. Trustees*, 41 N. J. L. 312; *Princeton v. Mount*, 29 N. J. L. 299. But see *Mayor v. Horton*, 38 N. J. L. 88, it is subject to garnishment. **N. C.**—*Robinson v. Howard*, 84 N. C. 151.

Actions by or against municipal corporations generally, see the title "Municipal Corporations."

9. Ill.—*Town of Chatham v. Mason*, 53 Ill. 411, although a change of venue is authorized. **Ohio.**—*Harding v. New Haven Twp.*, 3 Ohio 227. **Pa.**—*Wentz v. Philadelphia*, 14 Phila. 194. **W. Va.**—*County Court v. Holt*, 53 W. Va. 532, 44 S. E. 887, county court.

10. Hart v. Port Huron, 46 Mich. 428, 9 N. W. 481.

3. **Executors, Administrators, etc.**—Jurisdiction of justice's courts extends to actions by or against the personal representatives of deceased persons,¹¹ though a few earlier authorities are to be found, based on special statutory limitations, denying the jurisdiction of justice's courts over action against them.¹² An action against the heirs of a decedent on his contracts may be maintained before a justice of the peace.¹³

4. **Married Women.**—Actions may usually be maintained against married women,¹⁴ though in states where the power of a married woman to contract without her husband's consent is greatly limited, a justice's court has been held to have no such jurisdiction,¹⁵ except on liabilities incurred while they were unmarried or on their obligations as sole traders,¹⁶ or on their contracts for necessities.¹⁷

I. **AMOUNT IN CONTROVERSY AS A TEST OF JURISDICTION.**—One of the most common measures adopted to limit the jurisdiction of justice's courts is that by which the amount in controversy or the value of the property involved is the determining factor. The limit beyond which they have no jurisdiction varies in the different states, and no general rules applicable in this particular can be laid down. The subject has, however, been fully treated elsewhere in this work.¹⁸

11. **Ill.**—*Bradwell v. Wilson*, 158 Ill. 346, 42 N. E. 145. See *Miller v. McCray*, 37 Ill. 428; *Leigh v. Mason*, 2 Ill. 249. **Ind.**—*Thompson v. Harbison*, 7 Blackf. 495. See *Orth v. Jennings*, 8 Blackf. 418; *Simonds v. Colvert*, 2 Blackf. 413. **Ky.**—*Sherwood v. Campbell's Admr.*, 1 B. Mon. 54. **N. Y.** *Spencer v. Hall*, 30 Misc. 75, 62 N. Y. Supp. 826, *affirmed*, 51 App. Div. 623, 64 N. Y. Supp. 1149. **S. C.**—*Leach v. House*, 1 Bailey 42, person may be sued as an executor de son tort.

12. **U. S.**—*Adams v. Kincaid*, 2 Cranch C. C. 422, 1 Fed. Cas. No. 58; *Ritchie v. Stone*, 2 Cranch C. C. 258, 20 Fed. Cas. No. 11,864; *Foy v. Talburt*, 5 Cranch C. C. 124, 9 Fed. Cas. No. 5,020. But see *Ennis v. Holmead*, 5 Cranch C. C. 509, 8 Fed. Cas. No. 4,492. **Del.**—*Robinson v. Prince*, 3 Harr. 389. **D. C.**—*Newmeyer v. Cowling*, 6 Mackey 504. **Ind.**—*Arnold v. Fleming*, 14 Ind. 10, they may sue but cannot be sued in a justice's court. **Mich.** *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330, 21 N. W. 358, 23 N. W. 25 (an action of replevin is an exception, and may be maintained); *Basom v. Taylor*, 39 Mich. 682. **N. Y.**—*Wells v. Newkirk*, 1 Johns. 228; *Way v. Carey*, 1 Caines 191. **Pas.**—*Montgomery v. Heilman*, 96 Pa. 44.

[a] **Action on administrator's bond** is brought against the administrator personally and not as administrator, and may be maintained. *O'Neil v. Martin*, 1 E. D. Smith (N. Y.) 404. Compare *Hackworth v. Robinson*, 31 Ohio St. 655.

13. *Dodds v. Walker*, 9 Ill. App. 37, the action being *assumpsit*.

14. *Magruder v. Armes*, 15 App. Cas. (D. C.) 379. See generally the title "Husband and Wife."

Jurisdiction in equity over separate estate of married women, see *supra*, II, G, 1, a.

15. *Patterson, Rencher & Co. v. Gooch*, 108 N. C. 503, 13 S. E. 186; *Dougherty v. Sprinkle*, 88 N. C. 300. But see *Finger v. Hunter*, 130 N. C. 529, 41 S. E. 890, jurisdiction exists in those actions in which a married woman is made liable on her contract.

16. *McAfee's Est. v. Gregg*, 140 N. C. 448, 53 S. E. 304; *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1017; *Neville v. Pope*, 95 N. C. 346.

17. *Robinson v. Jarrett*, 159 N. C. 165, 74 S. E. 1017.

18. See generally the title "Jurisdiction."

Validity of statutes extending jurisdiction beyond constitutional limitation, see *supra*, II, B.

J. TERRITORIAL JURISDICTION. — The territorial jurisdiction of justices of the peace is discussed elsewhere in this article.¹⁹

K. ANCILLARY JURISDICTION. — The determination of matters arising merely incidentally in the main action is properly within the jurisdiction of a justice's court.²⁰ It cannot, however, upon the theory that a matter is incidental to a subject over which it has jurisdiction, draw to itself an unwarranted jurisdiction.²¹ A justice's court, operating under a constitutional grant of power, cannot be deprived of power to act by any failure of the legislature to enact laws governing its practice and procedure.²² It has power to enforce its orders by punishment for contempt.²³ It cannot, however, in the absence of a statute, appoint an elisor to act as constable where the regular officer is disqualified.²⁴

L. DISQUALIFICATION AND DISABILITY OF JUSTICES OF THE PEACE.

1. In General. — The enumeration in a statute of specific matters

19. See *infra*, III, D, 1.

20. *Moore v. Waters*, 5 Cranch. (C. C.) 283, 17 Fed. Cas. No. 9,780.

[a] Illustration.—In an action to recover for goods furnished, a justice of the peace may determine whether they were to be paid for only upon a condition and whether the condition had been performed. *Garrett v. Shaw*, 25 N. C. 395.

[b] Damages for wrongful attachment may be awarded defendant in a suit instituted by attachment in a justice's court, as the claim "was not an original suit, but was a mere collateral matter, arising out of and resulting from issue and levy of the attachment writ." *Barboro & Co. v. Serio*, 110 Miss. 353, 70 So. 458.

[c] The power to determine and award costs in a proceeding before a justice of the peace is incidental to jurisdiction in that proceeding. *Voorhees v. Martin*, 12 Barb. (N. Y.) 508.

Power to determine third party claim, see the title "Judgments and Decrees, Enforcement of."

21. *Fitzgerald v. Beebe*, 7 Ark. 305, 46 Am. Dec. 285, in an action for use and occupation, title to land cannot be adjudicated.

[a] Chose in action belonging to a judgment debtor cannot be subjected to payment of the judgment in an action before a justice of the peace. *Devon v. Simpson*, 1 Handy (Ohio) 557, 12 Ohio Dec. 287. *Contra*, *Sherwood v. Campbell's Admr.*, 1 B. Mon. (Ky.) 54. See generally 15 STANDARD PROC. 951.

22. *More v. Woodruff*, 5 Ark. 214.

See *Chamberlain v. Edmonds*, 18 App. Cas. (D. C.) 332, 342.

[a] Basis of the Rule.—"The justice's court, under our form of government, is a constitutional tribunal and clothed with exclusive original jurisdiction for certain purposes. It is a universal rule of construction that the grant of a principal power, ipso facto, includes all minor, subsidiary powers incidental to the exercise of the main power. The legislature possesses no power, either by acts of commission or omission, to alter or destroy the separate and independent constitutional jurisdiction of our respective courts. The constitution, in ordaining this department of the government, and in defining and specifying their peculiar powers and duties, contemplated that the legislature would pass the necessary laws for their complete organization. Their failure to do so certainly does not render inoperative or void the inherent and indispensable attributes that all these courts possess as matters of constitutional right and legal duty. . . . If these principles be undeniable, the justice's court was fully competent to make its own rules and regulations to carry into effect its original constitutional jurisdiction." *More v. Woodruff*, 3 Ark. 214, 215, adoption of summons as original process held valid.

23. *Marksberry v. Beasley*, 8 Ky. L. Rep. 534.

24. *State ex rel. Conrad v. Cotten*, 135 Mo. App. 167, 115 S. W. 1064.

which will operate to disqualify a justice of the peace from trying an action does not exclude other and common-law disqualifications.²⁵

2. By Interest in, or Connection With the Action.—Interest of a justice of the peace in the subject-matter of the action or proceeding is everywhere treated as a disqualification.²⁶ Actions by or against the township or district in which he resides sometimes serves to disqualify him.²⁷ But a general interest in common with other citizens and taxpayers in fines collected and penalties adjudged does not disqualify a justice.²⁸ A justice of the peace who is employed by one

25. *Pegues v. Baker*, 110 Ala. 251, 17 So. 943.

26. Ark.—*Morrow v. Watts*, 80 Ark. 57, 95 S. W. 988, at common law. **Cal.**—*La Rue v. Gaskins*, 5 Cal. 507. **Conn.**—*Clyma v. Kennedy*, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194. **La.**—*State v. Justice of Peace*, 47 La. Ann. 1592, 18 So. 622. **Mass.**—*Richardson v. Welcome*, 6 Cush. 331. **Minn.**—*Jordan v. Henry*, 22 Minn. 245. **N. J.**—*Schroder v. Ehlers*, 31 N. J. L. 44. **N. Y.**—*Baldwin v. McArthur*, 17 Barb. 414, even though the justice be only a nominal party to the action. **Tex.**—*Franco-Texan Land Co. v. Howe*, 3 Tex. Civ. App. 315, 22 S. W. 766.

[a] Interest in an action involving the same matter disqualifies at common law. *Pegues v. Baker*, 110 Ala. 251, 17 So. 943.

[b] Ownership of a lot on a street, to widen which proceedings are pending before him, does not disqualify a justice of the peace. *Mayor v. Long*, 31 Mo. 369.

[c] Search warrant cannot be issued by a justice of the peace for his own property. *Jordan v. Henry*, 22 Minn. 245.

[d] If a justice is a material witness, the trial should take place before another justice. *Julian v. Gallen*, 2 Cal. 358.

[e] Membership in a military company disqualifies a justice in an action to which the company is a party. *Kentish Artillery v. Gardiner*, 15 R. I. 296, 3 Atl. 662.

[f] Membership in the legislative body which enacted a law which comes in question before him does not disqualify a justice of the peace. *Mayor v. Williams*, 35 La. Ann. 329.

[g] Prior membership on a board of arbitration which considered the

same matter, does not disqualify a justice of the peace. *Batchelder v. Nourse*, 35 Vt. 642.

[h] Justice who was a juror in an action between the same parties on the same cause of action, is not disqualified. *Travis v. Jenkins*, 30 How. Pr. (N. Y.) 152.

[i] A surety who has settled with his cosurety for advances made by the latter on the suretyship obligation, may try a case, as justice of the peace, brought to secure reimbursement from a third surety. *Russell v. Perry*, 16 N. H. 100.

[j] Time of Interest.—If the justice is interested at the time the plea is filed it is immaterial whether he was interested at the time the warrant issued. *Clark v. Mikesell*, 81 Mich. 45, 45 N. W. 377.

27. Ill.—*Town of Chatham v. Mason*, 53 Ill. 411. **Me.**—*Norridgewock v. Sawtelle*, 72 Me. 484. **N. Y.**—*Wood v. Rice*, 6 Hill 58. **Pa.**—*McVeytown v. Union*, 5 Watts & S. 434; *Overseers of Washington Tp. v. Overseers of Beaver Tp.*, 3 Watts & S. 548, action for removal of paupers. **R. I.**—*Kentish Artillery v. Gardiner*, 15 R. I. 296, 3 Atl. 662. **Vt.**—See *Pierce v. Butler*, 16 Vt. 101. **Wis.**—See *Hancock v. Merriman*, 46 Wis. 159, 49 N. W. 970.

Compare *Mayor v. McKee*, 2 Yerg. (Tenn.) 167; *Morristown v. Fairfield*, 46 Vt. 33.

23. Colo.—*Deitz v. City of Central*, 1 Colo. 323. **Me.**—*State v. Craig*, 80 Me. 85, 13 Atl. 129. **Mass.**—*Hall v. Kent*, 11 Gray 467; *Hill v. Wells*, 6 Pick. 104. But see *Clark v. Lamb*, 2 Allen 396; *Pearce v. Atwood*, 13 Mass. 224. **N. Y.**—*Corwein v. Hames*, 11 Johns. 76. **Pa.**—*Com. v. Fenstermacher*, 5 Pa. Co. Ct. 424. **Vt.**—*Morristown v. Fairfield*, 46 Vt. 33. Compare *Waters v. Day*, 10 Vt. 487.

of the parties as an attorney in the case,²⁹ or in other litigation,³⁰ is thereby disqualified. Employment of the justice by the plaintiff as a collecting agent for the matter which is the basis of the action renders the justice incompetent to act,³¹ though if such employment be only casual and formal no disqualification is worked.³² Business connections with an attorney in the case may also disqualify a justice of the peace.³³

3. By Relationship to Parties.—Relationship of the justice to either of the parties, by consanguinity or affinity, within degrees which vary considerably in different states, operates to disqualify him from trying the action.³⁴ The rule applies to relationship to a party

29. Conn.—Yudkin *v.* Gates, 60 Conn. 426, 22 Atl. 776. Mass.—McGregor *v.* Crane, 98 Mass. 530. Vt.—Ingraham *v.* Leland, 19 Vt. 304.

30. Ind.—Chicago & A. R. Co. *v.* Summers, 113 Ind. 10, 14 N. E. 733, 3 Am. St. Rep. 616. Mich.—Clark *v.* Mikesell, 81 Mich. 45, 45 N. W. 377. N. Y.—Hubbell *v.* Harbeck, 54 Hun 147, 7 N. Y. Supp. 243, 26 N. Y. St. 748. Tex.—Harrison *v.* Lokey, 26 Tex. Civ. App. 404, 63 S. W. 1030, former employment in the same case.

[a] **Showing of Prejudice Unnecessary.**—"It is said that the case showed that the justice was not influenced to the prejudice of the defendant by his relation to the plaintiff, and so it seems to us on the evidence contained in the return. But in this case the justice not only tried the cause, ruled on questions of law and the admission of evidence, decided the case and made the judgment, but he took the minutes of testimony and made the return. . . . There may have been no corrupt intent in offering the retainer; there probably was none in accepting it; but the transaction did not avoid the appearance of evil, and was certain to cause suspicion and distrust on the part of the defendant, towards the tribunal to which he was compelled to submit his rights." Hubbell *v.* Harbeck, 54 Hun 147, 7 N. Y. Supp. 243.

[b] **Former employment by one of the parties in litigation concerning the same matter is a disqualification.** Carrington *v.* Andrews, 12 Abb. Pr. (N. Y.) 348.

31. Limerick *v.* Murlatt, 43 Kan. 218, 23 Pac. 567; Boyer *v.* Potts, 14 Serg. & R. (Pa.) 157.

32. Ind.—See Baldwin *v.* Runyon, 8 Ind. App. 344, 35 N. E. 569. Me.—Lovering *v.* Lamson, 50 Me. 334. Mich.—

Taggart *v.* Waters, 115 Mich. 638, 73 N. W. 885; Moon *v.* Stevens, 53 Mich. 144, 18 N. W. 600. But see West *v.* Wheeler, 49 Mich. 505, 13 N. W. 836, indorsement of a note to a justice of the peace for collection disqualifies him. Pa.—Wagner *v.* Hoffman, 19 Pa. Super. 414.

33. Keeler *v.* Stead, 56 Conn. 501, 16 Atl. 552, 7 Am. St. Rep. 320, occupying the same offices.

[a] **Justice who is a law student in the office of one of the attorneys to the action is not disqualified.** Knight *v.* Sampson, 99 Mass. 36.

34. Ala.—Pegues *v.* Baker, 110 Ala. 251, 17 So. 943, relationship within the fourth degree. Ark.—Morrow *v.* Watts, 80 Ark. 57, 95 S. W. 988, "near relationship" disqualifies; at common law relationship did not disqualify. Ga. Savage *v.* Oliver, 110 Ga. 636, 36 S. E. 54, within the fourth degree of consanguinity or affinity. Ind.—Test *v.* Beeson, 37 Ind. 380; Brady *v.* Richardson, 18 Ind. 1 (sixth degree); Dawson *v.* Wells, 3 Ind. 398. Me.—Spear *v.* Robinson, 29 Me. 531. Neb.—Walters *v.* Wiley, 1 Neb. (Unof.) 235, 95 N. W. 486. N. H.—Gear *v.* Smith, 9 N. H. 63. N. J.—State *v.* Walpack, 38 N. J. L. 200. N. Y.—Foot *v.* Morgan, 1 Hill 654 (a justice whose wife is the sister of the plaintiff's wife, is disqualified); Edwards *v.* Russell, 21 Wend. 63; Bellows *v.* Pearson, 19 Johns. 172 (justice son-in-law of the plaintiff); Post *v.* Black, 5 Denio 66, relationship of second cousins disqualifies. Pa.—Spidle *v.* Robinson, 2 Pa. Co. Ct. 642; Singer *v.* Singer Mfg. Co., 2 Pa. Co. Ct. 578; M'Gee *v.* Jackson, 2 Pa. Co. Ct. 136. Tenn.—Pierce *v.* Bowers, 8 Baxt. 353. Vt.—Hill *v.* Wait, 5 Vt. 124, relationship within the fourth degree disqualifies. Wis.—Elderkin *v.*

beneficially interested, as well as to a nominal party.³⁵ But relationship to one only collaterally liable is not a disqualification.³⁶

4. **Effect.**—Purely ministerial acts may be performed by a justice of the peace who for any reason is disqualified from presiding over the action.³⁷ Judicial action by a disqualified justice is, by some courts held to be void,³⁸ by others, only voidable.³⁹

A justice of the peace who is disqualified should, of his own motion, refuse to proceed with the case.⁴⁰

Special statutes usually provide the practice to be followed when a justice of the peace, who would ordinarily have jurisdiction over an

Wiswell, 61 Wis. 498, 21 N. W. 541 (a justice of the peace is "near of kin" to his son-in-law); *Hibbard v. Odell*, 16 Wis. 633, a justice who was father-in-law to plaintiff disqualified.

[a] **What Constitutes Relationship by Affinity.**—"A husband is related by affinity to the blood relations of his wife, and the wife by affinity to the blood relations of her husband, but not otherwise by affinity. Thus, two persons who are not otherwise related may marry two sisters, and these persons would not be related by affinity to each other. . . . In the present case the justice was not related in any respect to the party and hence was competent to preside in the case. The party having married a cousin of the justice's wife was not thereby brought within any of the degrees of consanguinity or affinity. Had the party married the justice's cousin, or the justice married the party's cousin, he would have been disqualified." *Blacklock v. Waldrup*, 84 Ga. 145, 10 S. E. 622, 20 Am. St. Rep. 350. See also *Higbe v. Leonard*, 1 Denio (N. Y.) 186.

[b] **Effect of Death of Wife on Relationship by Affinity.**—(1) Where relationship is by affinity, the death of the wife does not remove the disqualification if there are children of the marriage surviving (*Pegues v. Baker*, 110 Ala. 251, 17 So. 943. But see *Trout v. Drawhorn*, 57 Ind. 570); (2) if no children survive, the relationship by affinity no longer continues. *Carman v. Newell*, 1 Denio (N. Y.) 25. But see *Spear v. Robinson*, 29 Me. 531.

[c] **The mother, in bastardy proceedings is a party seeking redress and relationship of the justice to her disqualifies him.** *State v. Walpack*, 38 N. J. L. 200.

[d] "The presumption of bias and

partiality, which arises from the consanguinity of a judge to the party, is one of law, and is conclusive." *State v. Walpack*, 38 N. J. L. 200.

[e] **Relationship to stockholder of a corporation which is a party to an action disqualifies a justice of the peace.** *Place v. Butternuts Woolen & Cotton Mfg. Co.*, 28 Barb. (N. Y.) 503. *Contra*, *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315.

35. *Foot v. Morgan*, 1 Hill (N. Y.) 654.

36. *Allen v. Bruce*, 12 N. H. 418, relationship to surety on bond of a poor debtor.

37. **Ga.**—*Savage v. Oliver*, 110 Ga. 636, 36 S. E. 54 (issuance of execution to foreclose a landlord's lien); *Thornton v. Wilson*, 55 Ga. 607, issuance of distress warrant. **Ia.**—*Hass v. Leverton*, 128 Iowa 79, 102 N. W. 811, justice may certify a transcript of a judgment by his predecessor in office although he was a party to the action. **Vt.**—See *Pierce v. Butler*, 16 Vt. 101.

[a] **Issuance of process returnable to another court is within the power of a justice who is interested in the action.** *Graham v. Todd*, 9 Vt. 166.

38. **Conn.**—*Keeler v. Stead*, 56 Conn. 501, 16 Atl. 552, 7 Am. St. Rep. 320. **Neb.**—*Walters v. Wiley*, 1 Neb. (Unof.) 225, 95 N. W. 486. **N. Y.**—*Edwards v. Russell*, 21 Wend. 63; *Foot v. Morgan*, 1 Hill 654. **Tex.**—*Harrison v. Lokey*, 26 Tex. Civ. App. 404, 63 S. W. 1030. **Vt.**—*Hill v. Wait*, 5 Vt. 124.

See also 14 STANDARD PROC. 773, et seq.

39. *Jarrell v. Guann*, 105 Ga. 139, 31 S. E. 149; *Rogers v. Felker*, 77 Ga. 46; *Eastwood v. Buel*, 1 Ind. 434. *Compare* *Dawson v. Wells*, 3 Ind. 398. See also 14 STANDARD PROC. 775.

40. *Hibbard v. Odell*, 16 Wis. 633. See *State v. Justice of Peace*, 47 La. Ann. 1592, 18 So. 622.

action is disqualified or otherwise unable to preside, or where there is a vacancy in the office,⁴¹ extending the jurisdiction of other and usually an adjoining,⁴² or the nearest,⁴³ justice, in such cases; or providing for the calling in of another justice to preside over the trial of the action.⁴⁴ These statutes must be strictly followed in order to validate the proceedings taken under their authority.⁴⁵

M. TERMINATION OF JUSTICE'S OCCUPANCY OF OFFICE AND ITS EFFECT.—1. Powers After Expiration of Term.⁴⁶—Judicial functions of a justice of the peace entirely cease on the expiration of his term

41. See generally the statutes, and *Cal.*—*Harlan v. Gladding*, 7 Cal. App. 49, 93 Pac. 400, where the justice was incapacitated by illness. *Ky.*—*Wheeler v. Schulman*, 165 Ky. 185, 192, 176 S. W. 1017. *Pa.*—*Ingle v. Homman*, 1 Watts & S. 414. *Tenn.*—*Fowler v. McDaniel*, 6 Heisk. 529, another justice in the same district may act in case of sickness of the regular justice. *Wis.* See *Gallagher v. Serling*, 92 Wis. 544, 66 N. W. 692, effect of illness of the justice.

[a] In the absence of a statute, no other justice of the peace has jurisdiction. *Test v. Beeson*, 37 Ind. 380, this case, however, involved a special, separate act.

42. *Pegues v. Baker*, 110 Ala. 251, 17 So. 943.

[a] If there are several justices in a precinct, a justice of an adjoining precinct can act only if all of the justices in the first precinct are disqualified or unable to act. *Horton v. Elliott*, 90 Ala. 480, 8 So. 103.

43. *Ia.*—*Tennis v. Anderson*, 55 Iowa 625, 8 N. W. 477, sending case to the wrong justice is merely error which cannot be raised on a collateral attack. *Ohio.*—*Pittsburgh, C. & St. L. Ry. Co. v. Fleming*, 30 Ohio St. 480, in case of resignation of the justice. *Tex.* *Stewart v. Smallwood*, 46 Tex. Civ. App. 467, 102 S. W. 159; *Crawford v. Saunders*, 9 Tex. Civ. App. 225, 29 S. W. 102.

[a] Under such circumstances, the "statute does not, however, confer power upon such nearest justice to go outside of his precinct and to the office of such absent justice and there perform such duties, but contemplates that the duties shall be performed in the precinct of such nearest justice." *Stewart v. Smallwood*, 46 Tex. Civ. App. 467, 102 S. W. 159.

[b] **Waiver.**—The right to have the

nearest justice act is a right which may be waived. *Squires v. Curtain*, 42 Colo. 51, 93 Pac. 1166.

44. *Cal.*—*Harlan v. Gladding*, 7 Cal. App. 49, 93 Pac. 400. *Ga.*—*McClatchey v. Bryan*, 144 Ga. 292, 86 S. E. 1085. *Ky.*—*Wheeler v. Schulman*, 165 Ky. 185, 193, 176 S. W. 1017. *Neb.*—*Carmichael v. McKay*, 81 Neb. 725, 116 N. W. 676.

[a] Any justice of the county may act. *Savage v. Oliver*, 110 Ga. 636, 36 S. E. 54.

[b] When there are two justices in a district, a justice from another district cannot be called unless both of the resident justices are disqualified. *Harrison v. Perry*, 90 Ga. 206, 15 S. E. 742. See *Vaughn v. Strickland*, 108 Ga. 659, 34 S. E. 192.

[c] Return of an absent justice in time to act in a portion of the proceedings would seem to divest the visiting justice of authority. See *Carmichael v. McKay*, 81 Neb. 725, 116 N. W. 676, regular justice should approve the appeal bond.

45. *Harlan v. Gladding*, 7 Cal. App. 49, 93 Pac. 400.

[a] Additional cases cannot be tried by a justice called in from another district to preside over the trial of a particular case. *Simpkins & Co. v. Hester*, 3 Ga. App. 160, 59 S. E. 322.

[b] Written request to act by the justice to another justice within the same county must be made. *Harlan v. Gladding*, 7 Cal. App. 49, 93 Pac. 400.

[c] Refusal of a justice to act is not ground for applying to a justice in another township, unless the statute so expressly provides. *Poyser v. Murray*, 6 Ind. 35; *Klaise v. State*, 27 Wis. 462.

46. As to powers of judicial officers generally after expiration of office, see the title "Judicial Officers."

of office,⁴⁷ unless, by statute, they are expressly continued as to causes then pending before him,⁴⁸ though mere ministerial acts in connection with the cases he has tried may be performed.⁴⁹

2. Powers of Successor in Office.—The successor in office of a justice of the peace has power to correct errors and mistakes in the papers and proceedings in actions tried by his predecessor;⁵⁰ and he has general powers over judgments rendered by his predecessor,⁵¹ but he cannot revise the action of his predecessor or re-examine a case on its merits.⁵² In the absence of a statute granting the power, an action pending before a justice of the peace at the time of his retirement from office is not transferred to his successor;⁵³ but in most states statutes now provide that in case of the death, removal, resignation or termination of office of a justice of the peace, his successor in office,⁵⁴ or some other specified justice, may complete the unfinished business pending in his court.⁵⁵

N. LOSS OF JURISDICTION.⁵⁶ — **1. In General.**—Jurisdiction once obtained by a justice of the peace continues until the case is legally

47. Mo.—*Gage v. Vail*, 73 Mo. 454, entry of judgment in the docket cannot be made. N. J.—*Tichenor v. Hewson*, 14 N. J. L. 26, he cannot accept an appeal bond or certify a transcript. N. Y.—*In re Rodding*, 14 Civ. Proc. 47, justice cannot decide a submitted case thereafter. Pa.—*Koons v. Headley*, 49 Pa. 168.

48. *Hoyt v. Guarnieri*, 67 Conn. 590, 35 Atl. 511.

49. Conn.—*Hawley v. Middlebrook*, 28 Conn. 527, records may be perfected although the former justice has removed to another state. Me.—*Jones v. Elliott*, 35 Me. 137 (may renew on execution); *Matthews v. Houghton*, 11 Me. 377. Vt.—*Carruth v. Tighe*, 32 Vt. 626, may certify a record. Wis.—*Allard v. Smith*, 120 Wis. 22, 97 N. W. 510, may make return on appeal.

[a] Official reports required by law may be made out by him. *Knox v. State*, 45 Ark. 500.

50. St. Louis, I. M. & S. Ry. Co. v. Winfrey (Ark.), 16 S. W. 572 (judgment rendered but not entered by former justice may be entered nunc pro tunc); *Gates v. Bennett*, 33 Ark. 475, 489 (judgment may be corrected by nunc pro tunc order, on notice); *Adams v. Thompson*, 12 Ark. 670 (judgment may be rendered on the verdict of a jury); St. Louis & S. F. Ry. Co. v. Hurst, 52 Kan. 609, 35 Pac. 211, may supply omissions in a transcript.

51. *Wilcher v. Hamilton*, 15 Ga. 435

(may revive a judgment); *Hass v. Lev-erton*, 128 Iowa 79, 102 N. W. 811, may certify a transcript of a judgment rendered by his predecessor.

52. *Haley v. Villeneuve*, 11 Tex. 617.

53. *Anderson v. Hanson*, 28 Minn. 400, 10 N. W. 429; *Ross v. Ford*, 3 N. J. L. 906.

[a] Voluntary appearance of the parties before the successor in office does not confer original jurisdiction upon him. *Anderson v. Hanson*, 28 Minn. 400, 10 N. W. 429.

[b] Resignation of a justice of the peace creates a vacancy and matters coming up for hearing, before a successor is appointed, are discontinued. *Evans v. Richards*, 85 Iowa 620, 52 N. W. 541.

54. See the statutes, and *Bryant v. Buckner*, 67 Tex. 107, 2 S. W. 452 (may issue execution on judgment rendered by his predecessor); *Stamm v. Dixon*, 49 Wis. 328, 5 N. W. 858.

55. See *Horton v. Elliott*, 90 Ala. 480, 8 So. 103 (the justice of an adjoining precinct); *Martin v. Walker*, 15 Ill. 377, the nearest justice in the county.

[a] Presumption arises that the justice to whom a justice who was removing from the county turned over his records was the nearest justice of the peace, as the law required. *Martin v. Walker*, 15 Ill. 377.

56. See generally the title "Jurisdiction."

disposed of.⁵⁷ The fact that a portion of the relief sought is not within the power of a justice to grant does not deprive him of the jurisdiction which does exist.⁵⁸ The calling and impaneling of a jury, when authorized, to try an issue of fact does not oust the jurisdiction of a justice;⁵⁹ but delay in taking further proceedings, after a jury has disagreed, will have that effect.⁶⁰ The general rule is that failure to render and enter judgment within the time required by statute is fatal to the jurisdiction of the court in the particular cause before it.⁶¹

2. By Acts of Parties.—Various acts of the parties may work a discontinuance of the action in a justice's court.⁶² Thus, while a justice of the peace must wait a reasonable time after that set for the trial of a cause for the plaintiff to appear,⁶³ if the plaintiff does not

57. *Presley v. Dean*, 10 Idaho 375, 79 Pac. 71; *Southern Pac. Co. v. Russell*, 26 Ore. 459, 26 Pac. 304; *Knapp, Burrell & Co. v. King*, 6 Ore. 243.

[a] If a judgment is void for want of jurisdiction over defendant's person, the court still has jurisdiction to issue an alias summons and, having acquired jurisdiction over his person, to proceed with the case. *Southern Pac. Co. v. Russell*, 26 Ore. 459, 26 Pac. 304; *Knapp, Burrell & Co. v. King*, 6 Ore. 243.

[b] Docketing a justice's judgment in a higher court does not terminate the jurisdiction of the justice's court. *McCabe-Duprey Tanning Co. v. Justice Court*, 57 Ore. 44, 102 Pac. 795, 110 Pac. 395.

[c] Motion for Change of Venue. (1) Mere filing of such a motion does not oust a justice's court of jurisdiction (*Schobarg v. Manson*, 110 Ky. 483, 61 S. W. 999); (2) nor does the mere granting of the motion where it is made conditional upon payment of costs. *Presley v. Dean*, 10 Idaho 375, 79 Pac. 71, if the costs are not paid the jurisdiction continues.

58. *Howard v. Valentine*, 20 Cal. 282; *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770 (fact that reformation of an account cannot be granted does not prevent a judgment for an amount which may be found to be due); *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916; *Starke v. Cotton*, 115 N. C. 81, 20 S. E. 184; *Singer Mfg. Co. v. Barrett*, 95 N. C. 36; *Morris v. O'Briant*, 94 N. C. 72; *DeLoatch v. Coman*, 90 N. C. 186; *Ashe v. Gray*, 88 N. C. 190.

59. *Chamberlain v. Edmonds*, 18 App. Cas. (D. C.) 332 (the jury is only an instrumentality to determine the

question of fact); *Calvert v. Hendricks*, 155 Ind. 592, 58 N. E. 832.

60. *Ia.*—*Gates v. Knosby*, 107 Iowa 239, 77 N. W. 863. *Minn.*—*May v. Grawert*, 86 Minn. 210, 90 N. W. 383, a delay of two weeks. *N. J.*—See *Vandervoort v. Fleming*, 68 N. J. L. 507, 53 Atl. 225.

[a] The word "immediately" is synonymous with "forthwith" and "does not necessarily exclude all interval of time, and in many cases it has been held to mean within such time as is reasonably sufficient in which to accomplish the act to which it is applied." *Gates v. Knosby*, 107 Iowa 239, 77 N. W. 863.

61. *Ia.*—*Tomlinson v. Litze*, 82 Iowa 32, 47 N. W. 1015; *Harper v. Albee*, 10 Iowa 389. *Minn.*—*Murray v. Mills*, 56 Minn. 75, 57 N. W. 324. *N. D.* *In re Dance*, 2 N. D. 184, 49 N. W. 733, 33 Am. St. Rep. 768. *Ohio.*—*Robinson v. Kious*, 4 Ohio St. 593.

But see *Stephens v. Santee*, 49 N. Y. 25; *Mundy v. Kern*, 74 Wash. 477, 133 Pac. 1035. See also *infra*, III, M, 8, b.

62. *Town of New Haven v. Rogers*, 32 Conn. 221.

[a] Failure on the part of a plaintiff to bring a cause to trial for a considerable length of time may operate as a discontinuance. *Flanagan v. Smith*, 21 Tex. 493. But see *Johnson's Admsrs. v. Ward*, 23 Tex. 628.

[b] Forbidding court to be held at his home cannot operate as a discontinuance by the plaintiff where there was a public adjournment to another place. *Remick v. Sanborn*, 42 Vt. 477.

63. *Campbell v. Gallagher*, 2 Watts (Pa.) 135. Compare *Schroeder v. Wittram*, 66 Cal. 636, 6 Pac. 737.

appear, a judgment of nonsuit may be entered,⁶⁴ as a discontinuance is worked thereby.⁶⁵

3. **By Absence or Delay of Justice.**—The absence of a justice from his office at the time set for hearing a case for a period of time, variously fixed by different statutes, commonly operates as a discontinuance of the action, and no legal proceedings can be taken by him thereafter,⁶⁶ though in some states this rule has been changed by statute.⁶⁷ Mere delay in taking up the case, necessitated by attention to other business, does not affect the jurisdiction of the justice.⁶⁸

4. **Effect of Continuances.**⁶⁹—A justice of the peace does not lose

64. *Herriek v. Newell*, 49 Minn. 198, 51 N. W. 819; *Adams v. Ellis*, 86 Mo. App. 343.

[a] Oral request by plaintiff to justice to hold the case open does not authorize him to do so. *Scott v. Brown*, 175 Mich. 447, 141 N. W. 857.

[b] Written request for a continuance constitutes an appearance and confers jurisdiction on the court. *Wagner v. Kellogg*, 92 Mich. 616, 52 N. W. 1017.

[c] Announcement that a case was dismissed because of the non-appearance of the plaintiff, made under a misapprehension and mistake of the facts, may be corrected before any record entry of it is made. *Hodges v. Bagg*, 81 Mich. 243, 45 N. W. 841.

[d] Judgment in favor of defendant on a counterclaim cannot be rendered. *Norris v. Bleakley*, 3 Abb. Pr. (N. Y.) 107, 1 Hilt. 90.

65. *Purdy v. Law*, 132 Mich. 622, 94 N. W. 182; *Brady v. Taber*, 29 Mich. 199.

66. See the statutes, and: Ill.—*Brin v. Topp*, 131 Ill. App. 394 (absence for two hours); *Dickinson v. Hoffman*, 90 Ill. App. 83, one hour and a quarter. Kan.—*Olson v. Nunnally*, 47 Kan. 391, 28 Pac. 149. Me.—*Martin v. Fales*, 18 Me. 23, 36 Am. Dec. 693; *Spencer v. Perry*, 17 Me. 413. Mich.—*Ruberts v. Hathaway*, 42 Mich. 592, 4 N. W. 307, one and one-half hours. N. H.—*Downer v. Hollister*, 14 N. H. 122, 40 Am. Dec. 175. N. J.—*Chalmers v. Wildwood Water Works Co.*, 84 N. J. L. 573, 87 Atl. 74; *Hopkins v. Byard*, 80 N. J. L. 156, 76 Atl. 333; *Johnson v. Reilly*, 70 N. J. L. 620, 57 Atl. 133; *McKenna v. Murphy*, 68 N. J. L. 522, 53 Atl. 695; *Taylor v. Doremus*, 16 N. J. L. 473; *Nicholson v. Wright*, 16 N. J. L. 232; *Halsey v. Whitlock*, 3 N. J. L. 869. N. Y.—*McCarty v. McPherson*, 11 Johns. 407 (two hours); *Taft v.*

Grosfent, 5 Johns. 353; *Stoddard v. Holmes*, 1 Cow. 245; *Lynsky v. Pendergrast*, 2 E. D. Smith 43; *Flint v. Gault*, 15 Hun 213. Vt.—*Phelps v. Birge*, 11 Vt. 161 (two hours); *Brown v. Stacy*, 9 Vt. 118. See *Hinman v. Swift*, 18 Vt. 315.

Contra, *Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126.

[a] Knowledge by the justice that defendant does not intend to be present does not affect the result. *Chalmers v. Wildwood Water Works Co.*, 84 N. J. L. 573, 87 Atl. 74.

[b] Absence on official duty is sometimes held not to divest a justice of the peace of jurisdiction. *Stadler v. Moors*, 9 Mich. 264; *Hunt v. Wickwire*, 10 Wend. (N. Y.) 102, 25 Am. Dec. 545.

[c] Entry in docket reciting that absence was unavoidable and that both parties assented to an adjournment does not cure the defect. "The transcript is no evidence of what the parties may have assented to when out of court." *McKenna v. Murphy*, 68 N. J. L. 522, 53 Atl. 695.

[d] Absence of justice because of illness, the parties not objecting, will be treated as constituting an adjournment by consent of the parties. *Patterson v. McRea*, 29 Mich. 258.

[e] Telephonic request by counsel asking for an adjournment does not reinstate a case over which the court had lost jurisdiction by his absence at the time fixed for hearing. *Hopkins v. Byard*, 80 N. J. L. 156, 76 Atl. 333.

67. See the statutes, and *Parsons v. Aultman, Miller & Co.*, 45 W. Va. 473, 31 S. E. 935, absence of justice results in a continuance for one week.

68. *Chamberlain v. Lovet*, 12 Johns. (N. Y.) 217.

69. Continuances generally, see *infra*, III, L, 1, c, (II), and the title "Continuances."

jurisdiction of an action by continuing it to a fixed future hour or date.⁷⁰ Continuances from day to day necessitated by the length of a trial or the condition of the calendar of the court,⁷¹ and short adjournments during the day,⁷² do not affect the jurisdiction of the court. But a continuance of an action to an uncertain date in the future operates to divest a justice of jurisdiction,⁷³ though upon this proposition there are authorities to the contrary,⁷⁴ at least where both the parties have consented to the action of the court.⁷⁵ On the termination of the trial, a case cannot be taken under advisement for an indefinite time, and a decision reserved; the justice loses jurisdiction in such case;⁷⁶ but there are authorities to the contrary.⁷⁷

O. WAIVER OF JURISDICTIONAL AND PROCEDURAL DEFECTS. — 1. As to Subject-Matter of the Action.⁷⁸ — Since consent cannot confer jurisdiction over the subject-matter,⁷⁹ no acts of the parties can waive a defect of jurisdiction of this character.⁸⁰ In some states, want of

70. Cal.—Disque *v. Herrington*, 139 Cal. 1, 72 Pac. 336. Ill.—Henion *v. Pohl*, 113 Ill. App. 100. Kan.—Kaub *v. Mitchell*, 12 Kan. 57. Minn.—Wheeler *v. Paterson*, 64 Minn. 231, 66 N. W. 964, 58 Am. St. Rep. 527; Gillitt *v. Truax*, 27 Minn. 528, 8 N. W. 767. Miss.—Rice *v. Locke*, 59 Miss. 189. See Alabama *G. S. Ry. Co. v. Dalton*, 86 Miss. 299, 38 So. 285.

71. Ga.—Starnes *v. Mutual L. & Bkg. Co.*, 102 Ga. 597, 29 S. E. 452. Mich.—Woempener *v. Ketchum*, 110 Mich. 34, 67 N. W. 1106. Wis.—State *v. Nohl*, 113 Wis. 15, 88 N. W. 1004.

See also *infra*, III, R.

[a] A presumption exists that when a judgment was rendered by a justice, on a certain day, the court was at that time lawfully in session. Starnes *v. Mutual L. & Bkg. Co.*, 102 Ga. 597, 29 S. E. 452.

72. Pease *v. Gleason*, 8 Johns. (N. Y.) 409 (to enable plaintiff to procure witness); Steele *v. Wells*, 56 N. Y. Supp. 367 (holding the case open while waiting for a defendant to appear); Cowan *v. Farrell*, 7 N. D. 397, 75 N. W. 771, to enable counsel to obtain necessary papers.

73. Neb.—Lininger *v. Glenn*, 33 Neb. 187, 49 N. W. 1128. N. J.—Woodworth *v. Wolverton*, 24 N. J. L. 419. Pa.—Musser's Admr. *v. Simpson*, 14 Pa. Co. Ct. 526. Tex.—See Flanagan *v. Smith*, 21 Tex. 493.

74. D. C.—Chamberlain *v. Edmonds*, 18 App. Cas. 332. Idaho.—See Nadel *v. Campbell*, 18 Idaho 335, 110 Pac. 262, "the error is not jurisdictional." Mo.—Shanklin *v. Francis*, 67 Mo. App. 457.

75. Moir *v. Bourke*, 156 Iowa 612, 137 N. W. 921; Cedar Rapids *v. Rall*, 115 Iowa 335, 88 N. W. 826. See Gilman *v. Weiser*, 140 Iowa 554, 118 N. W. 774.

76. Ill.—Harrison *v. Chipp*, 25 Ill. 575 (even with the consent of the parties); Murray Bros. *v. Churchill & Co.*, 86 Ill. App. 480. Mont.—State *ex rel. Collier v. Houston*, 36 Mont. 178, 92 Pac. 476. Neb.—Johnson *v. Samuelson*, 82 Neb. 201, 117 N. W. 470. But see Huff *v. Babbott*, 14 Neb. 150, 15 N. W. 230; Reed *v. Mott*, 2 Neb. (Unof.) 450, 89 N. W. 277. N. J. Edwards *v. Hance*, 12 N. J. L. 108. But see Clark *v. Read*, 5 N. J. L. 560. N. D.—Sluga *v. Walker*, 9 N. D. 108, 81 N. W. 282.

[a] Reason for Rule.—"The law designs that the parties shall have the right to be present when every step is taken, and the officer has no power to deprive either party of that right." Harrison *v. Chipp*, 25 Ill. 471.

Time for rendition and entry of judgment, see generally *infra*, III, M, 8.

77. American Typefounders Co. *v. Justice's Court*, 133 Cal. 319, 65 Pac. 742, 978; Heinlen *v. Phillips*, 88 Cal. 557, 26 Pac. 366; Saunders *v. Pike*, 6 Ore. 312.

78. Jurisdiction as dependent upon subject matter of action, see *supra*, II, F.

79. See *supra*, II, D, and generally the title "Jurisdiction."

80. Ala.—Burgin *v. Ivy Coal & Coke Co.*, 127 Ala. 657, 29 So. 67. Mich.—Spear *v. Carter*, 1 Mich. 19, 48 Am. Dec. 688. Mo.—Fields *v. Maloney*, 78 Mo. 172. N. Y.—Robinson *v. West*, 11

jurisdiction in the justice's court cannot be urged on appeal after a trial on the merits.⁸¹

2. As to Jurisdiction Over the Person.—The objection that jurisdiction over the person of a defendant has not been obtained, may of course, be waived;⁸² and it is waived by a general appearance,⁸³ or by participating in the trial on its merits without objection.⁸⁴ But if a defendant, after appearing specially and urging the want of jurisdiction of the court over his person which objection is disregarded, files an answer and takes part in the trial on the merits, his objection for want of jurisdiction is not waived.⁸⁵

3. As to Disqualification of Justice.⁸⁶—The disqualification of a justice of the peace to try an action is a matter which may be waived by the parties.⁸⁷ Permitting a judgment to be entered by default,⁸⁸ or by confession,⁸⁹ or going to trial on the merits, without objection,⁹⁰ constitutes a waiver; but answering on the merits after a plea in abatement has been overruled, is not a waiver.⁹¹ A party cannot urge the

Barb. 309. **Okla.**—Hobbs *v.* German-American Doctors, 14 Okla. 236, 78 Pac. 356. **Pa.**—Nevil *v.* Heinke, 22 Pa. Super. 614.

81. *La Barre v. Bent*, 154 Mich. 520, 118 N. W. 6. See also, *infra*, III, R.

82. See *supra*, II, D.

83. **Me.**—Fuller *v.* Davis, 73 Me. 556. **Mo.**—Rogers *v.* Davis (Mo. App.), 184 S. W. 151, by motion for change of venue. **Mont.**—State *ex rel.* Beadle *v.* Smith, 42 Mont. 492, 113 Pac. 294. **N. Y.**—Patrick *v.* Williamson, 19 App. Div. 451, 46 N. Y. Supp. 504; Darling *v.* Protective Assur. Soc., 71 Misc. 113, 127 N. Y. Supp. 486. **Wis.**—State *ex rel.* Haeselich *v.* Schweitzer, 131 Wis. 138, 111 N. W. 217.

See also *supra*, II, D, and generally the titles "Appearances," "Jurisdiction."

84. **Ala.**—Stephens *v.* Cox, 124 Ala. 448, 26 So. 981. **Ark.**—Manufacturing Co. *v.* Donahoe, 49 Ark. 318, 5 S. W. 342. **Ill.**—Graves *v.* Shoefelt, 60 Ill. 462. **Mich.**—McCall *v.* Van Dusen, 141 Mich. 42, 104 N. W. 326. **Mo.**—Deck *v.* Wright, 135 Mo. App. 536, 116 S. W. 31. **N. Y.**—Huber *v.* Ehlers, 76 App. Div. 602, 79 N. Y. Supp. 150. **S. C.**—Dennis *v.* Atlantic Coast Line R. R. Co., 86 S. C. 258, 68 S. E. 465. **Tex.**—Gulf, C. & F. Ry. Co. *v.* Shield, 56 Tex. Civ. App. 7, 120 S. W. 222.

[a] Objection on special grounds is a waiver of other grounds not presented. *People v. Court of Appeals*, 33 Colo. 258, 79 Pac. 1017; *Brainard v. Butler, Ryan & Co.*, 77 Neb. 515, 109 N. W. 766.

85. **Minn.**—Perkins *v.* Meilicke, 66 Minn. 409, 69 N. W. 220. **N. Y.**—Allen *v.* Stone, 9 Barb. 60. **S. C.**—Able *v.* Hall, 101 S. C. 24, 85 S. E. 165.

But see *Storm v. Worland*, 19 Ind. 203.

86. See generally *supra*, II, L.

87. **Ark.**—Morrow *v.* Watts, 80 Ark. 57, 95 S. W. 988. **Ga.**—Vaughn *v.* Strickland, 108 Ga. 659, 34 S. E. 192. **Ind.**—Harbaugh *v.* Albertson, 102 Ind. 69, 1 N. E. 298; Brady *v.* Richardson, 18 Ind. 1; Eastwood *v.* Buel, 1 Ind. 434; Baldwin *v.* Runyon, 8 Ind. App. 344, 35 N. E. 569. **Neb.**—Keeley Institute *v.* Riggs, 5 Neb. (Unof.) 612, 99 N. W. 833. **N. H.**—Gilmanton *v.* Ham, 38 N. H. 108; Warren *v.* Glynn, 37 N. H. 340. See *Gear v. Smith*, 9 N. H. 63. **Ohio.**—Pittsburgh, C. & St. L. Ry. Co. *v.* Fleming, 30 Ohio St. 480. **Pa.**—Wagner *v.* Hoffman, 19 Pa. Super. 414. **Tenn.**—Hilton *v.* Miller & Co., 5 Lea 395. **Wis.**—Rector *v.* Drury, 3 Pinn. 298, 4 Chand. 24.

[a] Knowledge of the disqualifying facts will be presumed in a party. *Baldwin v. Runyon*, 8 Ind. App. 344, 35 N. E. 569, error must be shown affirmatively.

88. *Morrow v. Watts*, 80 Ark. 57, 95 S. W. 988, by party who had knowledge of the disqualification of the justice by reason of relationship.

89. *Eastwood v. Buel*, 1 Ind. 434; *Hilton v. Miller & Co.*, 5 Lea (Tenn.) 395.

90. *Brady v. Richardson*, 18 Ind. 1, 91. *Clark v. Mikesell*, 81 Mich. 45, 45 N. W. 377.

impropriety of or defects in proceedings taken by himself to obtain a hearing before a justice of the peace other than the one who would regularly have presided over the action.⁹² If a particular mode of waiving the disqualification is provided by statute this method is exclusive of all others.⁹³

4. As to Improper Continuances.⁹⁴—The discontinuance effected by the absence of a justice is a matter which may be waived, as it is regarded as pertaining to the jurisdiction of the court over the person of the defendant.⁹⁵

P. PROCEDURE TO RAISE AND DETERMINE JURISDICTIONAL QUESTIONS.⁹⁶—It is the duty of the court of its own motion to dismiss a cause whenever it is made to appear that it has no jurisdiction over the subject-matter.⁹⁷ If the question of jurisdiction depends upon the existence of controverted facts a justice of the peace has jurisdiction to hear the evidence for the purpose of determining whether he has jurisdiction to try and decide the case on its merits.⁹⁸ Want of jurisdiction may be urged, in some states, by a motion to dismiss the

92. Ga.—Vaughn v. Strickland, 108 Ga. 659, 34 S. E. 192. Ill.—See Graves v. Shoefelt, 60 Ill. 462. Ind.—Harbaugh v. Albertson, 102 Ind. 69, 1 N. E. 298. Minn.—Oltman v. Yost, 62 Minn. 261, 64 N. W. 564, insufficiency of affidavit.

[a] Surety of plaintiff who executed a replevin bond, cannot urge the disqualification of the justice as a ground of illegality of the bond. Harbaugh v. Albertson, 102 Ind. 69, 1 N. E. 298.

[b] A party who claims that a justice is disqualified is thereafter estopped from denying that the state of facts he represented to exist did in fact exist. Vaughn v. Strickland, 108 Ga. 659, 34 S. E. 192.

93. Keeler v. Stead, 56 Conn. 501, 16 Atl. 552, 7 Am. St. Rep. 320, waiver required to be in writing.

94. Disqualification of justice due to improper continuances, see *supra*, II, M, 4.

95. Minn.—Quaker Creamery Co. v. Carlson, 124 Minn. 147, 144 N. W. 449. Neb.—Reed v. Mott, 2 Neb. (Unof.) 450, 89 N. W. 277. N. J.—See Vandervoort v. Fleming, 68 N. J. L. 507, 53 Atl. 225. N. D.—Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605. Okla.—Hobbs v. German-American Doctors, 14 Okla. 236, 78 Pac. 356. Vt.—Phelps v. Birge, 11 Vt. 161 (by consent of defendant entered on the writ); Howe v. Hosford, 8 Vt. 220.

[a] Filing an answer after a discontinuance has been worked by an order adjourning the case for an unwarranted length of time, constitutes a waiver. Quaker Creamery Co. v. Carlson, 124 Minn. 147, 144 N. W. 449. Compare May v. Grawert, 80 Minn. 210, 90 N. W. 383.

[b] Mere presence at the hearing on the adjourned day for the purpose of interposing objections, is not a waiver. Martin v. Fales, 18 Me. 23, 36 Am. Dec. 693; Crisp v. Rice, 83 Hun 465, 31 N. Y. Supp. 908, 64 N. Y. St. 645.

[c] Participation in the trial after objections have been overruled, is not a waiver. Wright v. Shepherd, 44 Misc. 454, 90 N. Y. Supp. 154; Moody v. Becker, 70 N. Y. Supp. 543; Pinney v. Petty, 47 Vt. 616.

96. Raising and determining whether question of title involved, see *supra*, II, F, 4, j.

97. Jeffries v. Harbin, 20 Ala. 387.

98. D. C.—Anderson v. Morton, 21 App. Cas. 444, as to defendant's place of residence. Ill.—Kraft v. Porter, 76 Ill. App. 328. N. Y.—White v. Place, 40 Hun 481. Pa.—Stouffer v. Beetem, 18 Pa. Co. Ct. 605. Tex.—Jennings v. Shiner (Tex. Civ. App.), 43 S. W. 276, if the justice ignores the plea or ignores proof that clearly establishes it, his judgment may be enjoined.

action,⁹⁹ which may be made at any time;¹ or it may be urged by motion to quash the proceedings.² Where the jurisdictional defect does not appear on the face of the complaint, it may be raised by a plea in abatement,³ or by answer,⁴ or by a motion for a nonsuit, at the trial.⁵ An answer or plea of want of jurisdiction must be in writing,⁶ and verified,⁷ and, in some states, must disclose affirmatively what court does have jurisdiction of the action,⁸ and the particular defects relied upon as ousting the jurisdiction of the justice's court.⁹

Q. TRANSFER OF CAUSE.—The transfer of the cause for jurisdictional and other reasons is treated in subsequent sections.⁹⁴

III. PROCEEDINGS BEFORE.—**A. MANNER OF COMMENCING SUITS.**—The various statutes regulating the manner of commencing actions and suits before justices of the peace provide for their commencement by the voluntary appearance and agreement of the parties

99. *Burns v. Henry*, 67 Ala. 209; *Mountain City Mill Co. v. Southern*, 46 W. Va. 754, 34 S. E. 782, no provision is made for pleas in abatement in a justice's court.

1. *Ala.*—*Ala. v. Henry*, 67 Ala. 209. *Ind.*—*Wall v. Albertson*, 18 Ind. 145. *Utah.*—*Kansas City Hdw. Co. v. Neilson*, 10 Utah 27, 36 Pac. 131.

[a] **Motion to dismiss after plaintiff's evidence is in**, on the ground that the evidence failed to show that the court had jurisdiction, is proper; such a motion raises questions of both law and fact. *Purdum v. Neil*, 10 Idaho 263, 77 Pac. 631.

2. *Nelson v. Hillen*, 164 Mich. 507, 129 N. W. 717; *Appleman v. Hahn*, 149 Mich. 245, 112 N. W. 917, or a verified plea to the jurisdiction; a motion to dismiss is improper.

3. *Ala.*—*Louisville & N. R. Co. v. Barker*, 96 Ala. 435, 11 So. 453; *Burns v. Henry*, 67 Ala. 209. *Ga.*—*Talbott v. Collier*, 102 Ga. 550, 28 S. E. 225. *Ill.*—*Henion v. Pohl*, 113 Ill. App. 100.

[a] **Allegations by way of recital** are insufficient in such a plea. *Landon v. Roberts*, 20 Vt. 286.

[b] **Plea setting up disqualification of justice by relationship** must allege the particular relationship which it is claimed existed. *Landon v. Roberts*, 20 Vt. 286.

4. *Cal.*—*Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936 (improper venue); *Williams v. McCartney*, 69 Cal. 556, 11 Pac. 186, that the legality of an assessment was involved in an action. *Idaho.*—See *Purdum v. Neil*, 10 Idaho 263, 77 Pac. 631. *Utah.*—*Kansas*

City Hdw. Co. v. Neilson, 10 Utah 27, 36 Pac. 131.

5. *Lapham v. Rice*, 63 Barb. (N. Y.) 485.

6. *Crutchfield v. Durando*, 3 Lea (Tenn.) 68.

7. *Cal.*—*Williams v. McCartney*, 69 Cal. 556, 11 Pac. 186. *Ga.*—*Akers v. High Co.*, 122 Ga. 279, 50 S. E. 105. *Ind.*—*Storm v. Worland*, 19 Ind. 203. *Tex.*—*Landa v. Mack* (Tex. Civ. App.), 56 S. W. 540, verification on a day subsequent to filing is in effect an amendment and is proper.

8. *Ga.*—*Akers v. High Co.*, 122 Ga. 279, 50 S. E. 105; *Fain v. Crawford*, 91 Ga. 30, 16 S. E. 106. *Ind.*—See *Storm v. Worland*, 19 Ind. 203. *Tex.*—See *Aspermont Drug Co. v. J. W. Crowds Drug Co.* (Tex. Civ. App.), 80 S. W. 258; *McQuigg v. Nabors*, 23 Tex. Civ. App. 357, 56 S. W. 212; *Walthew & Sons v. Milby*, 3 Wills. Civ. Cas., §119.

9. *Brown v. Goodyear*, 29 Neb. 376, 45 N. W. 618; *Bell v. White Lake Lumb. Co.*, 21 Neb. 525, 32 N. W. 561; *Freeman v. Burks*, 16 Neb. 328, 20 N. W. 207.

9½. See *infra*, III, R, and generally the title "Transfer of Causes."

Change of venue, see *infra*, III, D, 2, b, (I), and generally the title "Change of Venue."

[a] **Fraudulent joinder of a co-defendant to confer apparent jurisdiction** must be pleaded if intended to be relied upon. *Needham v. Dial*, 4 Tex. Civ. App. 141, 23 S. W. 240.

or joinder of issue,¹⁰ by process,¹¹ or notice,¹² or by the issuance¹³ or service¹⁴ of summons, or sometimes by the filing of the declaration or complaint.¹⁵

B. FORM OF ACTION.—The justice's court not being a common-law court,¹⁶ technical forms of action are generally,¹⁷ although not

10. Ia.—Duffy v. Dale, 42 Iowa 215; Acres v. Hancock, 4 Iowa 568. Minn.—Craighead v. Martin, 25 Minn. 41; Lamberton v. Raymond, 22 Minn. 129. N. Y. Code Civ. Proc., §2876; Lester v. Crary, 1 Denio 81; Reed v. Warth, 2 Hilt. 281. S. D.—Jerome v. Rust, 19 S. D. 263, 103 N. W. 26; Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543. Wyo.—Cheeseman v. Fenton, 13 Wyo. 436, 451, 80 Pac. 823, 110 Am. St. Rep. 1010.

As to appearances, see *infra*, III, G.

[a] The litigation of the case before the court by the introduction of testimony is equivalent to the institution of the suit by voluntary appearance. Lamberton v. Raymond, 22 Minn. 129.

11. Ark.—Ruddell v. Walker, 7 Ark. 457, the mere filing of the cause of action is not the commencement of the action. Mich.—Hartford F. Ins. Co. v. Owen, 30 Mich. 441. Minn.—Craighead v. Martin, 25 Minn. 41. Mo.—Heman v. Larkin (Mo. App.), 70 S. W. 907. Wyo.—Cheeseman v. Fenton, 13 Wyo. 436, 450, 80 Pac. 823, 110 Am. St. Rep. 1010, summons.

As to process, see *infra*, III, F.

12. Arts v. Rocksien, 98 Iowa 536, 67 N. W. 409; Duffy v. Dale, 42 Iowa 215.

[a] Except in replevin, when a duly verified petition must be filed prior to the issuance of the writ. Duffy v. Dale, 42 Iowa 215.

13. Mo.—Fabien v. Grabow, 134 Mo. App. 193, 114 S. W. 80; Heman v. Larken (Mo. App.), 70 S. W. 907. N. D.—Taughner v. Northern Pac. R. Co., 21 N. D. 111, 129 N. W. 747. S. D.—Jerome v. Rust, 19 S. D. 263, 103 N. W. 26; Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543. Tex.—Watt v. Parlin, 44 Tex. Civ. App. 439, 98 S. W. 428, citing local cases.

14. N. Y. Code Civ. Proc., §2876; Bird v. Crane, 26 Hun (N. Y.) 531. See Hodge v. Adees, 2 Lans. (N. Y.) 314 (the suit was commenced at the time the summons was delivered to the officer for service); Cornell v. Moulton, 3 Denio (N. Y.) 12; Boyce v. Morgan, 3 Caines (N. Y.) 133, the issuing of

the summons is the commencement of the action.

15. Cal.—Code Civ. Proc., §839. Miss.—Stewart v. Pettitt, 94 Miss. 769, 48 So. 5. Mont.—Shandy v. McDonald, 38 Mont. 393, 100 Pac. 203. Nev.—Higley v. Pollock, 21 Nev. 198, 27 Pac. 895, by the filing of the complaint and issuance of summons. Utah.—Salt Lake C. & S. Co. v. District Court, 44 Utah 411, 140 Pac. 666.

[a] Where Issuance of Process Is Delayed.—Under a statute providing for the commencement of an action by filing a declaration, an action is not deemed commenced until the issuance of summons where the plaintiff requests that summons be not issued until further order. Stewart v. Pettitt, 94 Miss. 769, 48 So. 5.

As to declaration or statement of cause of action, see *infra*, III, K, 2.

16. See *supra*, I.

17. Ill.—Rehm v. Halverson, 197 Ill. 378, 64 N. E. 388; Phillips v. Roberts, 90 Ill. 492; Pollock v. McClurkin, 42 Ill. 370; Brewster v. Grover, 29 Ill. 246; Swingley v. Haynes, 22 Ill. 214. Ind.—Brush v. Carpenter, 6 Ind. 78. Miss.—Stier v. Surget, 10 Smed. & M. 154. Pa.—Bright v. Getz, 81 Pa. 144; Kraft v. Gilchrist, 31 Pa. 470, distinguished in Weisberger v. White, 12 Pa. Co. Ct. 224, decided under a statute giving justices "jurisdiction of actions of trover and conversion, and of actions of trespass." Tenn.—Bodenhamer v. Bodenhamer, 6 Humph. 264.

[a] Naming the Action.—(1) The party suing in a justice's court need not even name his cause of action, but if he misnames it, his rights will not be affected. Rehm v. Halverson, 197 Ill. 378, 64 N. E. 388; Pollock v. McClurkin, 42 Ill. 370; Chicago & R. I. R. Co. v. Reid, 24 Ill. 144; Morley v. Roach, 116 Ill. App. 534. (2) The action is what the proof makes it, regardless of the name which the plaintiff or justice may give it. Vincent v. Riling, 168 Ill. App. 445; Doherty v. Schipper, 157 Ill. App. 413, 422 (citing many local cases); Schwarzs

universally¹⁸ regarded as immaterial, and indeed, some statutes have expressly stated that forms of action shall not apply to the justice's court and that there shall be but one form of action in such court called a civil action.¹⁹

C. CONSOLIDATION OF ACTIONS.²⁰—In the absence of statute, a plaintiff cannot be required to consolidate his actions on several demands,²¹ but it is not erroneous to hear several cases at one time where witnesses are examined in each, and separate judgments are rendered.²² Some statutes, however, require a plaintiff to consolidate his demands,²³ which are of a nature to be consolidated,²⁴ if when consolidated they do not exceed the jurisdiction of the court,²⁵ and sometimes provide that if he refuse or neglect to do so, he will be forever barred from suing therefor.²⁶

child v. Goldstein, 121 Ill. App. 1.

18. Southern Exp. Co. v. Hunnicutt, 5 Ga. App. 262, 63 S. E. 26; Chapman v. Conwell, 1 Ga. App. 212, 58 S. E. 137; Somers v. Scull, 3 N. J. L. 1047; Owen v. Chidester, 3 N. J. L. 904; Fleming v. Newman, 3 N. J. L. 864.

19. O'Connor v. Dils, 43 W. Va. 54, 26 S. E. 354.

20. See generally the title "Consolidation of Actions."

21. Lindsay v. Wayland, 17 Ark. 385; Barns v. Holland, 3 Mo. 47. See Everett v. Clements, 9 Ark. 478, where the defendant who moved for consolidation was permitted on appeal to set up an omission to file a demand previous to the issuance of summons in two of the consolidated actions.

22. Baker v. Irvine, 62 S. C. 293, 40 S. E. 672.

23. See generally the statutes, and Colo.—Goldberger v. Leibowitz, 42 Colo. 99, 93 Pac. 1108. Ill.—Nickerson v. Rockwell, 90 Ill. 460; McKinney v. Finch, 2 Ill. 152; Leischke v. Miller, 100 Ill. App. 137. Miss.—McLendon v. Pass, 66 Miss. 110, 5 So. 234 (not referring to any statute); Louisville & N. R. Co. v. McCollister, 66 Miss. 106, 5 So. 695. Mo.—Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 S. W. 588.

[a] In Georgia, whether a motion for consolidation shall be granted is within the discretion of the justice. Atlantic C. L. R. Co. v. Du Pont, 122 Ga. 251, 50 S. E. 103.

[b] In Missouri, the statute provides for consolidation of actions pending before the same justice only. Aimee Realty Co. v. Haller, 128 Mo. App. 66, 106 S. W. 588.

24. Osborn v. Philpot, 46 Ill. App. 274. See generally the title "Consolidation of Actions."

[a] The test of whether the demands are of a nature to be consolidated is whether the same judgment may be rendered on both demands. Osborn v. Philpot, 46 Ill. App. 274.

[b] A demand for labor and one for damages for breach of contract are not of a nature to be consolidated. Osborn v. Philpot, 46 Ill. App. 274.

[c] If the parties by mutual agreement extend the time of payment of one of the claims to a day subsequent to the commencement of the suit, the judgment will not bar the postponed claim. Sherer v. Langford, 67 Ill. App. 342.

25. Ga.—Atlantic C. L. R. Co. v. Du Pont, 122 Ga. 251, 50 S. E. 103. Ill.—Nickerson v. Rockwell, 90 Ill. 460; Mallock v. Krome, 78 Ill. 110; Buckner v. Thompson, 11 Ill. 563; Calverley v. Steckler, 126 Ill. App. 586; Page v. Shields, 102 Ill. App. 575. Miss.—McLendon v. Pass, 66 Miss. 110, 5 So. 234; Louisville & N. R. Co. v. McCollister, 66 Miss. 106, 5 So. 695.

26. Mallock v. Krome, 78 Ill. 110; Leischke v. Miller, 100 Ill. App. 137.

[a] Construction of Statute.—This statute does not mean that the bare commencement of an action in which the plaintiff did not consolidate all his demands should, whether the cause is tried or not, bar all demands not consolidated. It means that where a suit is commenced before a justice in which all the demands of the parties may be investigated and such suit terminates in a judgment binding on the parties, the demands not brought

D. TERRITORIAL JURISDICTION AND PLACE OF COMMENCING ACTION.²⁷

1. **Generally.**—The nature and extent of the jurisdiction of a justice of the peace is fully treated in a previous section of this article, except as to the territorial jurisdiction which by reason of its almost inseparable connection with the question of venue is treated at this point.²⁸

The extent of the territory over which justices of the peace have jurisdiction is limited by constitutions and statutes,²⁹ which variously limit his jurisdiction to the county,³⁰ township,³¹ city,³² precinct,³³

forward shall not be the foundation of a future action. *McKinney v. Finch*, 2 Ill. 152.

27. See generally the titles "Jurisdiction;" "Venue."

28. See *supra*, II, A, B.

[a] The terms "jurisdiction" and "venue" are often confused and misapplied. *Southern Ry. Co. v. Fitzpatrick*, 195 Ala. 328, 70 So. 164. And see *Parker v. Uchida*, 14 Ariz. 57, 125 Pac. 715.

29. *Searl v. Shanks*, 9 N. D. 204, 82 N. W. 734. See generally the constitutions and statutes, and *supra*, II, A and B.

30. **Ala.**—*Southern R. Co. v. Fitzpatrick*, 195 Ala. 328, 70 So. 164. **Ariz.** *Parker v. Uchida*, 14 Ariz. 57, 125 Pac. 715. **Colo.**—*Miller v. Graf*, 14 Colo. App. 167, 59 Pac. 416, in *replevin*. **Ind.**—*Scott v. Willis*, 122 Ind. 1, 22 N. E. 786 (recovery of possession of premises by landlord); *Miller v. Citizens' Bldg. & L. Assn.*, 50 Ind. App. 132, 98 N. E. 70. **Ia.**—*Wright v. Phillips*, 2 G. Gr. 190, forcible entry and detainer. **Kan.**—*Parker Grain Co. v. Chicago, R. I. & P. R. Co.*, 70 Kan. 168, 78 Pac. 406; *State ex rel. Doolittle v. Brayman*, 35 Kan. 714, 12 Pac. 111. **Ky.**—*Wheeler v. Schulman*, 165 Ky. 185, 176 S. W. 1017; *Ackerson v. Semple*, 163 Ky. 395, 173 S. W. 1153; *Guelot v. Pearce*, 18 Ky. L. Rep. 1004, 38 S. W. 892; *Russell v. Muldraugh's Hill, C. & C. Tp. R. Co.*, 13 Bush 307. **Minn.**—*Perkins v. Mellicke*, 66 Minn. 409, 69 N. W. 220. **Miss.**—*Smith v. Jones*, 65 Miss. 276, 3 So. 740 (in proceedings for attachment for rent); *Cain v. Simpson*, 53 Miss. 521. **Mo.**—*United States Mut. Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571. **N. J.**—See *Hankins v. Berrian*, 62 N. J. L. 180, 40 Atl. 624. **N. Y.**—*McKey v. Lockner*, 43 App. Div. 43, 59 N. Y. Supp. 640;

Gould v. Mahaney, 39 App. Div. 426, 57 N. Y. Supp. 363; *Desmond v. Crane*, 39 App. Div. 190, 57 N. Y. Supp. 266; *Beach v. Baker*, 25 App. Div. 9, 48 N. Y. Supp. 1042. **S. C.**—*Wise v. Werts*, 72 S. C. 132, 51 S. E. 547; *Baker v. Irvine*, 61 S. C. 114, 39 S. E. 252. **W. Va.**—*Sovereign Coal Co. v. Britton*, 87 S. E. 925; *Bank of Gassaway v. Stalnaker*, 69 W. Va. 85, 71 S. E. 183; *Roberts v. Hickory Camp C. & C. Co.*, 58 W. Va. 276, 52 S. E. 182.

[a] **Road in Several Counties.**—The determination by a justice of one of the counties through which a toll road passes, that the whole road, being in several counties, is out of repair, is extrajudicial. *Russell v. Muldraugh's Hill, C. & C. Tp. R. Co.*, 13 Bush (Ky.) 307.

31. **U. S.**—*Leadbetter v. Kendall*, *Hempst.* 302, 15 Fed. Cas. No. 8,157a. **Ind.**—*Wabash, St. L. & P. Ry. Co. v. Lash*, 103 Ind. 80, 2 N. E. 250; *Wilkinson v. Moore*, 79 Ind. 397; *Worthington v. Qualkinbush*, 40 Ind. App. 554, 82 N. E. 534. **Mo.**—*Daniels v. St. Louis & S. F. R. Co.*, 130 Mo. App. 213, 109 S. W. 85.

32. **Mo.**—*Clarkson v. Guernsey Furn. Co.*, 22 Mo. App. 109. **N. Y.**—*Schwartz v. Palm*, 163 App. Div. 7, 147 N. Y. Supp. 1081; *Tobias v. Perry*, 25 Misc. 74, 54 N. Y. Supp. 716. **Ore.**—*Craig v. Mosier*, 2 Ore. 323. **Utah.**—*Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

33. **Ala.**—*Horton v. Elliott*, 90 Ala. 480, 8 So. 103; *Taylor v. Woods*, 52 Ala. 474. But see *Dew v. Bank of State of Alabama*, 9 Ala. 323 (where the county is the limit of jurisdiction); *Caldwell v. Meador*, 4 Ala. 755. **Colo.** *Reynolds v. Larkins*, 10 Colo. 126, 14 Pac. 114. **Utah.**—*Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532.

ward,³⁴ district,³⁵ parish,³⁶ and militia district,³⁷ for which they are elected and in which they reside. In limited and special classes of actions a more extended jurisdiction is sometimes conferred upon them,³⁸ and some statutes give justices jurisdiction for certain purposes co-extensive with the state.³⁹ In some instances their jurisdiction extends over the district adjoining that in which their court is held,⁴⁰ and it is not uncommon for justices in cities to have jurisdiction co-extensive with the boundaries of the city, notwithstanding this territory is larger than the district or precinct from which they were elected,⁴¹ and for city justices of the peace to have jurisdiction over the entire county of which the city forms a part,⁴² although justices of the peace, resident in cities, are sometimes deprived of jurisdiction where higher courts have been created.⁴³ On the other hand, justices

34. *La.*—New York Press Co. v. Salter, 129 La. 51, 55 So. 706. *Md.* See Levin v. Hewes, 118 Md. 624, 86 Atl. 233. *Minn.*—Holmes v. Igo, 110 Minn. 133, 124 N. W. 974.

35. *People ex rel. Hambrecht v. Campbell*, 22 Hun 574, 60 How. Pr. 102. See *Heggie v. Stone*, 70 Miss. 39, 12 So. 253.

36. See *State v. Falls*, 32 La. Ann. 553.

37. *Southern R. Co. v. Johnson*, 96 Ga. 655, 23 S. E. 836. See *Starnes v. Mutual L. & Bkg. Co.*, 102 Ga. 597, 29 S. E. 452.

38. *Colo.*—*Reynolds v. Larkins*, 10 Colo. 126, 14 Pac. 114, in forcible entry and detainer proceedings jurisdiction extends over the entire county. *Ga.* *Dean v. Donalson*, 2 Ga. App. 462, 58 S. E. 679, to issue distress warrants. *Ind.*—*Wilkinson v. Moore*, 79 Ind. 397 (attachments on personal property may be issued anywhere within the county); *Graham v. Klyla*, 29 Ind. 432 (over suits commenced by *capias ad respondendum* a justice's court has jurisdiction throughout the county; and see *Harris v. Knapp*, 21 Ind. 198); *Test v. Small*, 21 Ind. 127 (replevin may be instituted before any justice in the county); *Maxwell v. Collins*, 8 Ind. 28, any justice of the county has jurisdiction over a nonresident sued within the county.

And see cases cited *supra*, this section.

39. *Minn.*—*Perkins v. Mellicke*, 66 Minn. 409, 69 N. W. 220, the justice may issue writs of attachment to the proper officer of any county. *N. H.* *Young v. Bride*, 25 N. H. 482. *Vt.* *Sinclair v. Gadcomb*, 1 Vt. 32, giving a councillor acting as justice of the

peace jurisdiction and authority to sign process which shall run to any county or place within the state.

[a] Justices of the peace throughout the state have the same jurisdiction in any county in the state as the justices appointed for that county. *Young v. Bride*, 25 N. H. 482.

40. *O'Connell v. Menominee B. S. Lumb. Co.*, 113 Mich. 124, 71 N. W. 449 (such a provision is constitutional); *Backenstoe v. Wabash, St. L. & P. R. Co.*, 86 Mo. 492.

41. *Ga.*—*Starnes v. Mutual L. & Bkg. Co.*, 102 Ga. 597, 29 S. E. 452; *Thomas v. Lawton*, 71 Ga. 244; *Harbig v. Freund & Co.*, 69 Ga. 180. *Mo.*—See *Carpenter v. Roth*, 192 Mo. 658, 669, 91 S. W. 540. *Utah.*—*Briscoe v. Rich*, 20 Utah 349, 58 Pac. 837.

42. *Desmond v. Crane*, 39 App. Div. 190, 57 N. Y. Supp. 266; *Lantz v. Galpin*, 44 Misc. 356, 89 N. Y. Supp. 1096; *Shaeffer v. Steadman*, 24 Misc. 267, 53 N. Y. Supp. 586; *Armstrong v. Kennedy*, 23 Misc. 47, 51 N. Y. Supp. 509; *Ostrander v. People*, 29 Hun 513, 1 N. Y. Crim. 274; *Overseers of St. Clair v. Overseers of Moon*, 6 Watts & S. (Pa.) 522. See *Supthen v. Clark*, 119 App. Div. 671, 104 N. Y. Supp. 129. *Compare Tobias v. Perry*, 25 Misc. 74, 54 N. Y. Supp. 716.

[a] Justice in a city can be given no jurisdiction of a portion of a district without the city, where the constitution provides that justices of the peace shall be elected by districts. *Heggie v. Stone*, 70 Miss. 39, 12 So. 253.

43. *New Jersey S. P. C. A. v. Russ*, 83 N. J. L. 450, 83 Atl. 961, where district courts have been established. And see *Hankins v. Berrian*, 62 N. J.

outside the city are sometimes given jurisdiction within the city,⁴⁴ but sometimes county justices are denied jurisdiction over such portions of the county as are within the jurisdiction of a city justice.⁴⁵

A statute imposing or granting duties or powers upon a justice of the peace, in general terms, will be construed as not enlarging their territorial jurisdiction unless a more extensive jurisdiction is given by express language.⁴⁶ And the fact that, under special statutory provisions, process of a justice's court may be served outside of the district over which he is given jurisdiction does not operate to extend his jurisdiction.⁴⁷ Nor does a general provision defining and limiting the jurisdiction of justices of the peace in amount, operate to confer jurisdiction generally from a territorial standpoint.⁴⁸

These statutes require that the justice exercise his functions in the district over which he has jurisdiction,⁴⁹ unless under statute he attends and acts in another justice's court during the absence or disability of its justice.⁵⁰

If the justice acts while outside his own district the entire proceedings are void,⁵¹ even if the parties consent thereto,⁵² although it has been held that while outside of his township he may issue summonses returnable to his township.⁵³ So also if he issues his process to a district other than his own, when not authorized by statute, he does

L. 180, 40 Atl. 624; *Sloat v. McComb*, 42 N. J. L. 484.

44. *Douglass v. Reilly*, 8 Hun (N. Y.) 85, though they cannot hold court in the city.

45. See *McDougle-Craig Co. v. Greenlees*, 82 Kan. 440, 103 Pac. 827 (this limitation on their jurisdiction does not extend to places in which county courts have been created); *Parker Grain Co. v. Chicago, R. I. & P. R. Co.*, 70 Kan. 168, 78 Pac. 406; *Robinson v. Missouri Pac. R. Co.*, 67 Kan. 278, 72 Pac. 854.

[a] This statute divests a justice out of the city, of jurisdiction over the subject-matter involved in cases where any defendant resides in any city having a city court, and over the person of such defendant. *Parker Grain Co. v. Chicago, R. I. & P. R. Co.*, 70 Kan. 168, 78 Pac. 406.

46. *Caldwell v. Meador*, 4 Ala. 755.

47. *Sovereign Coal Co. v. Britton (W. Va.)*, 87 S. E. 925.

[a] The plain intent and scope of such provisions, is "to provide the manner of securing jurisdiction of the person of defendant when the justice had jurisdiction of the cause of action, and not otherwise." *Sovereign Coal Co. v. Britton (W. Va.)*, 87 S. E. 925.

48. *Roberts v. Hickory Camp C. & C. Co.*, 58 W. Va. 576, 52 S. E. 182.

49. *Kan.*—*Wilcox v. Johnson*, 34 Kan. 655, 9 Pac. 610; *Phillips v. Thralls*, 26 Kan. 780. *Ky.*—*Wheeler v. Schulman*, 165 Ky. 185, 176 S. W. 1017. *N. Y.*—*Eisenberg v. Lape*, 52 Misc. 329, 103 N. Y. Supp. 169; *People ex rel. Newell v. Montgomery Com. Pleas*, 18 Wend. 649. *Tex.*—*Foster v. McAdams*, 9 Tex. 542.

50. See *Wheeler v. Schulman*, 165 Ky. 185, 176 S. W. 1017.

51. *Ga.*—See *McDonald v. Farmers' Supply Co.*, 143 Ga. 552, 85 S. E. 861; *Simpkins & Co. v. Hester*, 3 Ga. App. 160, 59 S. E. 322. *Kan.*—*Wilcox v. Johnson*, 34 Kan. 655, 9 Pac. 610; *Phillips v. Thralls*, 26 Kan. 780. *Ky.*—*Wheeler v. Schulman*, 165 Ky. 185, 193, 176 S. W. 1017. *N. Y.*—*Eisenberg v. Lape*, 52 Misc. 329, 103 N. Y. Supp. 169.

52. *Kan.*—*Phillips v. Thralls*, 26 Kan. 780. *Ky.*—*Wheeler v. Schulman*, 165 Ky. 185, 176 S. W. 1017. *N. Y.*—*Eisenberg v. Lape*, 52 Misc. 329, 103 N. Y. Supp. 169. *Tex.*—*Foster v. McAdams*, 9 Tex. 542.

Contra, Holmes v. Igo, 110 Minn. 133, 124 N. W. 974. See *supra*, II.

53. *Ala.*—*Ex parte Davis*, 95 Ala. 9, 11 So. 308. *Ill.*—*Durfee v. Grinnell*, 69 Ill. 371. *N. C.*—*Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815.

not acquire jurisdiction over the person of a defendant who does not appear,⁵⁴ and the judgment rendered is void.⁵⁵

2. Place of Commencing Action. — a. *Generally.* — The venue of actions before justices of the peace is controlled wholly by statute.⁵⁶ Generally, the action must be commenced in the city, township, precinct, or sometimes in the county, where the defendant, or under some statutes, where either the plaintiff or defendant resides,⁵⁷ or in an

54. *Schwartz v. Palm*, 163 App. Div. 7, 147 N. Y. Supp. 1081.

55. **U. S.**—Leadbetter *v. Kendall*, Hempst. 302, 15 Fed. Cas. No. 8,157a. **Ia.**—Gage *v. Maschmeyer*, 72 Iowa 696, 34 N. W. 482. **Kan.**—State *ex rel. Doolittle v. Brayman*, 35 Kan. 714, 12 Pac. 111. **Mich.**—Hebel *v. Amazon Ins. Co.*, 33 Mich. 400; *Hartford F. Ins. Co. v. Owen*, 30 Mich. 441. **Mo.** *United States Mut. Acc. Ins. Co. v. Reisinger*, 43 Mo. App. 571. **N. C.** *Rutherford v. Ray*, 147 N. C. 253, 61 S. E. 57. **Ore.**—Pierce *v. Rock Creek G. Min. Co.*, 37 Ore. 342, 61 Pac. 348. **W. Va.**—Bank of Gassaway *v. Stalnaker*, 69 W. Va. 85, 71 S. E. 183.

56. See generally the statutes.

57. **Ala.**—Wright *v. Burt*, 5 Ala. 29; *Read v. Coker*, 1 Stew. 22. **Ariz.**—Parker *v. Uchida*, 14 Ariz. 57, 125 Pac. 715. **Cal.** *Cole v. Fisher*, 66 Cal. 441, 5 Pac. 915. **Colo.**—Charles *v. Amos*, 10 Colo. 272, 15 Pac. 417; *Melvin v. Latshaw*, 2 Colo. 81. **Conn.**—Humphreville *v. Perkins*, 5 Day 117. **Del.**—Wiggin *v. Massey*, 4 Boyce 482, 90 Atl. 40; *Lewis v. White Bros.*, 4 Penne. 288, 55 Atl. 830. **Ga.**—Mauck *v. Rosser*, 126 Ga. 268, 55 S. E. 32; *Southern R. Co. v. Johnson*, 96 Ga. 655, 23 S. E. 836; *Jones v. Wylie*, 82 Ga. 745, 9 S. E. 614. **Idaho.** *Purdum v. Neil*, 10 Idaho 263, 77 Pac. 631. **Ill.**—Pilgrim *v. Mellor*, 1 Ill. App. 448. **Ind.**—Wabash, St. L. & P. Ry. Co. *v. Lash*, 103 Ind. 80, 2 N. E. 250; *Johnson v. Ramsay*, 91 Ind. 189; *Wilkinson v. Moore*, 79 Ind. 397; *Hampton v. Warren*, 51 Ind. 288; *Grass v. Hess*, 37 Ind. 193; *Michael v. Thomas*, 24 Ind. 72. **Ia.**—Kent *v. Crenshaw*, 94 N. W. 1131; *Porter v. Welsh*, 117 Iowa 144, 90 N. W. 582; *Thompson v. Jackson*, 93 Iowa 376, 61 N. W. 1004, 27 L. R. A. 92; *Auspach v. Ferguson*, 71 Iowa 144, 32 N. W. 249; *Fitzgerald v. Arel*, 63 Iowa 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733; *Ebersole v. Ware*, 59 Iowa 663, 13 N. W. 884; *Hamilton v. Millhouse*, 46 Iowa 74; *Boyer v. Moore*, 42 Iowa 544. **Kan.** *Robinson v. Missouri Pac. R. Co.*, 67

Kan. 278, 72 Pac. 854. **La.**—State *v. Huft*, 39 La. Ann. 990, 3 So. 180. **Me.** *Jewell v. Brown*, 33 Me. 250; *Morton v. Chase*, 15 Me. 188. **Mich.**—Harris *v. Doyle*, 130 Mich. 470, 90 N. W. 293; *Sleight v. Swanson*, 127 Mich. 436, 86 N. W. 1010; *Burlingame v. Marble*, 95 Mich. 5, 54 N. W. 695; *Hall v. Shank*, 57 Mich. 36, 23 N. W. 478. **Miss.** *Gibson v. Mills*, 95 Miss. 726, 49 So. 568 (the defendant must be sued within the county of his residence and within that county the action may be brought in the district where he resides, or in which the debt was contracted, etc.); *Wise v. Keer Thread Co.*, 84 Miss. 200, 36 So. 244; *Hilliard v. Chew*, 76 Miss. 763, 25 So. 489; *Turner v. Lilly*, 56 Miss. 576; *Cain v. Simpson*, 53 Miss. 521. **Mo.**—Fare *v. Gunter*, 82 Mo. 522; *Smith v. Simpson*, 80 Mo. 634; *Harris v. Meredith*, 106 Mo. App. 586, 81 S. W. 203; *Dennis v. Bailey*, 104 Mo. App. 638, 78 S. W. 669. **N. Y.**—Cooper *v. Ball*, 14 How. Pr. 295; *Hunter v. Burtis*, 10 Wend. 358; *Hardy v. Rowe*, 7 Wend. 452; *People v. Haskell*, 47 App. Div. 225, 62 N. Y. Supp. 654; *McKey v. Lockner*, 43 App. Div. 43, 59 N. Y. Supp. 640; *Dodd v. Ecker*, 24 App. Div. 613, 48 N. Y. Supp. 690; *Patrick v. Williamson*, 19 App. Div. 451, 46 N. Y. Supp. 504; *Slavin v. Mansfield*, 77 Hun 535, 28 N. Y. Supp. 921; *Head's Iron Foundry v. Sanders*, 77 Hun 432, 28 N. Y. Supp. 808; *Larocque v. Harvey*, 57 Hun 366, 10 N. Y. Supp. 576; *Bennett v. Weaver*, 50 Hun 111, 3 N. Y. Supp. 776, 19 N. Y. St. 41; *Webb v. Hecox*, 27 Misc. 169, 58 N. Y. Supp. 382; *Bird v. Crane*, 26 Hun 531. **N. C.**—Fisher *v. Bullard*, 109 N. C. 574, 13 S. E. 799; *Lilly v. Purcell*, 78 N. C. 82. **N. D.**—Searl *v. Shanks*, 9 N. D. 204, 82 N. W. 734. **Ohio.**—Kelley *v. Flanagan*, 20 Ohio Cir. Ct. 391, 11 Ohio Cir. Dec. 111; *Watkins v. Schleeter*, 7 Ohio N. P. 42; *Place v. Welch*, 2 Ohio Dec. (Reprint) 542. **Ore.**—Pierce *v. Rock Creek G. Min. Co.*, 37 Ore. 342, 61 Pac. 348. **S. C.**—Dennis *v. Atlantic*

adjoining township or city,⁵⁸ except as otherwise provided by the statute in special cases,⁵⁹ although under some statutes, an action may be brought before the justice of the adjoining township only when there is no justice in the township where the action is directed to be brought.⁶⁰ If there are two or more defendants jointly, or jointly and

Coast Line R. R., 86 S. C. 258, 68 S. E. 465; *Jenkins v. Atlantic Coast Line R. Co.*, 84 S. C. 343, 66 S. E. 409; *Wise v. Werts*, 72 S. C. 132, 51 S. E. 547; *Baker v. Irvine*, 62 S. C. 293, 40 S. E. 672; *Jones v. Brown*, 57 S. C. 14, 35 S. E. 397. **Tex.**—*Cowan v. Nixon*, 28 Tex. 230; *Noble v. Broad* (Tex. Civ. App.), 167 S. W. 1; *Aspermont Drug Co. v. Crowdus Drug Co.* (Tex. Civ. App.), 80 S. W. 258; *Brown v. Pope*, 27 Tex. Civ. App. 225, 65 S. W. 42; *Landa v. Moody* (Tex. Civ. App.), 57 S. W. 51; *Eastham v. Harrell* (Tex. Civ. App.), 46 S. W. 389 (holding that failure of one defendant to object to venue does not affect the right of the other to do so when the suit is brought in a precinct where neither of the defendants reside); *Bracken v. Johnson* (Tex. Civ. App.), 24 S. W. 1101; *Claiborne v. Pickens*, 4 Wills. Civ. Cas., §117 (Tex. App.), 16 S. W. 867. **Utah.**—*Saunders v. Sioux City Nursery*, 6 Utah 431, 24 Pac. 532; *Klopfenstein v. Woolf*, 3 Utah 426, 4 Pac. 227; *Sanders v. Woolf*, 3 Utah 429, 4 Pac. 228. **Vt.**—*Stone v. Hazen*, 25 Vt. 178; *June v. Conant*, 17 Vt. 656. **W. Va.**—*Sovereign Coal Co. v. Britton*, 87 S. E. 925; *Roberts v. Hickory Camp C. & C. Co.*, 58 W. Va. 276, 52 S. E. 182.

[a] Although the cause of action may have arisen elsewhere, the justice has jurisdiction of an action in personam, if the defendant resides there. *Wabash, St. L. & P. Ry. Co. v. Lash*, 103 Ind. 80, 2 N. E. 250; *Pierce v. Rock Creek G. Min. Co.*, 37 Ore. 342, 61 Pac. 348; *Kirk v. Matlock*, 12 Ore. 319, 7 Pac. 322.

58. **Del.**—*Lewis v. White*, 4 Penne. 288, 55 Atl. 830. **Mich.**—*Harris v. Doyle*, 130 Mich. 470, 90 N. W. 293; *Jebb v. Chicago & G. T. Ry. Co.*, 67 Mich. 160, 34 N. W. 538. **Minn.**—*Tyrell v. Jones*, 18 Minn. 312. **Mo.** *Backenstoe v. Wabash, St. L. & P. R. Co.*, 86 Mo. 492 (affirming 23 Mo. App. 148); *Fare v. Gunter*, 82 Mo. 522; *Harris v. Meredith*, 106 Mo. App. 586, 81 S. W. 203; *Whitesides v. St. Louis,*

K. & N. W. R. Co., 49 Mo. App. 250; *Manuel v. Missouri Pac. Ry. Co.*, 19 Mo. App. 631; *Chaney v. Wabash, St. L. & P. Ry. Co.*, 18 Mo. App. 661; *Creason v. Wabash, St. L. & P. Ry. Co.*, 17 Mo. App. 111. **N. Y.**—*Holmes v. Carley*, 31 N. Y. 289, 28 How. Pr. 582 (affirming 32 Barb. 440); *Cooper v. Ball*, 14 How. Pr. 295; *Hardy v. Rowe*, 7 Wend. 452; *Sutphen v. Clark*, 119 App. Div. 671, 104 N. Y. Supp. 129; *People ex rel. Gegliardi v. Miller*, 97 App. Div. 35, 89 N. Y. Supp. 601; *People v. Haskell*, 47 App. Div. 225, 62 N. Y. Supp. 654; *McKey v. Lockner*, 43 App. Div. 43, 59 N. Y. Supp. 640; *Dodd v. Ecker*, 24 App. Div. 613, 48 N. Y. Supp. 690; *Slavin v. Mansfield*, 77 Hun 535, 28 N. Y. Supp. 921; *Head's Iron Foundry v. Sanders*, 77 Hun 432, 28 N. Y. Supp. 808; *Laroque v. Harvey*, 57 Hun 366, 10 N. Y. Supp. 576.

[a] Two towns contiguous at either of the corners are adjoining towns within the meaning of the statute. *Holmes v. Carley*, 31 N. Y. 289, 28 How. Pr. 582.

[b] A city wholly within a town, the interior of which was taken to form the city, adjoins only that town. So that under a statute authorizing an action to be brought in the town in which the defendant resides or in the adjoining town an action which is brought in the city against a defendant residing in a town adjoining the town which contains the city is not well brought; this, notwithstanding another statute giving the justice of the city jurisdiction co-extensive with the town. *Sutphen v. Clark*, 119 App. Div. 671, 104 N. Y. Supp. 129.

59. See generally the statutes.

[a] An action against a town shall not be brought before a resident justice, and a judgment recovered in violation of the statute is void. *Heagle v. Wheeland*, 64 Ill. 423. See also *Hill v. Wait*, 5 Vt. 124.

60. **Ariz.**—*Beam v. Parks*, 9 Ariz. 151, 80 Pac. 324. **Conn.**—*Lyme v. East-Haddam*, 14 Conn. 394; *Humphre-*

severally liable, the action may be brought in the township in which any of them reside.⁶¹ If the plaintiff is a nonresident of the county, he is sometimes required to bring his action in the town where the defendant resides or in an adjoining town.⁶² If the defendant is a nonresident of the county, the action is sometimes permitted to be brought before the justice of the town or city in which he may be at its commencement,⁶³ and if a nonresident of the state, where the defend-

ville v. Perkins, 5 Day 117. **N. M.** Sanchez v. Candelaria, 5 N. M. 400, 23 Pac. 239. **Ohio.**—McCleary v. McLain, 2 Ohio St. 368; Rogers v. Pruschansky, 3 Ohio C. C. (N. S.) 366. **Tex.**—Foster v. McAdams, 9 Tex. 542.

[a] In Texas, "if there be no justice of the peace qualified to try the case in the proper precinct, the suit may be commenced before the nearest justice of the peace of the county." This statute has no application to cases not falling within the thirteen exceptions to the rule requiring suit to be brought in the precinct where the defendant resides. The proper precinct referred to is that precinct in which suit is required to be commenced by the general rule or may be commenced under one of the exceptions. Aspermont Drug Co. v. Crowdus Drug Co. (Tex. Civ. App.), 80 S. W. 258.

61. **Cal.**—Code Civ. Proc., §832. **Ga.** Mauck v. Rosser, 126 Ga. 268, 55 S. E. 32. **Ky.**—Willis v. Tomes, 141 Ky. 431, 436, 132 S. W. 1043. **Miss.**—Cain v. Simpson, 53 Miss. 521. **N. C.**—Austin v. Lewis & Co., 156 N. C. 461, 72 S. E. 493.

[a] An improper joinder of a local defendant to obtain jurisdiction of a defendant residing in another county, does not give the justice jurisdiction over the latter and the judgment rendered is void. Willis v. Tomes, 141 Ky. 431, 435, 132 S. W. 1043 (citing local cases); Austin v. Lewis & Co., 156 N. C. 461, 72 S. E. 493. See also Landa v. Moody (Tex. Civ. App.), 57 S. W. 51.

As to issuance and service of process in such case, see *infra*, III, F.

62. Drew v. Cass, 129 App. Div. 453, 113 N. Y. Supp. 1042; McKey v. Lockner, 43 App. Div. 43, 59 N. Y. Supp. 640. See Hall v. Shank, 57 Mich. 36, 23 N. W. 478; Bird v. Crane, 26 Hun (N. Y.) 531, before amendment of statute.

[a] If Several Defendants.—This subdivision of the New York code ap-

plies to a case where there is one defendant only,—the action being required to be brought in the town "where the defendant resides." If in a suit by a nonresident plaintiff there are several defendants, residing in different towns not adjoining, the general provision, requiring suit to be brought where one of the parties resides or in an adjoining town in the same county, applies. McKey v. Lockner, 43 App. Div. 43, 59 N. Y. Supp. 640.

63. See generally the statutes and the following cases: **Ala.**—Williams v. Hyde, 10 Ala. App. 566, 65 So. 708. **Ind.**—Graham v. Klyla, 29 Ind. 432; Harris v. Knapp, 21 Ind. 198; Maxwell v. Collins, 8 Ind. 38. **La.**—State v. Huft, 39 La. Ann. 990, 3 So. 180. **Mich.** Sleight v. Swanson, 127 Mich. 436, 86 N. W. 1010; Weaver v. Rix, 109 Mich. 697, 67 N. W. 970; Newland v. Wayne County Circ. Judge, 85 Mich. 151, 48 N. W. 544; Hall v. Shank, 57 Mich. 36, 23 N. W. 478; Atkins v. Borstler, 46 Mich. 552, 9 N. W. 850. **Miss.** Cain v. Simpson, 53 Miss. 521. **Mo.** Smith v. Simpson, 80 Mo. 634. **N. Y.** Hunter v. Burtis, 10 Wend. 358; Drew v. Cass, 129 App. Div. 453, 113 N. Y. Supp. 1042; Dale v. Prentice, 126 App. Div. 137, 110 N. Y. Supp. 535; Bennett v. Weaver, 50 Hun 111, 3 N. Y. Supp. 776; Webb v. Hecox, 27 Misc. 169, 58 N. Y. Supp. 382; Hoffman v. Barton, 47 Hun 409, 14 N. Y. St. 506. **Ore.**—Taylor v. Jenkins, 11 Ore. 274, 3 Pac. 681.

[a] The actual residences of the plaintiff and defendant are of no importance under this statute. Dale v. Prentice, 126 App. Div. 137, 110 N. Y. Supp. 535.

[b] The personal presence of the plaintiff or the defendant at the time of taking out of the summons is not essential under statute providing in substance that actions in a justice's court where the plaintiffs are all non-residents of the county, or the de-

ant is found or has property,⁶⁴ but some statutes except from the jurisdiction of justices actions to recover money of actual residents of other counties, with certain exceptions.⁶⁵

Under some statutes, actions may be brought where the cause of action accrued or arose,⁶⁶ if in tort, where the tort was committed,⁶⁷ or if upon contract where the debt was contracted,⁶⁸ or where the contract was to be performed;⁶⁹ and this sometimes, and perhaps gen-

ferend is a nonresident of the county may be brought before any justice of the township or city where such plaintiffs or defendant or either of them may be. *Weaver v. Rix*, 109 Mich. 697, 67 N. W. 970. See also *Hunter v. Burtis*, 10 Wend. (N. Y.) 358.

[c] This provision in the New York code is permissive, not compulsory. *Slavin v. Mansfield*, 77 Hun 535, 28 N. Y. Supp. 921.

[d] On oath that the defendant has gone from the county of his residence to evade service, he may be sued in any county where found in Alabama. *Read v. Coker*, 1 Stew. (Ala.) 22.

64. *Sovereign Coal Co. v. Britton* (W. Va.), 87 S. E. 925. See *Harris v. Doyle*, 130 Mich. 470, 90 N. W. 293 (where the property is, both parties being nonresidents); *Pierce v. Rock Creek G. Min. Co.*, 37 Ore. 342, 61 Pac. 348; *Kirk v. Matlock*, 12 Ore. 319, 7 Pac. 322, in any precinct in the state.

65. *Porter v. Welsh*, 117 Iowa 144, 90 N. W. 582.

[a] An actual residence, within the statute, exists whenever a man buys or hires a house and sets up housekeeping with his family with the design of remaining there until he has completed a certain work although he may be domiciled elsewhere. *Fitzgerald v. Arel*, 63 Iowa 104, 16 N. W. 712, 18 N. W. 713, 50 Am. Rep. 733. Compare *Bradley v. Fraser*, 54 Iowa 289, 6 N. W. 293.

[b] Consent cannot confer jurisdiction under this statute. *Porter v. Welsh*, 117 Iowa 144, 90 N. W. 582. As to effect of consent generally, see *supra*, II, and *infra*, this section.

66. Ala.—*Wright v. Burt*, 5 Ala. 29. Colo.—*Charles v. Amos*, 10 Colo. 272, 15 Pac. 417. Miss.—*Williams v. Stewart*, 79 Miss. 46, 30 So. 1; *Turner v. Lilly*, 56 Miss. 576; *Cain v. Simpson*, 53 Miss. 521. Okla.—*Western Pav. Co. v. Binion*, 150 Pac. 898. Vt.—*Stone v. Hazen*, 25 Vt. 178; *Wainwright v. Berry*, 3 Vt. 423. W. Va.—*Sovereign Coal Co. v.*

Britton, 87 S. E. 925; *Roberts v. Hickory Camp C. & C. Co.*, 58 W. Va. 276, 52 S. E. 182; *Speidel Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

67. Ala.—*Williams v. Hyde*, 10 Ala. App. 566, 65 So. 703. Ga.—*Southern R. Co. v. Johnson*, 96 Ga. 655, 23 S. E. 836. Mo.—*Backenstoe v. Wabash, St. L. & P. R. Co.*, 86 Mo. 492; *Mitchell v. Missouri Pac. Ry. Co.*, 82 Mo. 106; *Gibson v. Vaughan*, 61 Mo. 418; *Bersch v. Schneider*, 27 Mo. 101; *Whitesides v. St. Louis, K. & N. W. R. Co.*, 49 Mo. App. 250; *Kinney v. Hannibal & St. J. R. Co.*, 27 Mo. App. 610; *Manuel v. Missouri Pac. Ry. Co.*, 19 Mo. App. 631. Tex.—*Brown v. Pope*, 27 Tex. Civ. App. 225, 65 S. W. 42; *Bracken v. Johnson* (Tex. Civ. App.), 24 S. W. 1101.

68. *Gibson v. Mills*, 95 Miss. 726, 49 So. 568; *Cain v. Simpson*, 53 Miss. 521.

69. Cal.—*Cole v. Fisher*, 66 Cal. 441, 5 Pac. 915. Colo.—*Cort-Hames Merc. Co. v. Hanlon*, 58 Colo. 337, 145 Pac. 684. Idaho.—*Purdum v. Neil*, 10 Idaho 263, 77 Pac. 631. Ia.—*Christensen v. Esbeck*, 167 Iowa 130, 149 N. W. 76; *Wayt v. Meighen*, 147 Iowa 26, 125 N. W. 802; *Ulber v. Dunn*, 143 Iowa 260, 119 N. W. 269; *Baily v. Birkhofer*, 123 Iowa 59, 98 N. W. 594; *Thompson v. Thompson*, 117 Iowa 65, 90 N. W. 493; *Fitzgerald v. Gimmell*, 64 Iowa 261, 20 N. W. 179; *Ebersole v. Ware*, 59 Iowa 663, 13 N. W. 884; *Klingel v. Palmer*, 42 Iowa 166. Tex.—*Perry v. Lovett*, 24 Tex. 359; *Harris v. Salvato* (Tex. Civ. App.), 175 S. W. 802. Utah.—*Sanders v. Woolf*, 3 Utah 429, 4 Pac. 228; *Kloppenstein v. Woolf*, 3 Utah 426, 4 Pac. 227; *Fenton v. Salt Lake County*, 3 Utah 423, 4 Pac. 241. Vt.—*Wainwright v. Berry*, 3 Vt. 423, actions for the sale of goods, wares and merchandise where the plaintiff does not reside in the town may be brought where the goods were sold and delivered, or where the defendant resides.

erally, in addition to the township where the defendant resides.⁷⁰

Actions to recover possession of personal property may, under varying statutes, be brought in the township in which the property is found,⁷¹ or in which the property was taken,⁷² or in which the defendant resides,⁷³ or in any one of these.⁷⁴

Actions involving possession of real property are local,⁷⁵ although under some statutes, they may be brought where the defendant lives also.⁷⁶

Corporations and Partnerships. — The venue of actions against corporations is determined in accordance with rules elsewhere treated.⁷⁷ These same rules are applied to actions against a partnership in so far as it is a legal entity,⁷⁸ but if the action is against the partners as individuals the general rules governing actions against individuals are applied.⁷⁹

Waiver of Objection to Improper Venue. — The objection that an action was not brought at the proper venue,⁸⁰ or that the justice of the

70. *Ind.*—*Wabash, St. L. & P. Ry. Co. v. Lash*, 103 *Ind.* 80, 2 *N. E.* 250. *Miss.*—*Gibson v. Mills*, 95 *Miss.* 726, 49 *So.* 568; *Cain v. Simpson*, 53 *Miss.* 521. *Vt.*—*Wainwright v. Berry*, 3 *Vt.* 423.

And see cases in preceding notes.

71. *Ia.*—*Tennis v. Anderson*, 55 *Iowa* 625, 8 *N. W.* 477. *Miss.*—*Richardson v. Davis*, 59 *Miss.* 15; *Turner v. Lilly*, 56 *Miss.* 576. *Ore.*—*Byers v. Ferguson*, 41 *Ore.* 77, 65 *Pac.* 1067, 68 *Pac.* 5.

As to venue of replevin action, see the title "Replevin."

72. See generally the statutes and *Cal. Code Civ. Proc.*, §832.

73. *Richardson v. Davis*, 59 *Miss.* 15; *Turner v. Lilly*, 56 *Miss.* 576; *Young v. Lego*, 38 *Wis.* 206, actions to recover personal property except that which is distrained are transitory. See *Dennis v. Bailey*, 104 *Mo. App.* 638, 78 *S. W.* 669, holding that a justice of the peace has no jurisdiction to replevy property in his township where both parties are nonresidents of his county. The jurisdiction in such cases is in a court of record.

74. *Copple v. Lee*, 78 *Ind.* 230.

75. *Ill.*—*Pilgrim v. Mellor*, 1 *Ill. App.* 448. *Ind.*—*Jolly v. Ghering*, 40 *Ind.* 139. *Mo.*—*Schultz v. Larkin*, 53 *Mo. App.* 223. *N. Y.*—*People ex rel. Hambrecht v. Campbell*, 22 *Hun* 574, 60 *How. Pr.* 102 (proceedings to recover possession of land for non-payment of rent); *Graves v. McKeon*, 2 *Denio* 639.

See 7 *STANDARD PROC.* 982, 1023.

[a] Where an act done in one county injures land in another, suit may

be brought in either county. *Pilgrim v. Mellor*, 1 *Ill. App.* 448.

[b] An action by a landlord against a tenant holding over may be brought before any justice of the peace of the county in which the lands are situated under the Indiana statute. *Scott v. Willis*, 122 *Ind.* 1, 22 *N. E.* 786.

76. *Sumner v. Finegan*, 15 *Mass.* 280; *Pitnam v. Flint*, 10 *Pick. (Mass.)* 504; *June v. Conant*, 17 *Vt.* 656.

77. See 5 *STANDARD PROC.* 585.

[a] A domestic corporation has its residence in the county in which it keeps its principal office within the meaning of the statute. *Speidel Co. v. Warder*, 56 *W. Va.* 602, 49 *S. E.* 534.

[b] Maintenance by a railroad company of a station for the accommodation of local business is not a residence within the statute. *Robinson v. Missouri Pac. R. Co.*, 67 *Kan.* 278, 72 *Pac.* 854.

[c] As to venue in the case of foreign insurance companies, see *Meyer v. Phoenix Ins. Co.*, 184 *Mo.* 481, 83 *S. W.* 479; *Rodgers v. National Council J. O. N. A. M.*, 172 *Mo. App.* 719, 155 *S. W.* 874.

78. *Fitzgerald v. Grimmell*, 64 *Iowa* 261, 20 *N. W.* 179, has a residence and may be sued where it maintains an agency, upon transactions consummated through such agency.

79. *Ebersole & Son v. Ware*, 59 *Iowa* 633, 13 *N. W.* 884. See also *Fitzgerald v. Grimmell*, 64 *Iowa* 261, 20 *N. W.* 179.

80. *Ala.*—*Woolf v. McGaugh*, 175 *Ala.* 299, 57 *So.* 754; *McKinney v. Low*, 1 *Port.* 129. *Cal.*—*McGerray v. Super-*

peace who presided was not acting within the limits of his territorial jurisdiction,⁸¹ may be waived in some states, though where the objection is treated as going to jurisdiction over the subject-matter of the action, it cannot be waived.⁸² Participation in the trial without objection,⁸³

rrior Court, 141 Cal. 266, 74 Pac. 853; *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936. See *Lowe v. Alexander*, 15 Cal. 296. **Ga.**—*Dozier v. Allen*, 65 Ga. 254; *Charles v. Pitts*, 16 Ga. App. 617, 85 S. E. 939. **Mo.**—*State v. Leonard*, 141 Mo. App. 416, 125 S. W. 234. **N. J.**—See *Quigley v. Baldwin*, 1 N. J. L. 37. **N. Y.**—*Osburne v. Gilbert*, 52 Barb. 158. **Pa.**—*Emerson v. Standard Protective Soc.*, 48 Pa. Super. 313. **S. C.**—*Jenkins v. Atlantic Coast Line R. Co.*, 84 S. C. 343, 66 S. E. 409. **Tex.**—*Masterson v. Ashcom*, 54 Tex. 324. **Utah.**—*State ex rel. Neilson v. Third Judicial Dist. Court*, 36 Utah 223, 102 Pac. 868.

See generally the titles "Change of Venue," "Venue."

81. **Ia.**—*Rogers v. Loop*, 51 Iowa 41, 50 N. W. 224. **Minn.**—*Holmes v. Igo*, 110 Minn. 133, 124 N. W. 974. **Tex.**—*Stewart v. Smallwood*, 46 Tex. Civ. App. 467, 102 S. W. 159.

But see *supra*, II, D.

[a] **Basis of the Rule.**—"It may be admitted that the locus of the forum of a justice of the peace is the township of his residence, and the place of his residence or office within the township. But this is not a matter affecting or limiting his jurisdiction to try and determine actions. It is rather a provision directing the manner of the exercise of jurisdiction, and we know of no reason why the parties may not, for their own convenience and the convenience of the witnesses, or for any other cause which may move them thereto, stipulate that the trial may be had at some place other than the residence or office of the justice. If that place should be over the township line, we cannot see why the stipulation should be held illegal and the proceedings void." *Rogers v. Loop*, 51 Iowa 41, 50 N. W. 224. Compare *McDonald v. Farmers' Supply Co.*, 143 Ga. 552, 85 S. E. 861.

82. **Ia.**—*Porter v. Welsh*, 117 Iowa 144, 90 N. W. 582, the fact that defendant appeared and made a defense on the merits does not confer jurisdiction. **Kan.**—See *Phillips v. Thralls*,

26 Kan. 780. **Mo.**—*Grant v. Stubblefield*, 138 Mo. App. 535, 120 S. W. 647. But see *Grimm v. Dundee Land & Inv. Co.*, 55 Mo. App. 457. **Ohio.**—*Place v. Welch*, 2 Ohio Dec. 542. But see *Caldwell v. High*, 8 Ohio Dec. 183.

[a] **Failure of one defendant to object on the ground of improper venue does not affect the right of a co-defendant to make an objection.** *Eastham v. Harrell* (Tex. Civ. App.), 46 S. W. 389.

[b] **A failure to sue a freeholder in his proper district is a question of jurisdiction and when the fact is presented to the magistrate he must desist from further cognizance of the suit.** *Cain v. Simpson*, 53 Miss. 521. To same effect, see *Hampton v. Warren*, 51 Ind. 288.

[c] **In New York, subdivision 5 of §2869, providing that the justice of a town adjoining an incorporated city shall not have jurisdiction of an action against a resident of such city unless one of the parties plaintiff is a resident of such town limits only the main clause. It does not affect the other subdivisions.** *Head's Iron Foundry v. Sanders*, 77 Hun 432, 28 N. Y. Supp. 808, 60 N. Y. St. 17.

83. **Cal.**—*McGorray v. Superior Court*, 141 Cal. 266, 74 Pac. 853, objection must be made at the trial. See *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936. **N. Y.**—*Osburne v. Gilbert*, 52 Barb. 158. **Utah.**—*State ex rel. Neilson v. Third Judicial Dist. Court*, 36 Utah 223, 102 Pac. 868.

[a] **An objection to venue is waived when not taken before trial.** *McGorray v. Superior Court*, 141 Cal. 266, 74 Pac. 853.

[b] **The fact that a defendant testified as a witness for the plaintiff, does not constitute a waiver of the objection that he should have been sued in the county of his residence.** *Mauck v. Rosser*, 126 Ga. 268, 55 S. E. 32.

[c] **Objection by motion to dismiss, made at the conclusion of the evidence comes too late.** *Emerson v. Standard Protective Soc.*, 48 Pa. Super. 313.

or asking for or acquiescing in a continuance,⁸⁴ is a waiver. Interposing an answer to the merits, after a plea of want of jurisdiction has been overruled, is regarded as a waiver in some states,⁸⁵ except where the objection may be urged at the trial.⁸⁶ Failure to appear in the action and object is not a waiver, however, where the record fails to show jurisdiction.⁸⁷

b. Change of Place of Trial. — (I.) Change of Venue.⁸⁸ — (A.) IN GENERAL. — Statutes generally provide for a change of venue in actions before justices of the peace.⁸⁹ But this right is purely statutory; it does not exist except where allowed by statute.⁹⁰ And from the nature of the right, it follows also that to obtain a change of venue the parties must strictly comply with the statute.⁹¹ Although the facts authorizing a change of venue may exist the parties may properly go to trial without applying for a change,⁹² and thereby waive the right.⁹³

A garnishee may secure a change of venue, as to the garnishment proceedings, without affecting the jurisdiction of the justice, in the

84. *Woolf v. McGaugh*, 175 Ala. 299, 57 So. 754. *Contra*, *Jennings v. Shiner* (Tex. Civ. App.), 43 S. W. 276.

85. *Storm v. Worland*, 19 Ind. 203.

86. *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936; *Perkins v. Mellicke*, 66 Minn. 409, 69 N. W. 220.

87. Cal.—*Lowe v. Alexander*, 15 Cal. 296, since jurisdiction must appear affirmatively from the record. Ky.—*Willis v. Tones*, 141 Ky. 431, 132 S. W. 1043. N. Y.—*Tiffany v. Gilbert*, 4 Barb. 320; *Larocque v. Harvey*, 57 Hun 366, 10 N. Y. Supp. 576, 19 Civ. Proc. 109, 32 N. Y. St. 415. S. C.—*Contra*, *Ex parte Townes*, 97 S. C. 56, 81 S. E. 278. Tex.—*Mistrot Bros. & Co. v. Wilson*, 41 Tex. Civ. App. 160, 91 S. W. 870, where the defendant was a nonresident and sick at the time. But see *Valdez v. Cohen*, 23 Tex. Civ. App. 475, 56 S. W. 375.

88. As to change of venue generally, see the title "Change of Venue."

89. See generally the statutes, and Cal.—*Palmer v. Snyder*, 67 Cal. 105, 7 Pac. 196, holding that the transfer to a justice outside the city limits is proper. Ia.—*Finch v. Marvin*, 46 Iowa 384. Neb.—*In re Garst*, 10 Neb. 78, 4 N. W. 511, statute applies to both civil and criminal proceedings.

[a] **Applicable Only to Suits at Law.**—Some statutes providing for the removal of causes from one justice to another do not apply to special pro-

ceedings, but relate only to suits at law. *People v. Brighton*, 20 Mich. 57. See also *Duffies v. State*, 7 Wis. 672.

[b] A scire facias to revive a judgment is a continuation of the former action and the defendant is not entitled to a change of venue in such proceedings on the ground of prejudice. *Sutton v. Cole*, 155 Mo. 206, 55 S. W. 1052, citing *Kincaid v. Griffith*, 64 Mo. App. 673.

90. Cal.—*Powell v. Sutro*, 80 Cal. 559, 22 Pac. 308. Colo.—*Otero v. Hoffmire*, 9 Colo. App. 526, 49 Pac. 375. Ia.—*Connell v. Stelson*, 33 Iowa 147. Mich.—*Hinchman v. Spaulding*, 137 Mich. 655, 100 N. W. 901; *Oakley v. Dunn*, 63 Mich. 494, 30 N. W. 96. Miss. *Cain v. Simpson*, 53 Miss. 521. Mo. *State v. Wofford*, 119 Mo. 408, 24 S. W. 1009; *Sutton v. Cole*, 73 Mo. App. 518. Mont.—*State v. District Court*, 33 Mont. 356, 83 Pac. 597. S. C. *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216; *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736; *Bacot v. Deas*, 67 S. C. 245, 248, 45 S. E. 171.

91. See cases cited in preceding notes.

92. *Quealy v. Sullivan*, 42 Utah 565, 132 Pac. 4.

93. *Morrow v. Watts*, 80 Ark. 57, 95 S. W. 988 (where the justice was related to a party); *Squires v. Curtain*, 42 Colo. 51, 93 Pac. 1106, where the justice was prejudiced.

main action,⁹⁴ although a change of venue in the principal action will operate as a change of venue in the garnishment proceedings.⁹⁵

(B.) GROUNDS.⁹⁶ — The grounds for a change of venue are provided by statute,⁹⁷ which usually provide that the venue of the action may be changed where the justice is interested,⁹⁸ or is prejudiced;⁹⁹ or where he is related to one of the parties to the action within certain degrees,¹ or is a material witness in the action,² or where there is no

94. *Martin v. Chicago, etc. R. Co.*, 50 Mo. App. 428. See also 10 STANDARD PROC. 485.

[a] But an execution defendant in garnishment proceedings issued by a justice of the peace in aid of a judgment previously rendered by him is not entitled to a change of venue on the ground of prejudice as the garnishee suit is merely auxiliary to the execution and the two should remain before the same tribunal. *Garland v. McKittrick*, 52 Wis. 261, 9 N. W. 160. And see *State ex rel. Stevenson v. Hughes*, 135 Mo. App. 131, 115 S. W. 1069.

95. *Garland v. McKittrick*, 52 Wis. 261, 9 N. W. 160.

96. Grounds for change of venue generally, see the title "Change of Venue."

97. See generally the statutes.

98. *Cal.*—*LaRue v. Gaskins*, 5 Cal. 507. *N. Y.*—*Carrington v. Andrews*, 12 Abb. Pr. 348; *Hubbell v. Harbeck*, 54 Hun 147, 7 N. Y. Supp. 243, 26 N. Y. St. 748. *Tenn.*—*Mayor v. McKee*, 2 Yerg. 167.

[a] Residence in a town does not disqualify the justice from hearing an action involving a penalty payable to the overseers of the poor of that town. *Corwein v. Hames*, 11 Johns. (N. Y.) 76; *Wood v. Rice*, 6 Hill (N. Y.) 58.

99. *Ia.*—*Berner v. Frazier*, 8 Iowa 77. *Minn.*—*Curtis v. Moore*, 3 Minn. 29. But see *Cooper v. Brewster*, 1 Minn. 94, wherein the justice refused to entertain a motion for a change of venue on the ground of prejudice and the court held that there was no error, the remedy for errors committed by the justice through partiality or prejudice being by appeal or certiorari. *Mo.*—See *Sutton v. Cole*, 155 Mo. 206, 55 S. W. 1052, not entitled to change on a scire facias to revive a judgment. *Ohio.*—*McMillen v. Andrews*, 10 Ohio St. 113; *Fike v. State*, 15 Ohio Cir. Dec. 554. *Tex.*—*Morris v. Foreaker* (Tex. Civ. App.), 15 S. W. 37. *Wis.*

Garland v. McKittrick, 52 Wis. 261, 9 N. W. 160.

[a] Statute Not Applicable to Bastardy Act.—The Wisconsin statute relating to the removal of causes from one justice to another on the ground of prejudice does not apply to proceedings under the bastardy act. *Duffies v. State*, 7 Wis. 672.

1. *Minn.*—*Cooper v. Brewster*, 1 Minn. 94. *Tenn.*—*Reams v. Kearns*, 5 Coldw. 217. *Tex.*—*Morris v. Foreaker* (Tex. Civ. App.), 15 S. W. 37.

[a] Illustrations.—(1) The justice is disqualified within the meaning of the rule if once married to plaintiff's sister (*Spear v. Robinson*, 29 Me. 531), (2) or where his wife is a sister of the wife of plaintiff in interest (*Foot v. Morgan*, 1 Hill [N. Y.] 654), (3) or where he is a cousin of a party to the action (*Edwards v. Russell*, 21 Wend. [N. Y.] 63), (4) or where his son-in-law is a party. *Elderkin v. Wiswell*, 61 Wis. 498, 21 N. W. 541. (5) But a justice who is half uncle to plaintiff's wife is not disqualified to act where there is a jury. *Eggleston v. Smiley*, 17 Johns. (N. Y.) 133.

[b] Rule Not Absolute.—The provision of a statute that a justice who is near of kin to a party in a suit before him shall transmit the suit to another justice, is not absolute but is subject to the condition that the fact appear before joinder of issue. *Rector v. Drury*, 3 Pin. (Wis.) 298.

[a] Effect of Relationship on Jurisdiction.—(1) The relationship of the justice to one of the parties is not a jurisdictional question. Consequently a judgment by him is not void. *Rogers v. Felker*, 77 Ga. 46. See also *Holmes v. Eason*, 8 Lea (Tenn.) 754. (2) But it is otherwise under a statute expressly providing that he shall not have jurisdiction in such case. *Dawson v. Wells*, 3 Ind. 398.

2. *Minn.*—*Cooper v. Brewster*, 1 Minn. 94. *N. Y.*—*Bronson v. Gutches*, 17 App. Div. 204, 45 N. Y. Supp. 487

qualified justice within the precinct,³ or in some jurisdictions, where the term of the justice is about to expire,⁴ or he is about to remove from the town or city.⁵ The fact that the suit is brought in the wrong jurisdiction is not ground for a change of venue,⁶ unless expressly provided by statute, as is sometimes the case.⁷

(C.) WHEN APPLICATION MUST BE MADE. — Application for a change of venue must be seasonably made, and in all cases must be made before the commencement of the trial,⁸ and if an application is made

Ohio.—*McMillen v. Andrews*, 10 Ohio St. 112.

[a] The justice must be a necessary as well as material witness; and if the facts to be proven by the justice can be established by other witnesses the party is not entitled to a change of venue. *Young v. Scott*, 3 Hill (N. Y.) 32.

[b] Justice Cannot Dispute Fact That He Is Material Witness.—On defendant making affidavit that justice before whom proceedings are had is a material witness for him and that facts he relies upon cannot be proved by any other witness, such justice cannot proceed; he cannot entertain the suit on the ground that he knows nothing material between the parties or that he has no recollection of facts which defendant expects to prove by him. *Hopkins v. Cabrey*, 24 Wend. (N. Y.) 264. See also *Bronson v. Gutches*, 17 App. Div. 204, 45 N. Y. Supp. 487; *Frank v. Jaspin*, 87 Misc. 9, 149 N. Y. Supp. 1053.

3. *Morris v. Foreaker* (Tex. Civ. App.), 15 S. W. 37.

4. See *Dezur v. Provost*, 99 App. Div. 14, 90 N. Y. Supp. 1016.

5. See *Dezur v. Provost*, 99 App. Div. 14, 90 N. Y. Supp. 1016.

6. *Meunch v. Breitenbach*, 41 Iowa 527; *Post v. Brownell*, 36 Iowa 497.

[a] Court must dismiss the suit if brought in the wrong precinct, as soon as the jurisdictional question is raised. The case cannot be transferred. *Cain v. Simpson*, 53 Miss. 521.

7. See generally the statutes, and *Leventhal v. Hollamon* (Tex. Civ. App.), 165 S. W. 6; *Kramer v. Lilley*, 55 Tex. Civ. App. 339, 118 S. W. 735; *Quealy v. Sullivan*, 42 Utah 565, 132 Pac. 4; *State ex rel. Gallagher v. Third Judicial Dist. Court*, 36 Utah 68, 104 Pac. 750.

8. Ia.—*McKenney v. Hopkins*, 20 Iowa 495; *Berner v. Frazier*, 8 Iowa

77; *Marshall v. Kinney*, 1 Iowa 580. See *Lyne v. Hoyle*, 2 G. Gr. 135, under early statute. Minn.—*Curtis v. Moore*, 3 Minn. 29. Mo.—*Stevens v. Earll*, 164 Mo. App. 461, 147 S. W. 211. Neb. *Tyler v. Baxter*, 29 Neb. 688, 46 N. W. 153. S. C.—*Mayer v. Evans*, 80 S. C. 362, 61 S. E. 216. Wis.—*Jacubeck v. Hewitt*, 61 Wis. 96, 20 N. W. 372.

[a] Relationship to Party.—Under a statute requiring application to be made before issue joined, the justice, on learning that he is near of kin to one of the parties even if after issue joined, should refuse to proceed with the case. *Hibbard v. Odell*, 16 Wis. 633.

[b] The commencement of the trial (1) has reference to a trial on the merits (*Curtis v. Moore*, 3 Minn. 29; *Stevens v. Earll*, 164 Mo. App. 461, 147 S. W. 211; *Sedgwick Furniture Co. v. Craig*, 160 Mo. App. 91, 141 S. W. 457), (2) not to the determination of any preliminary motions. *Curtis v. Moore*, 3 Minn. 29.

[c] The determination of a motion to strike matter from a pleading is the commencement of the trial within a statute defining a trial to be a judicial examination of the issues of law or fact in an action. *Columbus Junction Tel. Co. v. Overholt*, 126 Iowa 579, 102 N. W. 498.

[d] After a demurrer to the complaint has been made and overruled it is too late to demand a change of venue, as under the North Dakota Revised Codes, 1899, §6652, this constitutes the commencement of the trial. *Walker v. Maronda*, 15 N. D. 63, 106 N. W. 296.

[e] After disagreement of jury an application for a change of venue is in time, when after one trial wherein the jury disagreed and the cause is continued to another day, it is made before the second jury is sworn even though summoned. *Marshall v. Kinney*,

thereafter it comes too late.⁹ Where the change is made, in the presence of both parties, a change of venue may be granted by a justice, before the return day of the summons.¹⁰

(D.) PROCEEDINGS TO EFFECT CHANGE. — Although it has been held that when the justice learns of his incompetency to act, he should remove the cause on his own knowledge,¹¹ it is generally required that the party desiring it,¹² make and file an affidavit setting forth the facts relied on for the change.¹³ The plaintiff cannot prove by affidavit or otherwise the interest, bias, or prejudice of the justice to whom the action is transferred in order to prevent the defendant from obtain-

1 Iowa 580. See also *Keim v. Daugherty*, 8 Mo. 498; *State v. McCracken*, 60 Mo. App. 650, 1 Mo. App. Rep. 223.

[f] When the case has been continued, an application for change of venue, if made before the day to which it is continued is made before the trial. *Herbert v. Beathard*, 26 Kan. 746.

9. *McKenney v. Hopkins*, 20 Iowa 495; *Walker v. Maronda*, 15 N. D. 63, 106 N. W. 296.

10. *Weber v. Cummings*, 39 Mo. App. 518; *Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216.

[a] If made ex parte, the order is void. *Adams v. Anderson*, 93 Neb. 416, 140 N. W. 1023; *Martin v. Mershon*, 3 Neb. (Unof.) 174, 91 N. W. 180.

11. *Hibbard v. Odell*, 16 Wis. 633.

12. See cases cited below.

[a] Where there are several defendants jointly sued, all must join in the affidavit. *Olson v. Peabody*, 121 Wis. 675, 99 N. W. 458; *State v. Roberts*, 87 Wis. 292, 58 N. W. 409; *Jacubek v. Hewitt*, 61 Wis. 96, 20 N. W. 372. But see *Hellriegel v. Truman*, 60 Wis. 253, 19 N. W. 79, holding that if all the defendants appear and join in the motion the cause should be removed, even though all should not join in the affidavit. And see also *Phillips v. Phillips*, 186 Ala. 545, 65 So. 49, Ann. Cas. 1916D, 994.

[b] Affidavit by attorney is insufficient. *Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126. But see *Osborn v. Shotwell*, 33 Neb. 348, 50 N. W. 164, under statute.

13. Ky.—*Galbraith v. Williams*, 106 Ky. 431, 50 S. W. 686. Neb.—*Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728. Ore.—*Packwood v. State*, 24 Ore. 261, 33 Pac. 674, holding that the statute providing for a change of venue applies to criminal cases. S. C.—*Mayes v. Evans*, 80 S. C. 362, 61 S. E. 216; *Bacot v. Deas*, 67 S. C. 245, 45 S. E.

171. Wis.—See *Hager v. Falk*, 82 Wis. 644, 52 N. W. 432; *Burns v. Doyle*, 28 Wis. 460.

[a] An "oath" is all that is required under the Wisconsin statute. An imperfect affidavit containing evidence of the fact when read in connection with the entries of the justice on the docket is sufficient. *Burns v. Doyle*, 28 Wis. 460.

[b] Cause Must Be Stated.—An affidavit stating for ground of removal that it is for "prejudice or other cause" without stating what that cause is, is void. *Hager v. Falk*, 82 Wis. 644, 52 N. W. 432.

[c] Prejudice of Justice.—(1) The facts on which the party founds his belief that the justice will not give him a fair trial must be stated. *Galbraith v. Williams*, 106 Ky. 431, 50 S. W. 686; *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736; *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171. *Contra*, *Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728. (2) All that is necessary under the Nebraska statute is for the defendant, his agent or attorney, to make oath that the "defendant cannot, as affiant verily believes, have a fair and impartial hearing in the case on account of the interest, bias, or prejudice of the justice." *Osborn v. Shotwell*, 33 Neb. 348, 50 N. W. 164.

[d] Mere opinions of the affiant are not sufficient. *In re Garst*, 10 Neb. 78, 4 N. W. 511; *Witte v. Cave*, 73 S. C. 15, 52 S. E. 736.

[e] An affidavit (1) for change of venue cannot be amended at the hearing thereon. *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171. (2) But in *Morrell v. Glasspoole*, 111 Wis. 292, 87 N. W. 301, the justice was permitted to sign the jurat to the affidavit nunc pro tunc after the cause had been removed to the county court and from there appealed to the circuit court.

ing a change of venue.¹⁴ Upon the filing of the proper affidavit and the payment of costs,¹⁵ the justice must grant the change of venue,¹⁶ and make a docket entry of the proceedings had before him,¹⁷ stating the name of the justice to whom the cause is transferred,¹⁸ and the time¹⁹ and place²⁰ when and where the parties are to appear before him. The justice named must be the one specified in the statute regulating the procedure.²¹ If the person named in the order of transfer

14. *Oakley v. Dunn*, 63 Mich. 494, 30 N. W. 96; *Paul v. Ziebell*, 43 Neb. 424, 61 N. W. 630.

[a] **Objections to Near Justices.** Although the party moving for the change cannot dictate to what justice the cause shall be transferred, he may in his affidavit state any objections to the nearest justice that he may deem to be well founded. *Paul v. Ziebell*, 43 Neb. 424, 61 N. W. 630; *Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728; *State v. Cotton*, 33 Neb. 560, 50 N. W. 688.

15. As to payment of costs, see *infra*, this section.

16. Cal.—*Palmer v. Snyder*, 67 Cal. 105, 7 Pac. 196. Ia.—*Bremner v. Hallowell*, 59 Iowa 433, 13 N. W. 412. Minn.—*Rahilly v. Lane*, 15 Minn. 447; *Barnes v. Holton*, 14 Minn. 357. Neb. *Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728; *State v. Cotton*, 33 Neb. 560, 50 N. W. 688; *In re Garst*, 10 Neb. 78, 4 N. W. 511. N. D.—*Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44.

[a] **Statute (1) Is Mandatory.** *Ritzman v. Burnham*, 114 Cal. 522, 46 Pac. 379. (2) The word "may" in a statute providing that a justice of the peace may before trial on motion change the place of trial in certain cases should be construed as "must." *Walker v. Maronda*, 15 S. D. 63, 106 N. W. 296.

17. *Stow v. Shay*, 54 Kan. 574, 38 Pac. 784; *McGinty v. Warner*, 17 Minn. 41.

[a] **The affidavit for change of venue need not be entered nor its substance set forth in the docket of the justice of the peace.** Entry in the docket is sufficient to vest jurisdiction in the justice to whom it is transferred. *McGinty v. Warner*, 17 Minn. 41.

18. Ia.—*Bremner v. Hallowell*, 59 Iowa 433, 13 N. W. 412. Kan.—*Stow v. Shay*, 54 Kan. 574, 38 Pac. 784. Minn.—*Larson v. Dukleth*, 74 Minn. 402, 77 N. W. 220.

[a] **The justice from whom the cause is removed must designate by name who the nearest justice is.** The determination cannot be made by any other officer or person. *Bremner v. Hallowell*, 59 Iowa 433, 13 N. W. 412.

[b] **Only the justice named acquires jurisdiction.** *Miltimore v. Hoffman*, 125 Wis. 558, 104 N. W. 841.

[c] **A failure to name the justice, to whom the case is transferred, will operate as a discontinuance of the case.** *Rahilly v. Lane*, 15 Minn. 447. But see *Starkweather v. Sawyer*, 63 Wis. 297, 23 N. W. 566, holding the justice to which the cause is transmitted may permit the justice transferring the cause to amend the papers by inserting the name.

19. *Larson v. Dukleth*, 74 Minn. 402, 77 N. W. 220.

20. *Larson v. Dukleth*, 74 Minn. 402, 77 N. W. 220.

21. See generally the statutes.

[a] **To the Nearest Qualified (1) Justice.**—*Bremner v. Hallowell*, 59 Iowa 433, 13 N. W. 412. (2) If the nearest justice is prejudiced, it is error to transfer the place of trial to him. *Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728.

[b] **To a justice of the same village or of a town adjoining the village.** Under such statute a change cannot be made to a town adjoining the town in which the village is located as the town in which the village is located is an adjoining town within the meaning of the statute. *Wadena Cracker Co. v. Gaylord*, 93 Minn. 199, 101 N. W. 72.

[c] **To a justice the parties agree on, or if they do not agree, some other justice in the county.** Cal. Code Civ. Proc., §836.

[d] **A change from a mayor's court to a justice of the peace (1) may be made where the statute provides that "the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor."** *Finch v. Marvin*, 46

is not a justice either because of resignation or otherwise, the justice who made the order may change it and transfer the cause to a proper justice, while he has jurisdiction of the action and of the parties,²² but he cannot do so after he has finally adjourned the case.²³

Payment of Costs.—Although some cases hold that the justice has no right to refuse a change of venue because of failure to pay costs,²⁴ frequently it is a condition precedent to a change that the party pay costs already accrued,²⁵ or at least tender them,²⁶ or, in some jurisdictions, confess a judgment therefor.²⁷

Mandamus to Compel Change.—Where the statute and the affidavit are such that no judicial discretion is involved in the granting or re-

Iowa 384. (2) The converse is not true, however. *State v. Jamison*, 100 Iowa 342, 69 N. W. 529.

[e] A change from a police justice to a justice of the peace may be made under some statutes. *State ex rel. Hall v. Wicker*, 60 Wash. 238, 110 Pac. 992; *Puyallup v. Snyder*, 13 Wash. 572, 43 Pac. 635 (police justice of a city of the third class); *Jenkins v. Morning*, 38 Wis. 197.

[f] **Cannot Be Changed to Probate Court.**—Where the statute provides that on filing of an affidavit for change of venue the cause may be transferred for trial before some other justice of the peace it cannot be transferred to the probate court or vice versa even though there is another statute making the practice before justices' courts applicable to probate courts. *Chicago Bldg. & Mfg. Co. v. Pewthers*, 10 Okla. 724, 63 Pac. 964; *Jones v. Chicago Bldg. & Mfg. Co.*, 10 Okla. 628, 47 Pac. 7.

[g] The moving party cannot dictate to what justice the cause shall be transferred. *State v. Cotton*, 33 Neb. 560, 50 N. W. 688.

22. *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507, approved in *State Farmers' Mut. Ins. Co. v. Gran*, 76 Minn. 32, 78 N. W. 862.

23. *State Farmers' Mut. Ins. Co. v. Gran*, 76 Minn. 32, 78 N. W. 862.

24. *Mo.*—*Endicott v. Hall*, 61 Mo. App. 185; *State v. McCracken*, 60 Mo. App. 650, 1 Mo. App. Rep. 223. **N. D.** *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44. **Utah.**—*State ex rel. Gallagher v. Third Judicial Dist. Court*, 36 Utah 68, 104 Pac. 750.

[a] A change of venue is not dependent upon the payment of costs and a default judgment entered by a justice after a refusal to grant a

change for this reason is void. *Endicott v. Hall*, 61 Mo. App. 185.

25. **Idaho.**—*Presley v. Dean*, 10 Idaho 375, 79 Pac. 71. **Ind.**—*State v. Nickerson*, 154 Ind. 439, 56 N. E. 912. **Ia.**—*Holmes v. Butts*, 87 Iowa 412, 54 N. W. 249, holding that if the costs are not paid the justice may strike the application for change from the files. **Mich.**—*Hinchman v. Spaulding*, 137 Mich. 655, 100 N. W. 901. **Neb.** *Moss v. Lindsey*, 62 Neb. 829, 88 N. W. 119; *State v. Cotton*, 33 Neb. 560, 50 N. W. 688. **N. D.**—See *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44.

[a] If the defendant refuse to pay the costs after a change of venue is granted, it is the duty of the justice to proceed with the trial. *Taney v. Vollenweider*, 28 Mont. 147, 72 Pac. 415.

[b] **Where Justice Omits Taxation of Costs.**—After filing a sufficient affidavit for the removal of a cause from a justice of the peace the defendant may remain passive until the justice has taxed the costs. But if he omits to make such taxation he should be requested to do so by the defendant and his full fees paid or tendered, before he can be placed in fault and error assigned for his non action. *Oakley v. Dunn*, 63 Mich. 494, 30 N. W. 96.

26. *Bailey v. Williams*, 55 Colo. 95, 132 Pac. 1142.

[a] If the tender is not regarded sufficient as to amount, the justice should immediately state his objection and give an opportunity for a proper tender. *Jenkins v. Morning*, 38 Wis. 197.

27. *Spacek v. Aubert*, 92 Kan. 677, 141 Pac. 254. See *Chapin v. Brown*, 17 Kan. 142. But see *Herbert v. Beathard*, 26 Kan. 746.

fusal of a change of venue, as where the change must be made upon the filing of an affidavit stating merely the ultimate fact rather than the evidence of it, action may be compelled by mandamus;²⁸ but the granting of a change cannot be thus compelled where the exercise of judicial discretion is required to determine whether the facts are such as to justify or require affirmative action.²⁹ Under some statutes, in determining to what justice the action shall be sent, the justice exercises his judicial discretion.³⁰

(E.) WHEN JURISDICTION IS TRANSFERRED. — Strictly speaking the filing of a motion for a change of venue does not of itself divest the justice of jurisdiction,³¹ although it may stay or supersede its exercise.³² The justice retains jurisdiction until he has granted a change of venue and transmitted the papers to the proper justice,³³ and then it is

28. **Ia.**—*Berner v. Frazier*, 8 Iowa 77. **Kan.**—*Herbert v. Beathard*, 26 Kan. 746. **Mo.**—*State ex rel. Lloyd v. Clayton*, 34 Mo. App. 563. **Neb.** *Paul v. Ziebell*, 43 Neb. 424, 61 N. W. 620; *Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728; *State v. Cotton*, 33 Neb. 560, 50 N. W. 688; *In re Garst*, 10 Neb. 78, 4 N. W. 511. **N. Y.**—See *Bronson v. Gutches*, 17 App. Div. 204, 45 N. Y. Supp. 487. **Okla.**—*Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419. **S. C.**—*Witte v. Cave*, 73 S. C. 15, 52 S. E. 736; *State v. Conkle*, 64 S. E. 371, 42 S. E. 173.

29. **Ill.**—*Grampp v. McBrearty*, 109 Ill. App. 277. **Ky.**—*Galbraith v. Williams*, 106 Ky. 431, 50 S. W. 686. **N. Y.** *Young v. Scott*, 3 Hill 32; *Bronson v. Gutches*, 17 App. Div. 204, 45 N. Y. Supp. 487.

30. **Ia.**—*Bremner v. Hallowell*, 59 Iowa 433, 13 N. W. 412; *Tennis v. Anderson*, 55 Iowa 625, 8 N. W. 477; *Connell v. Stelson*, 33 Iowa 147. **Kan.** *Barnhart v. Davis*, 30 Kan. 520, 2 Pac. 633; *Reed v. Marple*, 7 Kan. App. 170, 53 Pac. 674. **Wis.**—*De Puy v. Evans*, 88 Wis. 255, 60 N. W. 433.

But see *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44, holding this to be a ministerial act.

31. **Cal.**—*Ritzman v. Burnham*, 114 Cal. 522, 46 Pac. 379. **Ill.**—*Grampp v. McBrearty*, 109 Ill. App. 277. **Kan.** *Spacek v. Aubert*, 92 Kan. 677, 141 Pac. 254; *Ellis v. Whitaker*, 62 Kan. 582, 64 Pac. 62; *Barnhart v. Davis*, 30 Kan. 520, 2 Pac. 633. **Neb.**—*Huff v. Arnett*, 98 Neb. 420, 153 N. W. 496. **N. D.**—*Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44. **Okla.** *Wrought Iron Range Co. v. Leach*, 32 Okla. 706, 123 Pac. 419. **Tex.**—*Jen-*

nings v. Shiner (Tex. Civ. App.), 43 S. W. 276.

[a] Even though the refusal to grant a change of venue is erroneous, the justice retains jurisdiction. *Ritzman v. Burnham*, 114 Cal. 522, 46 Pac. 379. And see cases cited *supra* this note.

32. *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44.

[a] Under a statute providing, "From the time the order changing the place of trial is made, the court to which the action is thereby transferred has the same jurisdiction," etc., jurisdiction to try the cause is on the presentation of the application, superseded or stayed, with no power remaining to proceed or do aught but order a change of venue, but jurisdiction is not transferred until the order of transfer is made, which order completely divests the justice court making it of jurisdiction and vests it in the court designated in the order. *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44.

33. **Conn.**—*Lamb v. Beebe*, 10 Conn. 322. **Ind.**—*Deane v. Robinson*, 34 Ind. App. 468, 83 N. E. 169. **Minn.**—*State Farmers' Mut. Ins. Co. v. Gran*, 76 Minn. 32, 78 N. W. 862, *distinguishing* *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507. **Neb.**—*Peyton v. Johnson*, 37 Neb. 886, 56 N. W. 728. **N. D.** *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44, 49. **W. Va.**—*Simmons v. Thomasson*, 50 W. Va. 656, 41 S. E. 335.

[a] Immediately on signing of the order granting the change of venue the jurisdiction of the cause is transferred. *Stacy Fruit Co. v. McClellan*, 25 N. D. 449, 142 N. W. 44.

immediately vested in the justice to whom the case is transferred,³⁴ even though the change of venue is erroneously granted.³⁵ But some courts hold,³⁶ under statute requiring the court to change the place of trial without motion being made therefor when an affidavit sets up a certain ground, that the filing of a proper application for a change of venue divests the justice of jurisdiction except to grant the change, and the statute sometimes so provides.³⁷

(F.) PROCEEDINGS SUBSEQUENT TO THE CHANGE OF VENUE. — Upon the receipt by him of the papers,³⁸ the justice to whom the cause is transferred has the same jurisdiction over the action as though it had been commenced there,³⁹ and he is authorized to proceed as if the suit had been begun before him.⁴⁰ The issuance of new summons is not necessary,⁴¹ although it is sometimes required that written notice of the

[b] The transfer of a cause by a justice ends his jurisdiction and if he proceeds afterwards to try the case and render judgment he is liable for the damage sustained thereby. *Hatch v. Galvin*, 50 Cal. 441.

[c] Retaining Jurisdiction by Request. — Where after an order granting a change of venue the parties agreed to arbitrate the controversy and allow judgment on the award it was held that the justice might upon request of both parties retain jurisdiction for that purpose. *Bivert v. Perkins*, 4 Okla. 718, 47 Pac. 475.

34. *Ark.*—*Buffington v. Sipe*, 53 Ark. 235, 13 S. W. 763. *Cal.*—*Hatch v. Galvin*, 50 Cal. 441. *Ind.*—*Mayer v. Goldsmith*, 58 Ind. 94; *Nesbit v. Long*, 37 Ind. 300. *Minn.*—*Oltman v. Yost*, 62 Minn. 261, 64 N. W. 564; *McGinty v. Warner*, 17 Minn. 41. *Miss.*—*Carter v. Wamack*, 64 Mo. App. 338. *N. D.*—*Henry v. Maher*, 6 N. D. 413, 71 N. W. 127.

See section following.

35. *Marshall v. Kinney*, 1 Iowa 96.

36. *Colo.*—*Bailey v. Williams*, 55 Colo. 95, 132 Pac. 1142. *Mont.*—*State v. Evans*, 13 Mont. 239, 33 Pac. 1010. *Utah.*—*State ex rel. Gallagher v. Third Judicial Dist. Court*, 36 Utah 68, 104 Pac. 750.

37. *Baskowitz v. Guthrie*, 99 Mo. App. 304, 73 S. W. 227; *O'Reilly v. Henson*, 97 Mo. App. 491, 71 S. W. 109; *Endicott v. Hall*, 61 Mo. App. 185; *Jones v. Pharis*, 59 Mo. App. 254; *State ex rel. Lloyd v. Clayton*, 34 Mo. App. 563. But see *Colvin v. Six*, 79 Mo. 198, holding that a judgment rendered by a justice of the peace subsequent to an application for a change of venue is not void but erroneous merely

and would not be open to collateral attack.

38. See cases in succeeding note.

[a] If a justice fails to certify his transcript to another justice when an order for a change of venue is granted the cause should be remanded back to the original justice for trial. *Todhunter v. Marshall*, 32 Ind. 96.

39. *Ark.*—*Buffington v. Sipe*, 53 Ark. 235, 13 S. W. 763. *Cal.*—*Hatch v. Galvin*, 50 Cal. 441. *Ind.*—*Mayer v. Goldsmith*, 58 Ind. 94. *Minn.*—*Oltman v. Yost*, 62 Minn. 261, 64 N. W. 564. *Mo.*—*Carter v. Wamack*, 64 Mo. App. 338.

See preceding section.

40. *Otero v. Hoffmire*, 9 Colo. App. 526, 49 Pac. 375. See 5 STANDARD PROC. 44.

[a] The time and place of the hearing are governed by that stated in the justice's docket. If had at another place without the consent and in the absence of a party, the judgment is void as to such party. *Larson v. Dukleth*, 74 Minn. 402, 77 N. W. 220.

[b] Review of the decision of the justice ordering the change is unauthorized. *Tennis v. Anderson*, 55 Iowa 625, 8 N. W. 477. See 5 STANDARD PROC. 44.

[c] Prior proceedings (1) before a disqualified justice may be dismissed (*Limerick v. Murlatt*, 43 Kan. 318, 23 Pac. 567), (2) but orders by a justice competent to act cannot be set aside on rehearing. *People v. Hubbard*, 22 Cal. 34; *Nixon v. Johnson*, 7 Kan. App. 239, 52 Pac. 702.

41. *Louisville, N. A. & C. Ry. Co. v. Hagen*, 87 Ind. 30. But see *Cullen v. Callison*, 110 Mo. App. 174, 80 S. W. 290.

time and place of trial be given.⁴² The parties securing the change cannot question the jurisdiction of the justice to whom it is transferred,⁴³ unless he is disqualified to act therein,⁴⁴ or unless the proceedings of removal are void,⁴⁵ as where the defendant fails to comply with the conditions upon which the change of venue was granted.⁴⁶

(G.) **SUBSEQUENT CHANGE.**—In the absence of an express statute,⁴⁷ the right to a subsequent change of venue is sometimes allowed,⁴⁸ and sometimes denied.⁴⁹ But even if it be erroneous, the defendant cannot complain that he himself procured two changes.⁵⁰

(H.) **IRREGULARITIES, THEIR EFFECT AND WAIVER.**—It is reversible error for a justice to proceed with the trial after the filing of the proper affidavit and giving of notice of motion,⁵¹ and the judgment is,⁵² or is not,⁵³ void, depending on whether the rule in the particular jurisdic-

42. *Idalia Realty & Dev. Co. v. Norman*, 184 Mo. App. 146, 168 S. W. 643; *Richards v. Heger*, 122 Mo. App. 512, 99 S. W. 802; *Cullen v. Callison*, 110 Mo. App. 174, 80 S. W. 290; *Demars v. Gardner*, 27 N. D. 60, 145 N. W. 129.

43. **Ark.**—*Buffington v. Sipe*, 53 Ark. 235, 13 S. W. 763. **Ga.**—*Vaughn v. Strickland*, 108 Ga. 659, 34 S. E. 192. **Ind.**—*Mayes v. Goldsmith*, 58 Ind. 94; *Nesbit v. Long*, 37 Ind. 300; *Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137. **Ia.**—*Post v. Brownell & Co.*, 36 Iowa 497; *Oltman v. Yost*, 62 Minn. 261, 64 N. W. 564; *McGinty v. Warner*, 17 Minn. 41. **Mo.**—*Carter v. Wamack*, 64 Mo. App. 338. **N. D.** *Henry v. Maher*, 6 N. D. 413, 71 N. W. 127. **Wis.**—*Cox v. Groshong*, 1 Pin. 307.

44. *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507.

[a] Motion to remand is proper remedy. *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507. See 5 STANDARD PROC. 44.

45. *Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126; *Hager v. Falk*, 82 Wis. 646, 52 N. W. 432, void affidavit.

As to waiver of irregularities, see *infra*, III, D, 2, b, (I), (H).

46. *Pressley v. Dean*, 10 Idaho 375, 79 Pac. 71; *Hinchman v. Spalding*, 137 Mich. 655, 100 N. W. 901.

47. See Cal. Code Civ. Proc., 1915, §834.

48. **Cal.**—*People v. Hubbard*, 22 Cal. 34. **Ind.**—*Mayes v. Goldsmith*, 58 Ind. 94. **Mo.**—*Cullen v. Callison*, 110 Mo. App. 174, 80 S. W. 290. **Neb.**—See *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507, holding at most it is erroneous but is not void.

[a] Subsequent Application by

Other Party.—The fact that the defendant has applied for a change, which has been granted, will not preclude the plaintiff from procuring a subsequent change where good cause is shown. *Herbert v. Beathard*, 26 Kan. 746.

49. *People v. Gibbons*, 91 Ill. App. 567; *Bacot v. Deas*, 67 S. C. 245, 45 S. E. 171; *Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126.

[a] In criminal cases, the defendant is entitled to more than one change when properly applied for. *State v. Minski*, 7 Iowa 336.

50. *Mayes v. Goldsmith*, 58 Ind. 94; *Hitchcock v. McKinster*, 21 Neb. 148, 31 N. W. 507.

51. **Cal.**—*Ritzman v. Burnham*, 114 Cal. 522, 46 Pac. 379. **Mo.**—*O'Reilly v. Henson*, 97 Mo. App. 491, 71 S. W. 109, holding that after a refusal of an application for change of venue, the defendant may abandon the cause or continue to take part in the trial and defend himself and such conduct will not waive his objection to the jurisdiction as long as the application is not withdrawn. **S. C.**—*Witte v. Cave*, 73 S. C. 15, 52 S. E. 736.

[a] **Privilege of Being Sued in Proper County.**—The continuance of a case by consent after a party has pleaded his privilege of being sued in the county of his residence will not operate as a waiver of the plea. *Jennings v. Shiner* (Tex. Civ. App.), 43 S. W. 276.

52. *Baskovitz v. Guthrie*, 99 Mo. App. 304, 73 S. W. 227; *Jones v. Pharis*, 59 Mo. App. 254.

53. *Ritzman v. Burnham*, 114 Cal. 522, 46 Pac. 379; *Louisville & N. R. Co. v. Bostick*, 7 Ky. L. Rep. 673.

tion is that the filing of the affidavit divests the justice of jurisdiction.⁵⁴ Any and all irregularities in the granting of the change of venue are waived by the appearance and participation of the parties in the trial without objection,⁵⁵ but a voluntary appearance will not confer jurisdiction if the justice has not jurisdiction of the subject-matter of the action.⁵⁶ If the case is not transferred to the justice named in the statute, and the parties do not submit to jurisdiction, the justice to whom the cause is transferred is without jurisdiction,⁵⁷ but it is otherwise if they appear and go to trial,⁵⁸ or otherwise consent.⁵⁹

(II.) **Transfer of Cause.** — The transfer of the cause to a superior court because of lack of jurisdiction over the subject-matter, and other transfers not amounting to change of venue, are treated in a subsequent section.⁶⁰

E. **PARTIES.** — 1. **In General.** — The same general rules governing parties in actions in courts of record, in so far as they are appropriate, apply to suits before a justice of the peace.⁶¹ The proceed-

54. As to when jurisdiction is transferred, see *supra*, III, D, 2, b, (I), (E).

55. Ark.—Buffington v. Sipe, 53 Ark. 235, 13 S. W. 763. Cal.—McGorray v. Superior Court, 141 Cal. 266, 74 Pac. 553. Colo.—Otero v. Hoffmire, 9 Colo. App. 526, 49 Pac. 375. Ind.—Mayes v. Goldsmith, 58 Ind. 94; Nesbit v. Long, 37 Ind. 300. Kan.—Stow v. Shay, 54 Kan. 574, 38 Pac. 784. Mo.—Schaefer v. Green, 68 Mo. App. 168; Voigt v. Avery, 14 Mo. App. 48. Mont.—*In re* Graye, 36 Mont. 394, 93 Pac. 266. N. D. Henry v. Maher, 6 N. D. 413, 71 N. W. 127. Ore.—Woldenberg v. Haines, 35 Ore. 246, 57 Pac. 627. Wis.—Magmer v. Renk, 65 Wis. 364, 27 N. W. 26, *distinguishing* Dykeman v. Budd, 3 Wis. 640.

But see Columbus Junction Tel. Co. v. Overholt, 126 Iowa 579, 102 N. W. 498 (holding that error of a justice in granting a defendant a change of venue was not waived by plaintiff's going to trial); Tennis v. Anderson, 55 Iowa 625, 8 N. W. 477, *distinguishing* Connell v. Stelson, 33 Iowa 147; Post v. Brownell & Co., 36 Iowa 497.

[a] Even where the record fails to disclose any valid transfer from the first justice if the defendant appears before the justice, to whom the case was transferred and tries it on its merits, the claim that there was no valid transfer will be treated as frivolous. Horton v. Toeneboehn, 68 Mo. App. 42.

[b] A general appearance in a justice court to which the venue is changed confers jurisdiction to try the cause.

Buzzard v. Hapeman, 61 Mo. App. 464.

[c] Any defect in the affidavit (1) of removal is waived by participation in the trial after the change of venue. Magmer v. Renk, 65 Wis. 364, 27 N. W. 26. (2) But if the affidavit is void, the second justice has no jurisdiction even if the parties voluntarily appear and consent thereto. Hager v. Falk, 82 Wis. 646, 52 N. W. 432.

[d] Failure to make docket entry will not avoid the judgment, where the parties appear before the other justice and proceed to trial. Stow v. Shay, 54 Kan. 574, 38 Pac. 784.

[e] The defect of improper certification of the case to the new justice is cured by the due service of a new summons and the appearance of the defendant. Schaefer v. Green, 68 Mo. App. 168.

56. McGinty v. Warner, 17 Minn. 23; Rahilly v. Lane, 15 Minn. 447.

57. Board of County Comrs. v. Hoffmire, 9 Colo. App. 526, 49 Pac. 375; State v. Ivie, 118 N. C. 1227, 24 S. E. 539.

58. Cox v. Groshong, 1 Pin. (Wis.) 207. And see Voigt v. Avery, 14 Mo. App. 48, holding that a change of venue to a justice not the nearest is an imperfection merely which the circuit court on appeal will disregard.

59. Cross v. Levy, 57 Miss. 634.

60. See *infra*, III, R, and generally the title "Transfer of Causes."

61. Ala.—Mooney v. Ivey, 8 Ala. 810. Colo.—Layton v. Kirkendall, 20 Colo. 236, 38 Pac. 55; Forsyth v. Ryan, 17 Colo. App. 511, 68 Pac. 1055. Conn.

ings before a justice of the peace will be treated with great liberality, and where the pleadings are sufficient to enable the justice to determine the case on its merits in accordance with the rights of the parties, mere formal defects in the designation of parties will not invalidate the proceedings,⁶² but may be cured by amendment.⁶³ An incorrect statement of the names of parties in the complaint is cured by an answer correctly setting them out,⁶⁴ and the judgment cures all defects as to the description,⁶⁵ or misjoinder,⁶⁶ of parties.

Goodsell v. Wheeler, 34 Conn. 485. **III.** *Columbian Hardwood Lumber Co. v. Langley*, 51 Ill. App. 100. **Mo.**—*Smith v. Zimmerman*, 29 Mo. App. 249; *Crescent Furniture & L. Co. v. Raddatz*, 28 Mo. App. 210, holding that while a party in a justice court may appear and conduct his suit by agent the suit cannot be maintained in the name of the agent. **N. Y.**—*Leggett v. Raymond*, 6 Hill 639; *Buyce v. Buyce*, 48 Hun 433, 1 N. Y. Supp. 642. **Pa.**—*Powell v. Roderick*, 1 Pa. Dist. 120.

For the rules governing parties, see the title "Parties," and particular titles dealing with the subject matter in question.

62. **Cal.**—*Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89, holding that the omission of the initial letter of the middle name of a party to an action in a justice's court is a matter of no consequence and does not in any way affect the validity of the proceedings. **Ga.**—*Dorsey v. Black*, 55 Ga. 315. **III.**—*Newton v. People*, 72 Ill. 507, holding that an information for the recovery of a fine need not be in the name of the people. It is sufficient if the process which brings the defendant into court runs in the name of the people.

[a] Title of Suit in Firm Name. The fact that the title to a suit before a justice of the peace is stated in the firm name instead of the individual names of the partners is not such error as to warrant a dismissal of the suit. It may be amended at any time before final judgment. *Rohrbough, Moore & Co. v. Reed Bros.*, 57 Mo. 292.

[b] Justice May Reject Plea of Misnomer.—Unless the plea offered will enable the magistrate to decide the case according to the law and right of the matter he may reject it. *Hall v. Washington*, 4 Cranch C. C. 722, 11 Fed. Cas. No. 5,953.

63. *Rohrbough, Moore & Co. v. Reed Bros.*, 57 Mo. 292.

[a] Substituting Officers of Corporation.—In an action in the name of the treasurer of an association it is proper on appeal from the justice to amend by substituting the trustees of the association as plaintiff so as to conform to the act of incorporation. *Comfort v. Leland*, 3 Whart. (Pa.) 81; *Giffen v. St. Clair Tp.*, 4 Watts & S. (Pa.) 327.

[b] A variation in a declaration, from the summons, in stating the name of the defendant is not a jurisdictional defect and may be amended, and when it is not amended, the amendment will be treated as made after judgment rendered in the case. *Bole v. Sands & Maxwell Lumb. Co.*, 77 Mich. 239, 43 N. W. 873; *Bockheim v. Linn*; *How. N. P.* (Mich.) 261 (holding that where the summons was in the name of the firm and the declaration was against the defendant that a motion to amend by inserting the name of one of the partners was properly allowed); *Haskins v. Citizens' Bank*, 12 Neb. 39, 10 N. W. 466.

[c] Statute allows inserting the name of partners in an action commenced in the partnership name. *Knowles & Son v. Cavanaugh*, 144 Mich. 260, 107 N. W. 1073.

[d] Addition of Name of Creditor in Substituted Account.—Where an account in proper form is filed before a justice of the peace as the foundation of an action and is lost, and a substituted account is filed which omits the name of the creditor, the plaintiff should be allowed to amend at any time either before trial, after judgment, or after appeal to the circuit court. *Martin v. McClellan*, 30 Ark. 405.

64. *Sherrod v. Shirley*, 57 Ind. 13.

65. *Peeples v. Sethness Co.*, 119 Ga. 777, 47 S. E. 170; *Bole v. Sands & Maxwell Lumb. Co.*, 77 Mich. 239, 43 N. W. 873; *Hughes Bros. Paint & Hdw. Co. v. Prewitt*, 170 Mo. App. 594, 157 S. W. 120.

66. See cases in preceding note.

2. Change and Substitution of Parties.—A justice of the peace may permit amendments to the parties to the extent of discontinuing as to any joint plaintiff,⁶⁷ and perhaps a joint defendant,⁶⁸ so long as any one or more of the original plaintiffs and defendants remain parties, but he cannot permit an amendment which changes entirely the parties plaintiff or defendant and substitutes new parties,⁶⁹ especially where such change would in effect introduce a new cause of action,⁷⁰ unless the adverse party consents,⁷¹ or it is authorized by statute.⁷² An amendment to join a joint contractor may be allowed.⁷³ The right of a party sued in a justice court, to interplead adverse claimants, is sometimes recognized.⁷⁴ In some jurisdictions the code provides for the revival of actions before justices of the peace upon the death of one of the parties.⁷⁵

3. Objections.—The objection for misnomer or other defects as to parties to a justice suit should be taken by plea in abatement,⁷⁶

67. *Douglas v. Newman*, 5 Ill. App. 518; *Lapham v. Rice*, 55 N. Y. 472; *Ackley v. Tarbox*, 31 N. Y. 564, the amendment in this case consisted in striking out the name of a nominal plaintiff. But see *Gates v. Ward*, 17 Barb. (N. Y.) 424.

As to amendments, see *infra*, III, K, 8, and the titles "Amendments and Joefails;" "New Cause of Action or Defense;" "Parties."

[a] Restoration of the name of the plaintiff stricken out cannot be made subsequently against objection. *Cornelius v. Mellvaine*, 1 Morris (Iowa) 318.

68. *Douglas v. Newman*, 5 Ill. App. 518. But see *Gilmore v. Jacobs*, 48 Barb. (N. Y.) 336; *Webster v. Hopkins*, 11 How. Pr. (N. Y.) 140, holding that the statute relative to amending pleadings by adding or striking out the names of parties are of necessity confined to courts of record and has no application to justice's courts.

69. Ala.—*Hallmark v. Hopper*, 119 Ala. 78, 24 So. 563, 72 Am. St. Rep. 900; *Davis Ave. R. Co. v. Mallon*, 57 Ala. 168; *Otis v. Thorn*, 18 Ala. 395; *Taylor v. Acre*, 8 Ala. 491 (holding that the real party in interest could not be substituted for the nominal party); *Moffet v. Wooldridge*, 3 Stew. 322; *Frierson v. Blakesley*, 3 Stew. 267. Ga.—*Bass & Co. v. Bearden*, 6 Ga. App. 696, 65 S. E. 692. Ill.—*Douglas v. Newman*, 5 Ill. App. 518. Mo. *Crescent Furniture & L. Co. v. Raddatz*, 28 Mo. App. 210. N. Y.—*Colegrove v. Breed*, 2 Denio 125. Vt.—*Emerson v.*

Wilson, 11 Vt. 357, 34 Am. Dec. 695.

[a] Where suit is brought in the name of an agent, the name of the principal cannot be substituted. *Hallmark v. Hopper*, 119 Ala. 78, 24 So. 563, 72 Am. St. Rep. 900; *Crescent Furniture Co. v. Raddatz*, 28 Mo. App. 210.

[b] As to Capacity in Which Sued. An amendment showing suit to be against defendant in his representative, instead of individual, capacity is permissible. *Wilson v. Wilson*, 3 Clark (Pa.) 419, 5 Pa. L. J. 462; *Logan v. Chandler*, 2 Clark (Pa.) 509, 4 Pa. L. J. 297. See generally 6 STANDARD PROC. 435, and the titles "New Cause of Action or Defense;" "Parties."

70. *Chicago, R. I. & P. R. Co. v. Young*, 85 Ark. 444, 108 S. W. 831; *Emerson v. Wilson*, 11 Vt. 357, 34 Am. Dec. 695. See the title "New Cause of Action or Defense."

71. *Cornelius v. McIlvaine*, 1 Morris (Iowa) 318; *Colegrove v. Breed*, 2 Denio (N. Y.) 125.

72. *Hanlin v. Baxter*, 20 Kan. 134.

73. *Weinstein v. Harrison*, 66 Tex. 546, 1 S. W. 626.

74. *Geller v. Puchta*, 1 Ohio Cir. Ct. 30, 1 Ohio Cir. Dec. 18. See generally the title "Interpleader."

75. *Hunter v. Leahy*, 18 Neb. 80, 24 N. W. 680; *Miller v. Curry*, 17 Neb. 521, 22 N. W. 559. See generally the title "Revivor."

76. Ill.—*Moss v. Flint*, 13 Ill. 570. Minn.—*Morse v. Barrows*, 37 Minn. 239, 33 N. W. 706. Neb.—*Smelt v. Knapp*, 16 Neb. 53, 20 N. W. 20. N. Y.

or by motion to dismiss on nonsuit,⁷⁷ or under some circumstances by plea or answer.⁷⁸ An objection to the jurisdiction,⁷⁹ and in some states a demurrer,⁸⁰ are not proper methods of objecting to a non-joinder or misjoinder of parties.

F. PROCESS AND SERVICE THEREOF.—1. In General.⁸¹—The process by which actions before justices of the peace may be commenced is either a summons,⁸² or under some statutes an attachment.⁸³ The ordinary process of the justice's court is a summons,⁸⁴ which has for its object the bringing of the parties into court,⁸⁵ and generally the commencing of the action,⁸⁶ although in some jurisdictions the

Gorman v. Dewey, 24 Misc. 643, 54 N. Y. Supp. 303.

See generally the titles "Names;" "Parties."

77. Ala.—Davis Ave. R. Co. v. Mallon, 57 Ala. 168. Ia.—Hall v. Bennett, 2 G. Gr. 466. Mich.—Hirsh v. Fisher, 138 Mich. 95, 101 N. W. 48; Fisher v. Northrup, 79 Mich. 287, 44 N. W. 610, 7 L. R. A. 629, holding that a motion to dismiss on the ground that the plaintiff's full Christian name does not appear is equivalent to a plea in abatement. N. J.—Ryerson's Admr. v. Ryerson, 4 N. J. L. 363.

[a] The infancy of the plaintiff may be taken advantage of by motion to dismiss. Smith v. Van Houten, 9 N. J. L. 381.

78. Gorman v. Dewey, 24 Misc. 643, 54 N. Y. Supp. 303; Frazier v. Gibson, 15 Hun (N. Y.) 37. See *infra*, III, K, 3, and the title "Parties."

79. Howard v. Dawson, 23 N. D. 165, 135 N. W. 783.

80. Lord v. Lord, 38 Hun 601, 11 N. Y. Supp. 389, 33 N. Y. St. 752; Gorman v. Dewey, 24 Misc. 643, 54 N. Y. Supp. 303.

81. See the titles "Process;" "Service of Process and Papers."

82. Charless v. Marney, 1 Mo. 537; Barnes v. Harris, 4 N. Y. 374. But see Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597, holding a summons is not a process within the meaning of the constitution.

83. Minn.—Beseman v. Weber, 53 Minn. 174, 54 N. W. 1053. Mo.—See Heman v. Larkin, 99 Mo. App. 294, 73 S. W. 218. N. Y.—Barnes v. Harris, 4 N. Y. 374. Compare Code Civ. Proc. §2876. Wis.—Ruthe v. Green Bay & M. R. Co., 37 Wis. 344. Wyo. Cheeseman v. Fenton, 13 Wyo. 436, 451, 80 Pac. 823, 110 Am. St. Rep. 1010, if attachment is issued at the commencement of the action it must con-

tain the substance of a summons, and a summons is unnecessary.

As to attachment, see *infra*, III, I.

84. Barnes v. Harris, 4 N. Y. 374.

85. Colo.—Duffield v. Denver & R. G. R. Co., 5 Colo. App. 25, 36 Pac. 622. Ga.—Peoples v. Strickland, 101 Ga. 829, 29 S. E. 22; Gunnels v. Deavours, 54 Ga. 496; Georgia, etc. R. Co. v. Barfield, 1 Ga. App. 203, 58 S. E. 236. Ind.—Davis v. Osborn & Co., 156 Ind. 86, 59 N. E. 279. Minn.—Beseman v. Weber, 53 Minn. 174, 54 N. W. 1053; Craighead v. Martin, 25 Minn. 41. Mo. Little v. Little, 5 Mo. 227, 32 Am. Dec. 317. Nev.—Higley v. Pollock, 21 Nev. 198, 27 Pac. 895. N. Y.—McCoun v. New York, etc. R. R. Co., 50 N. Y. 176; Barnes v. Harris, 4 N. Y. 374. Okla.—Hobbs v. German-American Doctors, 14 Okla. 236, 78 Pac. 356. Tex. Western Union Tel. Co. v. Garner (Tex. Civ. App.), 83 S. W. 433; Watt v. Parlin & Orendorff Co., 44 Tex. Civ. App. 439, 98 S. W. 428; Carpenter v. Anderson, 33 Tex. Civ. App. 484, 491, 77 S. W. 291. Utah.—Luke v. Bennion, 36 Utah 61, 106 Pac. 712. W. Va.—Colborn v. Booth, 41 W. Va. 289, 23 S. E. 556. Wyo.—Cheeseman v. Fenton, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010.

[a] The attempted use by a justice of the peace of a notice instead of a citation to commence an action is wholly without force or effect. Carpenter v. Anderson, 33 Tex. Civ. App. 484, 491, 77 S. W. 291.

[b] In Tennessee the summons, or warrant, issuing from a justice's court is intended, not only as the original process to bring the defendant into court, but also to some extent, to take the place of the declaration. Memphis St. Ry. Co. v. Flood, 122 Tenn. 56, 113 S. W. 384.

86. See cases in preceding note.

action is commenced by filing of a complaint.⁸⁷ Unless the defendant waives it in writing,⁸⁸ or by appearing voluntarily,⁸⁹ the justice acquires no jurisdiction over the defendant until the issuance and proper service of a valid summons,⁹⁰ even though the defendant had actual notice of the pendency of the action.⁹¹

2. Issuance of.⁹²—The issuance of a summons is a judicial act to be performed by the justice of the peace himself,⁹³ except under some statutes which provide for issuance by the clerk.⁹⁴ Some statutes authorize its issuance upon the mere suggestion of the plaintiff that he has a demand against the defendant within the jurisdiction of the justice,⁹⁵ but other statutes require a previous filing of a bill of particulars, or the instrument upon which the suit is brought,⁹⁶ or

87. See *supra*, III, A, and the title "**Suits and Actions.**"

88. Cal. Code Civ. Proc., §841.

89. Ill.—*Schofield v. Pope*, 104 Ill. 130. Ia.—*Acres v. Hancock*, 4 Iowa 568. Nev.—*Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. N. D.—*Deering & Co. v. Venne*, 7 N. D. 576, 75 N. W. 926.

As to appearance, see *infra*, III, G, 4, b, and generally the title "**Appearances.**"

90. Cal.—*Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621, 1 Am. St. Rep. 48. Ga.—*Jeffers v. Ware*, 72 Ga. 135; *Gunnels v. Deavours*, 54 Ga. 496. Ill.—*Roberts v. Formhalls*, 46 Ill. 66; *Evans v. Pierce*, 3 Ill. 468; *Olsen v. Stark*, 94 Ill. App. 556. Kan.—*Case v. Hannahs*, 2 Kan. 490. Mass.—*Arnold v. Tourtelot*, 13 Pick. 172. Mich.—*Vliet v. Westenhaver*, 42 Mich. 593, 4 N. W. 448. Mo.—*Little v. Little*, 5 Mo. 227, 32 Am. Dec. 317. N. Y.—*Rue v. Perry*, 63 Barb. 40; *Willins v. Wheeler*, 28 Barb. 669. N. C.—*Durham Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708. Pa.—*Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789; *Alberty v. Dawson*, 1 Binn. 105; *Huddy v. Putt*, 13 Phila. 550; *Meyl v. Wedeman*, 3 Com. Pl. 96. Tenn.—*Kirkwood v. Smith*, 9 Lea 228. Tex.—*Carpenter v. Anderson*, 33 Tex. Civ. App. 484, 491, 77 S. W. 291. W. Va.—*Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556.

As to necessity of process as a basis for default judgment, see *infra*, III, M, 5.

[a] Service of a writ of attachment will not operate as a summons and is ineffective to give jurisdiction to the justice. *Langtry v. Wayne Circ. Judges*, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352.

[b] The word "issued" (1) imports delivery. *Heman v. Larkin*, 99 Mo. App. 294, 73 S. W. 218. (2) The mere filling out of a summons which is then left in the office of the justice until the return day, or is retained in the custody of the plaintiff, is not "issued" in the sense of commencing the action. *Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661.

91. *Vliet v. Westenhaver*, 42 Mich. 593, 4 N. W. 448.

92. As to the issuance of summonses while outside his township, see *supra*, III, D, 1.

As to issuance to an outside district, see *supra*, III, D, 1.

93. Colo.—*Ware v. Mosher*, 52 Colo. 318, 121 Pac. 751. Ore.—*Perry v. Gholson*, 39 Ore. 438, 65 Pac. 601, 87 Am. St. Rep. 685. Vt.—*Ex parte Kellogg*, 6 Vt. 509.

[a] He cannot delegate the power to another. *Ware v. Mosher*, 52 Colo. 318, 121 Pac. 751; *Ex parte Kellogg*, 6 Vt. 509.

94. *Nellis v. Justices' Court*, 20 Cal. App. 394, 129 Pac. 472, under statute relating to justices of the peace of townships having a population over 250,000 and less than 400,000, amended in 1913.

95. *Barnes v. Harris*, 4 N. Y. 374, the request is equivalent to a plaint levied according to the old cases.

96. *Everett v. Clements*, 9 Ark. 478; *Levy v. Shurman*, 6 Ark. 182, 42 Am. Dec. 690; *McCarty v. Blake*, 2 Ohio Dec. (Reprint) 155.

[a] Not only where the defendant makes default, but also where he appears and defends, it is indispensable that a previous filing of the demand appear. *Everett v. Clements*, 9 Ark. 478.

a previous filing of a complaint.⁹⁷ An affidavit showing circumstances authorizing the issuance of short summons,⁹⁸ or a summons returnable forthwith,⁹⁹ is generally required before such process will be issued, but the absence of such affidavit is waived by a voluntary appearance.¹ A valid summons cannot be issued on Sunday.²

3. Form and Contents.—*a. In General.*—The provisions of the statute prescribing the form and contents of the summons issued by a justice of the peace should be strictly followed,³ although a substantial compliance has been held to be sufficient.⁴ And if the defendant appear voluntarily and plead, it is immaterial how defective the summons is.⁵

The summons is sometimes required to run in the name of the state,⁶ and to be directed to the constable or other officer of the precinct or township,⁷ or, under some statutes, to the defendant.⁸ The names of all the parties should be set out in the summons, if known,⁹ and in

97. Cal. Code Civ. Proc., §39.

98. *Onderdonk v. Ranlett*, 3 Hill (N. Y.) 323; *Rue v. Perry*, 41 How. Pr. (N. Y.) 385; *Sperry v. Major*, 1 E. D. Smith (N. Y.) 361; *Wende v. Bradley*, 5 Hun (N. Y.) 513; *Clark v. Wellington*, 5 Hun (N. Y.) 638.

99. *Bishop v. Carpenter*, 1 Houst. (Del.) 526.

1. *Bishop v. Carpenter*, 1 Houst. (Del.) 526.

As to effect of appearance, see *infra*, III, G, 4.

2. *Whiteside v. Flora*, 27 Pa. Co. Ct. 25. See generally the title "Sunday and Holidays."

[a] Issuance on Sunday is an irregularity which may be waived by appearance and plea. *Benchoff v. Stephenson* (Tex. Civ. App.), 72 S. W. 106.

3. *Montpelier v. Andrews*, 16 Vt. 604; *Streeter v. Frank*, 3 Pin. (Wis.) 386, 4 Chand. 9.

[a] Summons issued under an earlier statute is not void. *Perry v. Gholson*, 39 Ore. 438, 65 Pac. 601, 87 Am. St. Rep. 685. See also *North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

[b] The statute of Nevada does not require the summons to run in any particular form. *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 323, 53 Pac. 597.

4. *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895; *Andrews v. Harrington*, 19 Barb. (N. Y.) 343.

5. As to effect of appearance, see *infra*, III, G, 4.

6. *Charless v. Marney*, 1 Mo. 537;

McPherson v. First Nat. Bank, 12 Neb. 202, 10 N. W. 707. But see *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, 53 Pac. 597, holding that a summons is not process within the meaning of art. VI, §13 of the state constitution requiring all process to run in the name of the state.

7. Ark.—*McCabe v. Payne*, 37 Ark. 450. N. C.—*Baker v. Brem*, 126 N. C. 367, 35 S. E. 630. Pa.—*Clark v. Worley*, 7 Serg. & R. 349.

[a] If directed to the coroner instead of the constable, the summons is voidable but not void, and a default judgment against the defendant upon service by the coroner of such a summons will be upheld. *McCabe v. Payne*, 37 Ark. 450.

[b] If there is no constable convenient, the justice may appoint a special constable and shall direct process to him by name. This statute is imperative. *Benninghoof v. Finney*, 22 Ind. 101.

8. Cal. Code Civ. Proc., §844; *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5. See also *McConnell v. Kennedy*, 29 S. C. 180, 7 S. E. 76.

9. Cal.—*Tucker v. Justice's Court*, 120 Cal. 512, 52 Pac. 808. Ga.—*Wynn v. Richard Allen Lodge No. 14 K. P.*, 115 Ga. 796, 42 S. E. 29. Pa.—*Houser v. Jones*, 1 Phila. 394; *Wenger & Bro. v. Hartman*, 3 Just. L. Rep. 114; *Cooke v. Shoemaker*, 17 Pa. Co. Ct. 641. Tex.—*Hunt v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.), 28 S. W. 460.

[a] An omission of the plaintiff's name is a fatal defect. *Tucker v. Justice's Court*, 120 Cal. 512, 52 Pac. 808.

an action by an officer in his official capacity, such official capacity must be disclosed.¹⁰ Some statutes require the summons to contain notice to the defendant that if he fail to answer within the time limited, the plaintiff will take judgment against him if the action is on contract, or if it is not, apply for the relief demanded.¹¹

b. *Statements as to the Cause of Action.*—Although not required in the absence of statute,¹² some statutes require the summons or notice to describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him,¹³ and in addition thereto, it is sometimes required that the amount demanded

[b] The omission of the name of the plaintiff in a copy of a summons is a mere irregularity where in addition to the service by giving a copy the summons is read to the defendant and the original summons contained the name of the plaintiff. *Martin v. Lindstrom*, 73 Minn. 121, 75 N. W. 1038.

[c] A defect in the name of the defendant in the summons is cured by a judgment by default against him, under the code. *Clawson v. Wolfe*, 77 N. C. 100.

[d] The omission of the initial letter of the defendant's middle name may be cured by amendment notwithstanding a special appearance for the purpose of setting aside the summons. *Abrahams v. Jacoby*, 69 N. J. L. 178, 54 Atl. 525.

[e] A misnomer of the defendant in a summons cannot be cured by amendment of the record unless the amendment is accompanied by an alias summons as a rule to show cause why the amendment should not be made. *Meyl v. Wedeman*, 3 Com. Pl. (Pa.) 96.

[f] In an action by a partnership brought in the firm name, before a justice of the peace the summons need not state that the plaintiff is a partnership, nor that it is formed for the purpose of carrying on trade or business in the state. *Biddle v. Spatz*, 1 Neb. (Unof.) 175, 95 N. W. 354.

[g] *Plaintiffs Described as "Heirs."*—Where in the notice of an action the plaintiffs describe themselves as heirs of the payee of a promissory note upon which the suit was founded, this will be taken as descriptive personae or rejected as surplusage. *King v. Gottschalk*, 21 Iowa 512.

[h] *Summons to Agent Not Summons to Principal.*—A citation commanding an officer to summon "J. N. S., agent for the Gulf, etc., Ry. Co.," etc., does not command service

upon the railway company and will not sustain a judgment by default against the railway company although served upon the person named as agent. *Gulf, C. & S. F. Ry. Co. v. Rawlins*, 80 Tex. 579, 16 S. W. 430. To the same effect, *Smith Premier Typewriter Co. v. Westcott*, 112 Md. 146, 75 Atl. 1052.

10. In the Matter of Hamilton, 2 Utah 225.

11. Cal.—*Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838. Nev.—*Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895. S. D. *Brown v. Smith*, 24 S. D. 231, 123 N. W. 689; *Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035; *Berry v. Bingaman*, 1 S. D. 525, 47 N. W. 825.

[a] The complaint will not be set aside because the summons in a tort action gives the notice prescribed in cases of contract where the summons and complaint state fully facts showing the action to be in tort. *Berry v. Bingaman*, 1 S. D. 525, 47 N. W. 825, followed in *Bradey v. Mueller*, 22 S. D. 534, 118 N. W. 1035.

[b] Where a complaint is served with the summons, it is sufficient, in an action on contract, to state that the plaintiff will take judgment in accordance with the prayer of the complaint on defendant's failure to answer, without stating the amount. *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895.

As to default judgment, see *infra*, III, M, 5.

12. *Levy v. Shurman*, 6 Ark. 182, 42 Am. Dec. 690. But see *Jeffery v. Underwood*, 1 Ark. 168.

13. Ia.—*Winneschiek County v. Hum- pal*, 61 Iowa 172, 16 N. W. 67; *Francis v. Bentley*, 50 Iowa 59; *Fauble v. Stewart*, 35 Iowa 379; *Dilley v. Nusum*, 17 Iowa 238; *Hall v. Monahan*, 1 Iowa 554. Kan.—*Hoffman v. Forslund*, 6 Kan. App. 352, 51 Pac. 816. Mo. *Leonard v. Sparks*, 117 Mo. 103, 22 S.

be stated.¹⁴ It is not necessary that the summons or notice set out the cause of action with technical precision,¹⁵ or that the form of action, whether debt, covenant, and the like be stated, however.¹⁶

c. *Place of Appearance*.—The place at which the defendant is to appear in answer to a summons must be clearly designated therein in order to confer jurisdiction upon the justice.¹⁷ As a general rule, the

W. 899, 38 Am. St. Rep. 646; *Thompson v. Chicago*, S. F. & C. Ry. Co., 110 Mo. 147, 19 S. W. 77; *Hill v. St. Louis Ore & S. Co.*, 90 Mo. 103, 2 S. W. 289; *Brandenburger v. Easley*, 78 Mo. 659; *Anthony v. St. Louis*, I. M. & S. Ry. Co., 76 Mo. 18; *Missouri Pac. R. Co. v. Warden*, 73 Mo. App. 117; *Reinhardt v. Varney*, 72 Mo. App. 646; *Damhorst v. Missouri Pac. R. Co.*, 32 Mo. App. 350. *Neb.*—*McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707. *N. Y.*—*Bissell v. Dean*, 3 E. D. Smith 172; *Hogan v. Baker*, 2 E. D. Smith 22; *Cooper v. Chamberlain*, 2 Code Rep. 142; *Ellis v. Merit*, 2 Code Rep. 68. For present law, see *Code Civ. Proc.*, §2277. *Pa.*—*Mills v. Ross*, 11 Pa. Dist. 790. *S. D.*—*Brown v. Smith*, 24 S. D. 231, 123 N. W. 689; *Phillips v. Norton*, 18 S. D. 530, 101 N. W. 727. *Tenn.*—*Whittaker v. Louisville & N. R. Co.*, 132 Tenn. 576, 179 S. W. 140; *Memphis St. Ry. Co. v. Flood*, 122 Tenn. 56, 63, 113 S. W. 384; *Odell v. Koppee*, 5 Heisk. 88; *Irby v. Brigham*, 9 Humph. 750; *Seals v. Cummings*, 8 Humph. 442; *Wood v. Hancock*, 4 Humph. 465; *Kirby v. Lee*, 8 Yerg. 439; *Parris v. Brown*, 5 Yerg. 267. *W. Va.*—*Meighen v. Williams*, 50 W. Va. 65, 40 S. E. 332.

[a] That the summons states more than one cause of action if it is sufficient in other respects is not ground for quashing it. *Fouse v. Vandevort*, 30 W. Va. 327, 4 S. E. 298.

[b] An omission to state the nature of the suit is an irregularity at most which may be complained of at the time and in the court where the action is pending. The defendant cannot fail to appear or appeal and then enjoin a judgment against it on such a summons on the ground it is void. *Missouri, K. & T. Ry. Co. v. Warden*, 73 Mo. App. 117.

Effect of variance from summons, see *infra*, III, L, 1, g, (II), (B).

14. *Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783; *Singer Mfg. Co. v. Barrett*, 95 N. C. 36; *Noville v. Dew*, 94 N. C. 43; *Allen v. Jackson*, 86 N. C. 321;

Duffy v. Averitt, 27 N. C. 455; *Brown v. Smith*, 24 S. D. 231, 123 N. W. 689. But see *Hedinger v. Silsbee*, 2 G. Gr. (Iowa) 363; *Charles v. Marney*, 1 Mo. 537.

As to indorsement of amount, see *infra*, III, F, 3, f.

15. *Fauble v. Stewart*, 35 Iowa 379; *Brown v. Smith*, 24 S. D. 231, 123 N. W. 689.

[a] A designation in a very general way suffices. Thus a description of a cause of action as being on a promissory note is sufficient. *McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707.

[b] A notification that the suit is for "personal injuries" is insufficient and the warrant is void. *Nashville, C. & St. L. R. Co. v. Davis*, 127 Tenn. 167, 154 S. W. 530, following *Memphis St. Ry. Co. v. Flood*, 122 Tenn. 56, 113 S. W. 384.

16. *Ark.*—*Jeffery v. Underwood*, 1 Ark. 108. *Ga.*—*Davis v. Wilson*, 61 Ga. 388. *N. Y.*—*Delancy v. Nagle*, 16 Barb. 96; *Smith v. Joyce*, 12 Barb. 21; *Cornell v. Bennett*, 11 Barb. 657. *Pa.*—*Kern v. Com.*, 2 Del. Co. 490.

17. *Ark.*—See *Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550. *Del.*—*Coulter v. Layton*, 1 Harr. 494. *Neb.*—*McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707. *N. Y.*—*Stewart v. Smith*, 17 Wend. 517. *Pa.*—*Murdy v. McCutcheon*, 95 Pa. 435; *Garey v. Redmond*, 12 Pa. Dist. 580; *Mills v. Ross*, 11 Pa. Dist. 790; *Williams v. Shultz*, 20 Pa. Co. Ct. 301; *Skinner v. Morrow*, 16 Pa. Co. Ct. 606; *Lumber & Feed Co. v. Curley*, 15 Pa. Co. Ct. 428; *Ritchie v. Perd*, 11 Pa. Co. Ct. 590.

[a] Reasonable precision at least is essential. *Chalfan v. Brey*, 23 Pa. Co. Ct. 88.

[b] A summons returnable outside the justice's district will not support a judgment by default. *Stanton-Belmont Co. v. Case*, 47 W. Va. 779, 35 S. E. 851.

[c] Location of Office Must Be Given.—A summons which states name

summons must be made returnable before the justice issuing it.¹⁸

d. *Time of Appearance.*—The summons must state the precise time for appearance and pleading,¹⁹ as specified by law.²⁰ Provision is

of the justice and the county of which he is justice but does not state where his office is, is fatally defective. *Murdy v. McCutcheon*, 95 Pa. 435.

[d] Where the borough or city is divided into wards (1) the ward in which the office of the justice is situated should be shown (*Harbold v. Bailey*, 11 Pa. Dist. 736; *Lumber & Feed Co. v. Curley*, 15 Pa. Co. Ct. 428; *Ritheie v. Perd*, 11 Pa. Co. Ct. 590; *Caldwell v. Volpe*, 1 Just. L. Rep. [Pa.] 23), (2) unless the justice's office is designated by street and number. *Purnell v. McBreen*, 23 Pa. Co. Ct. 442.

[e] Where the streets are named and the houses numbered, the name of the street and the number of the justice's office should be designated in the summons. *Griffith v. Hender*, 10 Pa. Dist. 632; *Purvine v. Purvine*, 10 Kulp (Pa.) 376.

[f] A designation by the name of the city and the block is sufficient. *Hayley v. Crawford*, 11 Pa. Dist. 548.

[g] *Designation of Office in Village.* Where the summons designates the office of the justice as being situated in a certain village within the township of the venue of the summons, it is sufficiently certain. *Barnum v. Fitzpatrick*, 11 Wis. 81.

18. *Williams v. Bowling*, 111 N. C. 295, 16 S. E. 176, exception in cases of bastardy and in summary proceedings in ejectment.

[a] A summons issued by a justice officially directing the defendant to appear "at my office" is sufficient although omitting the words "me" and "undersigned." *Smith v. Young*, 11 Mo. 566.

[b] *Designation of Justice.*—A warning to appear, signed by a justice of the peace, is sufficiently definite as to the justice before whom the appearance is to be made, though the justice is not named in the order. *Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550. See *Johnson v. Dodge*, 19 Iowa 106.

19. Conn.—*Burgess v. Tweedy*, 16 Conn. 39; *Dyer v. Smith*, 12 Conn. 384. Ia.—*Hodges v. Brett*, 4 G. Gr. 345. Minn.—*Seurer v. Horst*, 31 Minn. 479, 18 N. W. 283; *Craighead v. Martin*, 25 Minn. 41. Neb.—*McPherson v. First Nat. Bank*, 12 Neb. 202, 10 N. W. 707.

N. D.—*Miner v. Francis*, 3 N. D. 549, 58 N. W. 343. Pa.—*Mills v. Ross*, 11 Pa. Dist. 790; *Graham v. Christ*, 1 W. N. C. 169.

[a] A summons in which the return day is left blank is of no validity. *Phinney v. Donahue*, 67 Iowa 192, 25 N. W. 126.

[b] An omission to state the hour is a fatal defect. *Wiggin v. Massey*, 4 Boyce (Del.) 482, 90 Atl. 40.

[c] *Sufficient Direction.*—A direction to appear and answer within a specified number of days from service of summons is sufficient. *Grant v. Clinton Cotton Mills*, 56 S. C. 554, 35 S. E. 193; *Kelley v. Kennemore*, 47 S. C. 256, 25 S. E. 134; *Adkins v. Moore*, 43 S. C. 173, 20 S. E. 985. See also *Wideman v. Pruitt*, 52 S. C. 84, 29 S. E. 405, holding that when a defendant can by calculation determine the exact day of trial he cannot complain.

[d] *Fixing an Impossible Date.* A summons requiring an appearance before a justice of the peace at an impossible date confers no jurisdiction over the person served and a judgment based upon such service is void. *Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024.

[e] The fact that a writ is returnable on some day other than the regular court day of the justice is not a ground for dismissing the writ. *Harper v. Baker*, 9 Mo. 116.

[f] Where the return day is incorrectly given in the copy of the summons it is ground for a reversal of the judgment. *Monroe v. White*, 25 App. Div. 292, 49 N. Y. Supp. 517.

[g] Where two summons are issued before different magistrates for counterclaims against the same parties and are made returnable at the same hour, that magistrate has jurisdiction of the case who first issued the summons. *Tuttle v. Sheridan*, 4 Com. Pl. (Pa.) 160.

20. Cal.—*Deidesheimer v. Brown*, 8 Cal. 339. Ga.—*Blue v. McCorkle*, 110 Ga. 275, 34 S. E. 847; *Thurston v. Wilkerson*, 65 Ga. 557. Ind.—*Davis v. Osborn & Co.*, 156 Ind. 86, 59 N. E. 279; *Fuller v. Indianapolis*, etc. R. Co., 18 Ind. 91; Ohio, etc. R. Co. v. *Hanna*, 16 Ind. 391. Mich.—*Simonson v. Duffee*, 50 Mich. 80, 14 N. W. 706; *Evarts*

sometimes made for the issuance of a summons returned forthwith or within a shorter time than is usual in certain cases, as where an order of arrest is indorsed on the summons.²¹ And in suits against nonresidents, a summons is sometimes provided for, which is known as a short summons and is returnable in a shorter time than in the case of a summons against a resident, known as a long summons.²² A summons shall not be made returnable on a legal holiday.²³

e. *Signature and Seal*.—Although notice commencing the action must, in some states, be signed by the plaintiff, his attorney or the justice,²⁴ the general rule is that the summons must be signed by

v. Fisk, 44 Mich. 515, 7 N. W. 81. Mo. Williams v. Bower, 26 Mo. 601; East v. Whitmer, 84 Mo. App. 223. N. Y. Willins v. Wheeler, 28 Barb. 669; King v. Dowdall, 2 Sandf. 131, 3 Code Rep. 200. Ore.—Belfils v. Flint, 15 Ore. 158, 14 Pac. 295. Pa.—Hess v. Lee, 5 Pa. Dist. 563; Gilmore v. Allds, 1 Just. L. Rep. 231; Hunter v. Weidner, 1 Woodw. Dec. 6. S. C.—Wideman v. Pruitt, 52 S. C. 84, 29 S. E. 405; Kelly v. Kenemore, 47 S. C. 256, 25 S. E. 134; Adkins v. Moore, 43 S. C. 173, 20 S. E. 985; Simmons v. Cochran, 29 S. C. 31, 6 S. E. 859. Tex.—White v. Johnson, 5 Tex. Civ. App. 480, 24 S. W. 568, must be returnable to “some” term.

21. Del.—Smith v. Fryling, 5 Penne. 229, 63 Atl. 801; Murray v. West, 2 Marv. 372, 43 Atl. 256; Gehring v. Pfrommer, 1 Marv. 336, 40 Atl. 1124; Harris v. Buehler, 1 Penne. 346, 40 Atl. 733; Hunter v. Roach, 1 Penne. 265, 40 Atl. 192. Miss.—Goodbar v. Owen, 70 Miss. 840, 12 So. 556. S. C. Cothran v. Knight, 47 S. C. 243, 25 S. E. 142; Cavender v. Ward, 28 S. C. 470, 6 S. E. 302.

As to arrest, see *infra*, III, H.

[a] The day of issuance of the summons should be excluded in computing the time when it may be made returnable. Wideman v. Pruitt, 52 S. C. 84, 29 S. E. 405.

[b] Sunday is not included in the two days in which a short summons may be made returnable. Simonson v. Durfee, 50 Mich. 80, 14 N. W. 706.

22. Mich.—Everts v. Fisk, 44 Mich. 515, 7 N. W. 81; Sallee v. Ireland, 9 Mich. 154. See also Gallagher v. American Exp. Co., 56 Mich. 13, 22 N. W. 96; and Langtry v. Wayne Circ. Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352. N. Y.—Barnes v. Harris, 4 N. Y. 374; Murphy v. Mooney, 2 Sandf. 288; Burghart v. Rice, 2 Denio

95; Dowd v. Stall, 5 Hill 186; Waters v. Whittemore, 22 Barb. 593, a short summons cannot issue against a nonresident unless the demand arises upon a contract express or implied. Pa. Courtors v. Jennings, 1 Just. L. Rep. 200.

[a] Statute Is Permissive.—(1) Either a long or a short summons may be issued against a nonresident. Moore v. Vrooman, 32 Mich. 526. (2) Although the word “shall” is used in the Pennsylvania statute, it will be construed as if it used the word “may.” Benighouse v. Felt, 1 Pa. Co. Ct. 496. See also Meany & Co. v. Cannon, 11 Pa. Dist. 25.

[b] The short summons need not show that the defendant is a nonresident. Stoll v. Padley, 98 Mich. 13, 56 N. W. 1042.

[c] The presumption from the issuance of a long summons is that the defendant is a resident of the county in which the justice resides. Segar v. Muskegon Shingle & Lumb. Co., 81 Mich. 344, 347, 45 N. W. 982. See also Henika v. Brown, 155 Mich. 559, 119 N. W. 1083; Courtis v. Garrison, 148 Mich. 226, 111 N. W. 770.

23. People *ex rel.* Monday v. Schwartz, 3 Abb. Pr. N. S. (N. Y.) 395; Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543.

[a] Effect of Summons Returnable on Holiday.—Where summons is returnable on a legal holiday, the justice has no jurisdiction to continue the case to a later day. People *ex rel.* Monday v. Schwartz, 3 Abb. Pr. N. S. (N. Y.) 395, followed in Leonosio v. Bartilino, 7 S. D. 93, 63 N. W. 543. But see Strowbridge v. Miller, 4 Neb. (Unof.) 449, 94 N. W. 825; Ostertag v. Galbraith, 23 Neb. 730, 37 N. W. 637.

24. Arts v. Rocksien, 98 Iowa 536, 67 N. W. 409.

the justice of the peace,²⁵ or under some statutes by the justice's clerk upon the order of the presiding justice.²⁶ It is a sufficient signing if someone else signs the name of the justice in his presence and under his authority,²⁷ but the absence of either of these requirements renders the signature invalid.²⁸ A seal is sometimes required.²⁹

f. *Indorsements*.—The cause of action,³⁰ and the amount demanded,³¹ are sometimes required to be indorsed upon the summons, as well as the date the constable or officer received the summons,³² but a failure of the constable to make this indorsement is harmless as the date of receipt of the summons may be proved by evidence aliunde.³³ The statutes providing for the appointment of a dis-

25. Cal.—*Nellis v. Justice's Court*, 20 Cal. App. 394, 129 Pac. 472. Colo.—*Ware v. Mosher*, 52 Colo. 318, 121 Pac. 751. Del.—*Draper v. Draper*, 3 Harr. 65. N. H.—*Hanson v. Rowe*, 26 N. H. 327; *Kidder v. Prescott*, 24 N. H. 263; *Smith v. Smith*, 15 N. H. 55. N. J.—*Wood v. Fithian*, 24 N. J. L. 838. N. Y.—*Hannaman v. Muckle*, 20 Civ. Proc. 296, 15 N. Y. Supp. 961. Ore.—*Perry v. Gholson*, 39 Ore. 438, 65 Pac. 601. Tenn.—*Kirkwood v. Smith*, 9 Lea 228. W. Va.—*Colbourn v. Booth*, 41 W. Va. 289, 23 S. E. 556.

[a] Where there are several justices of the inferior court, the teste of one only is necessary under a statute requiring the process to bear test in the name of one of the justices of such court. *Brown v. Roberts*, 19 Ga. 424.

[b] *Initials of Christian Name Sufficient*.—*Wood v. Fithian*, 24 N. J. L. 838.

[c] Where the justice signs the summons in blank and it is filled out by the plaintiff by his authority, such signature is sufficient even though the signature be by stamp bearing facsimile signature. *Loughren v. Bonniwell & Co.*, 125 Iowa 518, 101 N. W. 287, 106 Am. St. Rep. 319.

[d] *Voidable*.—A summons not signed by the justice is voidable and may be set aside on motion. *Wong Kee v. Lillis*, 37 Nev. 5, 138 Pac. 900.

[e] *Amendment*.—The omission of the justice's signature may be cured by amendment. *Burckhalter v. Jones*, 58 N. C. 89, 36 S. E. 495.

26. *Helms v. Dunne*, 107 Cal. 117, 40 Pac. 100, construing §91, Code Civ. Proc. relating to justices of cities and counties.

27. *Achorn v. Matthews*, 38 Me. 173; *Richardson v. Bachelder*, 19 Me. 86; *Hanson v. Rowe*, 26 N. H. 327.

28. *Kidder v. Prescott*, 24 N. H. 263 (where the justice was absent at the time of the signing); *Kirkwood v. Smith*, 9 Lea (Tenn.) 228, where the justice was absent.

29. *Wright v. Vesta*, 5 How. (Miss.) 152.

[a] *Sufficient Seal*.—A scroll with the word seal written within it is a sufficient seal. *Wright v. Vesta*, 5 How. (Miss.) 152.

30. *Bessemer Ice Del. Co. v. Brandon*, 138 Ala. 157, 35 So. 56; *Abrams v. Johnson*, 65 Ala. 465.

[a] In Georgia (1) the justice of the peace or notary public issuing a summons shall attach a copy of the note, account, or cause of action sued on to the summons at the time it is issued. *Macon, etc. R. Co. v. Walton*, 121 Ga. 275, 48 S. E. 940; *Thomas v. Forsyth Chair Co.*, 119 Ga. 693, 46 S. E. 869; *Southern R. Co. v. Collins*, 118 Ga. 411, 45 S. E. 306; *National Computing Scale Co. v. Eaves*, 116 Ga. 511, 42 S. E. 783. See also *Davis v. Wilson*, 61 Ga. 388, decided before the statute. (2) It is a sufficient compliance with the statute if a statement of the cause of action is contained in the body of the summons. *Southern R. Co. v. Collins*, 118 Ga. 411, 45 S. E. 306.

31. Colo.—*Deitz v. Central*, 1 Colo. 323. Ill.—*Eaton v. Graham*, 11 Ill. 619. Ia.—*Hedinger v. Silsbee*, 2 G. Gr. 363.

[a] *Statute Is Directory*.—*Deitz v. Central*, 1 Colo. 323; *Eaton v. Graham*, 11 Ill. 619.

32. *Heman v. Larkin*, 99 Mo. App. 294, 73 S. W. 218.

33. *Heman v. Larkin*, 99 Mo. App. 294, 73 S. W. 218; *Perry v. Gholson*, 39 Ore. 438, 65 Pac. 601, 87 Am. St. Rep. 685.

interested person to serve the process in emergencies require that the appointment be indorsed upon the writ.³⁴

g. *Completeness When Issued.*—The summons must be complete and all the blanks must be filled in before issuance and delivery to the officer,³⁵ and when not so issued, it has been held to be void.³⁶

h. *Alterations.*—The summons should not bear evidence of alterations.³⁷

4. *Service.*—a. *In General.*³⁸—To obtain jurisdiction over the person of the defendant, the process of the justice must be served upon him,³⁹ unless he voluntarily appears,⁴⁰ in the manner provided by the statute.⁴¹ If the statute is not followed, the service will be void and

34. See *infra*, III, F, 4, b.

35. *Ia.*—Phinney *v.* Donahue, 67 Iowa 192, 25 N. W. 126. *Minn.*—Seurer *v.* Horst, 31 Minn. 479, 18 N. W. 283. *N. Y.*—Title Guarantee & Trust Co. *v.* Johnson, 95 Misc. 101, 160 N. Y. Supp. 189; Richmond Sales Co. *v.* Morris, 157 App. Div. 374, 142 N. Y. Supp. 244; Hannaman *v.* Muekle, 20 Civ. Proc. 296, 15 N. Y. Supp. 961.

[a] The summons may be filled out by some other person if it is done in the presence and under the control of the justice and, in the absence of evidence to the contrary, the presumption would prevail that the person so filling out the summons was acting as the clerk of the justice. *People v. Smith*, 20 Johns. (N. Y.) 63.

36. *Seurer v. Horst*, 31 Minn. 479, 18 N. W. 283 (under express statute); *Craighead v. Martin*, 25 Minn. 41; *Title Guarantee & Trust Co. v. Johnson*, 95 Misc. 101, 160 N. Y. Supp. 189, under express statute.

[a] A writ filled up by a constable is void and will be dismissed on motion. This would be true even though the constable acted at the request of the plaintiff's attorney and in his presence and under his control. *Winchell v. Pond*, 19 Vt. 198. This case was decided, however, under a statute which expressly prohibited sheriffs or deputy sheriffs from making writs.

[b] A summons issued with a blank as to the return day is absolutely void and its service and return after the blank is filled by another person confers no jurisdiction. *Craighead v. Martin*, 25 Minn. 41.

[c] A blank left in the copy of a summons will not invalidate the service. *Martin v. Lindstrom*, 73 Minn. 121, 75 N. W. 1038.

37. *Elwood Paper Co. v. Radziewicz*,

16 Pa. Co. Ct. 81, setting aside the proceedings, the date of hearing appearing to have been altered.

[a] The plaintiff must explain (1) any alteration that appears on the face of the summons (*Hummell v. Hoffecker*, 5 Lack. Leg. N. [Pa.] 162), (2) even though the defendant was notified of the alteration. *Barnett v. Fisher*, 5 Pa. Dist. 277.

[b] *Presumption as to Time.*—Where it is open to question whether an interlineation in a summons was made before or after service, the presumption that it was made before service will prevail. *Clark v. Sheridan's Estate*, 5 Kulp (Pa.) 95. See *Fitzgerald v. Campbell*, 10 Pa. Co. Ct. 396.

38. See the title "Service of Process and Papers."

39. *Evans v. Pierce*, 3 Ill. 468.

[a] A defendant cannot by letter authorize the justice to render judgment against him, there having been no service or appearance. *Evans v. Pierce*, 3 Ill. 468.

40. As to appearances, see *infra*, III, G.

As to judgment by confession, see *infra*, III, M, 2, and generally the title "Judgments."

41. *Colo.*—*Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024. *Ga.*—*Bull v. Edward*, 99 Ga. 134, 25 S. E. 31. *Ind.*—*Fuller v. Indianapolis & C. R. Co.*, 18 Ind. 91; *Ohio & M. R. Co. v. Hanna*, 16 Ind. 391. *Mont.* *State v. Harrington*, 31 Mont. 294, 78 Pac. 484. *Okla.*—*Western Pav. Co. v. Binion*, 150 Pac. 898, *construing Laws*, 1913, ch. 83. *Ore.*—*Belfils v. Flint*, 15 Ore. 158, 14 Pac. 295; *Maroonney v. McKay*, 3 Ore. 372. *Pa.*—*Caldwell v. Volpe*, 1 Just. L. Rep. 23. *Vt.*—*Hogle v. Mott*, 62 Vt. 255, 20 Atl. 276, 22 Am. St. Rep. 106.

may be set aside,⁴² and the judgment based thereon will be subject to reversal.⁴³

b. *Who May Serve.*—The persons, by whom process may be served, are designated by statute and service by any one not so designated is void.⁴⁴ In some states process issuing from a justice court should be directed to, and be served either by a constable,⁴⁵ or by his dep-

42. **Kan.**—*Friend v. Green*, 43 Kan. 167, 23 Pac. 93; *Foster v. Markland*, 37 Kan. 32, 14 Pac. 452. **Ore.**—*Whit-
tier v. Woods*, 57 Ore. 432, 112 Pac. 408. **Tex.**—*Stegall v. Huff*, 54 Tex. 193.

[a] **The remedy**, where the summons is not served in sufficient time, is to set aside the summons and issue another, not to dismiss the action. *Foster v. Markland*, 37 Kan. 32, 14 Pac. 452.

43. **Ind.**—*Davis v. Osborn & Co.*, 156 Ind. 86, 59 N. E. 279; *Johnson v. Ramsay*, 91 Ind. 189. **Mass.**—*Gay v. Richardson*, 18 Pick. 417; *Arnold v. Tourtelot*, 13 Pick. (Mass.) 172. **Mich.**—*King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518; *Moore v. Hanson*, 75 Mich. 564, 42 N. W. 981. **Miss.**—*Raiford v. Weems*, 68 Miss. 138, 8 So. 260. **Mont.**—*State v. Harrington*, 31 Mont. 294, 78 Pac. 484. **Nev.**—*Little v. Currie*, 5 Nev. 90; *McDonald v. Prescott*, 2 Nev. 109, 90 Am. Dec. 517. **N. J.**—*Harrison v. Union Transp. Co.*, 82 N. J. L. 45, 81 Atl. 490. **N. C.**—*Durham Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708. **Ore.**—*Belfils v. Flint*, 15 Ore. 158, 14 Pac. 295. **Pa.**—*Fulmer v. Kinney*, 5 Pa. Co. Ct. 426; *Galligan v. Central Railroad*, 1 Just. L. Rep. 239; *Williams v. McDonald*, 1 Just. L. Rep. 121; *Corson v. Sullivan*, 1 Just. L. Rep. 78; *Thomas v. Scotch Woolen Mills Co.*, 11 Kulp 80; *Hudson v. Trethaway*, 10 Kulp 570; *Buchanan v. Specht*, 1 Phila. 252.

44. **Miss.**—*McDugle v. Filmer*, 79 Miss. 53, 29 So. 996, 89 Am. St. Rep. 582. **N. J.**—*Dunham v. Solomon*, 16 N. J. L. 50. **N. Y.**—*Warring v. Keeler*, 11 Misc. 451, 33 N. Y. Supp. 415, 24 Civ. Proc. 427, 67 N. Y. St. 417. **Pa.**—*Harbold v. Bailey*, 11 Pa. Dist. 736; *Com. v. Blankenmeyer*, 8 Del. Co. 400.

[a] **The plaintiff cannot serve process** and it makes no difference whether he be a constable or be specially deputized for the purpose. *Smith v. Burliss*, 23 Misc. 544, 52 N. Y. Supp. 841, 28 Civ. Proc. 89. But see *Put-*

nam v. Man, 3 Wend. (N. Y.) 202, 20 Am. Dec. 686; *Tuttle v. Hunt*, 2 Cow. (N. Y.) 436; *Bennett v. Fuller*, 4 Johns. (N. Y.) 486, decided before the adoption of §3156, N. Y. Code Civ. Proc.

45. **Ala.**—*Drewry v. Leinkauff*, 94 Ala. 486, 10 So. 352; *Alford v. Johnson*, 9 Port. 320. **Ark.**—*McCabe v. Payne*, 37 Ark. 450. **La.**—*State v. Dupre*, 46 La. Ann. 117, 14 So. 907, holding that any constable of the parish is authorized to serve process. **Me.**—*Blanchard v. Day*, 31 Me. 494, holding that a constable of a town may serve a justice's writ upon a nonresident of the town if he is within the town at the time of service.

[a] **Service need not be made by the constable of the town**, (1) but may be made by the constable of any township in the county. *Bick v. Wilkerson*, 62 Mo. App. 31. (2) Under the "twenty-five dollar act" in New York any constable of the county may serve process anywhere in the county. *Mills v. Kennedy*, 1 Johns. (N. Y.) 502. (3) In North Carolina a constable can serve process anywhere in the county when directed to him by any court, but when not so directed to him service of a summons by him is invalid. *Baker v. Brem*, 126 N. C. 367, 35 S. E. 630.

[b] **In Pennsylvania service of process** issuing from a justice's court is to be made by the constable of the district where the defendant resides or by the constable most convenient to the defendant. *Fire Ins. Co. v. Keller*, 9 Pa. Dist. 61. But this statute has been held to be directory only and service by any constable is valid if the process is directed to him. *Kans v. Cherry Tp. School Dist.*, 26 Pa. Co. Ct. 276. See also *Delaware Merc. Co. v. Fulton*, 8 Del. Co. (Pa.) 327; *Lyons v. Farrell*, 11 Kulp (Pa.) 145. But see *Butz v. Phoenix Iron Co.*, 11 Pa. Dist. 680, holding that where the summons is not directed to nor served by the constable of the township where the defendant resides nor the next constable most convenient to the defendant, the judgment cannot be sustained.

uty,⁴⁶ although in others service may be made by a sheriff or his deputy,⁴⁷ by any officer authorized to serve process,⁴⁸ or by any person of sufficient age who is not a party.⁴⁹ Some statutes provide for the appointment of a disinterested person to serve process in certain contingencies, by indorsing upon the writ their special appointment, but they must be strictly complied with.⁵⁰

[c] **Who is the "nearest constable"** is to be determined by the justice, but as the statute is directory merely, a service by one who is not the nearest will not invalidate the judgment. *Smith v. Schell*, 13 Serg. & R. (Pa.) 336.

46. *Prickett v. Cleek*, 13 Ore. 415, 11 Pac. 49.

[a] The record must show that a constable's deputy was acting under a regular appointment for the purpose, or service by such deputy will not be valid. *Prickett v. Cleek*, 13 Ore. 415, 11 Pac. 49.

47. **Ia.**—*Little v. Devendorf*, 109 Iowa 47, 79 N. W. 476. **Tenn.**—*Union Bank v. Lowe*, Meigs 225; *Estes v. Williams*, Cooke 413. **Tex.**—*Davis v. Hatch*, Dall. Dig. 518.

But see *Pearce v. Renfro*, 68 Ga. 194.

48. **Ark.**—*McCabe v. Payne*, 37 Ark. 450, although directed to the constable under statute. **Ga.**—*Divine v. Bailey*, 62 Ga. 235; *Fitzgerald v. Adams*, 9 Ga. 471. **N. C.**—*Durham Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708, holding that the officers of one county are not authorized under the code to serve process issued to officers of another county. **Ohio.**—*Richter v. Thornton*, 16 Ohio Cir. Ct. 637, 18 Ohio Cir. Ct. 872, 8 Ohio Cir. Dec. 369. **Pa.**—*Clohesy v. Frick*, 22 Pa. Co. Ct. 160; *Harlan v. Tripp*, 7 Pa. Dist. 382; *Carter v. Shindel*, 7 Pa. Dist. 308; *Overshire v. Cook*, 8 Kulp 164. **Vt.**—*Nelson v. Denison*, 17 Vt. 73.

49. *State v. Harrington*, 31 Mont. 294, 78 Pac. 484; *Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208; *Johnson v. McCoy*, 32 W. Va. 552, 9 S. E. 887.

50. **Colo.**—*Hamill v. Ferrier*, 8 Colo. App. 266, 45 Pac. 522. **Conn.**—*Case v. Humphrey*, 6 Conn. 130; *Eno v. Frisbie*, 5 Day 122; *Lawrence v. Kingman*, Kirby 6. **Ill.**—*Gordon v. Knapp*, 2 Ill. 488. **Mich.**—*King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518; *Gadsby v. Stimer*, 79 Mich. 260,

44 N. W. 606; *Union Mut. Fire Ins. Co. v. Page*, 61 Mich. 72, 27 N. W. 859; *Rasch v. Moore*, 57 Mich. 54, 23 N. W. 456; *Buel v. Duke*, 38 Mich. 167. **Miss.**—*Miller v. Edwards*, 75 Miss. 739, 23 So. 426. **Mont.**—*State v. Harrington*, 31 Mont. 294, 78 Pac. 484; *Layton v. Trapp*, 20 Mont. 453, 52 Pac. 208. **Neb.**—*Mysenburg v. Leisure*, 63 Neb. 239, 88 N. W. 478; *Morse v. Carpenter*, 31 Neb. 224, 47 N. W. 853; *Haskins v. Citizens' Bank*, 12 Neb. 29, 10 N. W. 466. **N. C.**—*Baker v. Brem*, 127 N. C. 322, 37 S. E. 454 (holding the statute relating to the appointment of a suitable person, when the sheriff and coroner are disqualified applies to justice's courts); *State v. Barefoot*, 89 N. C. 565; *Marsh v. Williams*, 63 N. C. 371. **Compare** *McKee v. Angel*, 90 N. C. 60. **Ore.**—*Smith v. McDuffee*, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947; *Pickard v. Marsh*, 62 Ore. 192, 124 Pac. 268; *North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636. **S. C.**—*Cromer v. Watson*, 59 S. C. 488, 38 S. E. 126; *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5. **Tenn.**—*Allison v. Hampton*, 11 Humph. 71. **Tex.**—*Snell v. State*, 4 Tex. App. 171. **Vt.**—*Carr v. Tyler*, 28 Vt. 783; *Dolbear v. Hancock*, 19 Vt. 388; *Ross v. Fuller*, 12 Vt. 265, 36 Am. Dec. 342; *Clark v. Washburn*, 9 Vt. 302; *Ex parte Kellogg*, 6 Vt. 509. **Wis.**—*Moulton v. Williams*, 101 Wis. 236, 77 N. W. 918; *Betts v. Stevens*, 6 Wis. 398.

[a] A minor may be appointed. *Bell v. Pruitt*, 51 S. C. 344, 29 S. E. 5.

[b] As to appointment by clerk of justice, see *Hamill v. Ferrier*, 8 Colo. App. 266, 45 Pac. 522.

[c] **Showing Required.**—Under a statute providing that, when it appears that process will not be served for want of an officer, the justice may appoint a suitable person, not a party, to serve the same, not only the constable must be not available but absence or inability of the sheriff or his deputies to act must also appear to

c. *Time of Service.*—The time when service must be made is generally regulated by the statutes,⁵¹ which usually require service to be made a designated time before the time of appearance or return day specified therein.⁵² In computing time, the day of service is excluded and the day of appearance included or vice versa.⁵³

d. *Place of Service.*—Service of summons outside of the county in which the action is brought or the district over which the justice

warrant the appointment of a third person. *Pickard v. Marsh*, 62 Ore. 192, 124 Pac. 268.

[d] Appointment must be indorsed on the process. Ill.—*Gordon v. Knapp*, 2 Ill. 488. Mich.—*King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518, must be endorsed on the summons or entered on the justice's docket. Neb.—See *Haskins v. Citizens' Bank*, 12 Neb. 39, 10 N. W. 466. Ore. See *Smith v. McDuffee*, 72 Ore. 276, 142 Pac. 558, 143 Pac. 929, Ann. Cas. 1916D, 947. Wis.—*Murdock v. Phillips*, 65 Wis. 622, 28 N. W. 66.

[e] An appointment upon a separate and distinct paper (1) is not a compliance with the statute (*Gordon v. Knapp*, 2 Ill. 488), (2) unless securely fastened to the back of the writ. *Lewis v. Smith*, 45 Colo. 557, 101 Pac. 762.

[f] A deputation signed in blank and afterwards filled up by a third person without the knowledge or direction of the justice is void. *Carr v. Tyler*, 28 Vt. 783.

[g] The full name of the appointee must be indorsed. *Allison v. Hampton*, 11 Humph. (Tenn.) 71.

[h] Form of Deputation. — (1) "State of N——, to J. H., of said county, specially deputized to serve these papers, Greeting," appearing on the face of the summons is a sufficient deputation under a statute requiring a deputation to be "in writing on the process." *Haskins v. Citizens Bank*, 12 Neb. 39, 10 N. W. 466. (2) An indorsement signed by the justice is sufficient, which recites that "the constable of said district being unable to act herein, and it appearing that the within process will not be served for want of an officer, I hereby appoint H. C. W. to make service of the within summons." *North Pacific Cycle Co. v. Thomas*, 26 Ore. 381, 38 Pac. 307, 46 Am. St. Rep. 636.

[i] The writ should not be directed to the person appointed but his author-

ity should be endorsed thereon. *Murdock v. Phillips*, 65 Wis. 622, 28 N. W. 66.

[j] A person appointed to execute process is possessed of all the powers and authority and subject to the same obligations as a constable in relation to the writ directed to him. *Houck v. Swartz*, 25 Mo. App. 17.

[k] Decision of Justice Conclusive as to When Emergency Arises.—Under a statute providing that in "extraordinary cases" a justice may appoint any one not a party to execute process, the decision of the justice as to when such cases arise is conclusive. *State v. Wynne*, 118 N. C. 1206, 24 S. E. 216.

51. See generally the statutes.

52. Conn.—*Payne v. Bacon*, 1 Root 109. Ga.—*Jarrell v. Guann*, 105 Ga. 139, 143, 31 S. E. 149; *Hyfield v. Sims*, 90 Ga. 808, 16 S. E. 990; *Western & A. R. Co. v. Pitts*, 79 Ga. 532, 537, 4 S. E. 921; *Massengale v. McGinty*, 73 Ga. 120. Kan.—*Foster v. Markland*, 37 Kan. 32, 14 Pac. 452. Neb.—*Leake v. Gallogly*, 34 Neb. 857, 52 N. W. 824; *Houston v. Pepperl*, 32 Neb. 828, 49 N. W. 803; *White v. Germain Ins. Co.*, 15 Neb. 660, 20 N. W. 30. N. J. *Day v. Hall*, 12 N. J. L. 203. N. Y. *Jones v. Wallace*, 75 App. Div. 401, 78 N. Y. Supp. 35, 11 N. Y. Ann. Cas. 392. N. C.—*Durham Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 708. Ohio. *Richter v. Thornton*, 16 Ohio Cir. Ct. 637, 18 Ohio Cir. Ct. 872, 8 Ohio Cir. Dec. 369. Ore.—*Whittier v. Woods*, 57 Ore. 432, 112 Pac. 408; *Munroe v. Thomas*, 35 Ore. 174, 57 Pac. 419. Pa. *Clohesy v. Frick*, 22 Pa. Co. Ct. 160; *Overshire v. Cook*, 8 Kulp 164; *Harlan v. Tripp*, 7 Pa. Dist. 382; *Carter v. Shindel*, 7 Pa. Dist. 308. Vt.—*Nelson v. Denison*, 17 Vt. 73.

53. Ind.—*Wort v. Finley*, 8 Blackf 235. Kan.—*Schultz v. American Crock Co.*, 39 Kan. 334, 18 Pac. 221; *Foster v. Markland*, 37 Kan. 32, 14 Pac. 452.

has jurisdiction, cannot be had,⁵⁴ except when allowed by statute, as where the action is upon the joint obligation of two or more persons, one of whom resides within the county,⁵⁵ or where the action is upon a written contract of a nonresident of the county to be performed in the forum.⁵⁶

e. *Manner of Service.*⁵⁷—The manner of serving the original process in actions before the justice of the peace varies in different jurisdictions,⁵⁸ some requiring that the defendant be shown the original

Mich.—*Lemon v. Hampton*, 128 Mich. 182, 87 N. W. 53; *Crozier v. Allen*, 117 Mich. 171, 75 N. W. 300; *Chaddock v. Barry*, 93 Mich. 542, 53 N. W. 785; *Evarts v. Fisk*, 44 Mich. 515, 7 N. W. 81. **Mo.**—*Sappington v. Lenz*, 53 Mo. App. 44. **N. J.**—*Day v. Hall*, 12 N. J. L. 203.

But see *Messick v. Wigent*, 37 Neb. 692, 56 N. W. 493 (holding that a summons issued and served three days prior to the day appointed for trial including the day of service is sufficient to confer jurisdiction over the person of the defendant under a statute requiring service to "be three days before the day of trial"); and *Pickering v. Justice of the Peace*, 16 N. M. 37, 113 Pac. 619, holding that in computing the statutory time both the day of service and the day of return should be excluded.

[a] **Sunday** is excluded in calculating the time of service of a short summons. *Lemon v. Hampton*, 128 Mich. 182, 87 N. W. 53; *Crozier v. Allen*, 117 Mich. 171, 75 N. W. 300; *Chaddock v. Barry*, 93 Mich. 542, 53 N. W. 785; *Simonson v. Durfee*, 50 Mich. 80, 14 N. W. 706.

54. **Colo.**—*Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024. **Kan.**—*State v. Brayman*, 35 Kan. 714, 12 Pac. 111. **N. C.**—*Rutherford v. Ray*, 147 N. C. 253, 61 S. E. 57; *Austin v. Lewis & Co.*, 156 N. C. 461, 72 S. E. 493. **N. D.**—*Searl v. Shanks*, 9 N. D. 204, 82 N. W. 734. **Ore.**—*Pierce v. Rock Creek G. Min. Co.*, 37 Ore. 342, 61 Pac. 348. **W. Va.**—*Speidel Co. v. Warder*, 56 W. Va. 602, 49 S. E. 534.

As to territorial jurisdiction of justice of the peace, see *supra*, III, D, 1.

[a] **A Constable Can Serve Process Throughout the County.**—*Goldrick v. Bennett*, 20 R. I. 581, 40 Atl. 761.

[b] The ordinary process of a justice of the peace may be served at any place within his county. *Beach v. Baker*, 25 App. Div. 9, 48 N. Y. Supp. 1042.

[c] **Service of a summons issued by a city justice** may, under some statutes, be made outside of the city. *Lantz v. Galpin*, 44 Misc. 356, 89 N. Y. Supp. 1096 (justice of Hornellsville); *Shaefter v. Steadman*, 24 Misc. 267, 53 N. Y. Supp. 586, justice of city of Lockport.

[d] Where the record shows that service was made in the proper township, it will be presumed in absence of evidence to the contrary that the defendant resided in such township and the judgment will be good as against collateral attack. *Fulkerson v. Davenport*, 70 Mo. 541.

55. **Mich.**—*Reed v. Parker*, 134 Mich. 68, 95 N. W. 979. **Miss.**—*Cain v. Simpson*, 53 Miss. 521. **Neb.**—*Stewart v. Rosengren*, 66 Neb. 445, 92 N. W. 586; *Miller v. Meeker*, 54 Neb. 452, 74 N. W. 962. **N. C.**—*Austin v. Lewis & Co.*, 156 N. C. 461, 72 S. E. 493 (there must be bona fide defendants resident in the county); *Rutherford v. Ray*, 147 N. C. 253, 61 S. E. 57. **S. D.**—*Brown v. Brown*, 12 S. D. 21, 80 N. W. 139.

But see *State v. Brayman*, 35 Kan. 714, 12 Pac. 111, there being no statute.

[a] Where there is a collusive joinder of defendants in an action before a justice of the peace for the sole purpose of bringing action against a person in a county where he does not reside, a summons issued to another county for the purpose of bringing in a defendant residing therein is void and confers no jurisdiction on the court to render a default judgment. *Strowbridge v. Miller*, 4 Neb. (Unof.) 449, 94 N. W. 825.

56. *Roberts v. Justices Court*, 29 Cal. App. 768, 157 Pac. 511.

57. See generally the title "Service of Process and Papers."

58. See generally the statutes, and *Brown v. Webb*, 121 Ga. 281, 48 S. E. 917.

summons and be informed of its contents,⁵⁹ and some requiring that he be given a copy of the summons,⁶⁰ and sometimes a copy of the complaint also,⁶¹ or in some jurisdictions by leaving a copy at his last and usual place of abode with some adult member of his family.⁶² Some statutes permit service by leaving a copy with a member of the family only where the defendant is not found.⁶³ Service by publication is

59. *Lenore v. Ingram*, 1 Phila. (Pa.) 519; *French v. Pennsylvania & N. Y. C. & R. Co.*, 1 Leg. Chron. (Pa.) 66.

[a] The reading of a copy of the original summons personally to the defendant is a substantial compliance with the statute and is a valid service. *Hewett v. Jensen* (Iowa), 85 N. W. 16.

[b] Where the constable erroneously states the place of the return the process is not duly served and the justice acquires no jurisdiction. *Waring v. McKinley*, 62 Barb. (N. Y.) 612.

60. *Ga.*—*Jarrell v. Guann*, 105 Ga. 139, 143, 31 S. E. 149; *Smith v. Bryan*, 60 Ga. 628; *Fitzgerald v. Adams*, 9 Ga. 471. *N. Y.*—*McMullin v. Mackey*, 53 Hun 638, 6 N. Y. Supp. 885, 25 N. Y. St. 265. *Ore.*—*Munroe v. Thomas*, 35 Ore. 174, 57 Pac. 419. *Pa.*—*Looney v. Horn*, 12 Pa. Dist. 605; *Frickman v. Wunder*, 12 Pa. Dist. 590.

[a] But see *Kirkland v. Hogan*, 65 N. C. 144, holding it is not necessary to leave a written copy with the defendant to obtain service under the code.

[b] **Inaccurate Copy.**—If the copy of the summons is accurate except as to the signature, it being signed by the constable instead of the justice, the judgment is voidable only. *Stewart v. Bodley*, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105.

[c] **Failure to certify the copy to be a true copy** renders the judgment merely voidable. *Friend v. Green*, 43 Kan. 167, 23 Pac. 93. See also *Bassett v. Mitchell*, 40 Kan. 549, 20 Pac. 192.

61. See generally the statutes and *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895.

62. *Del.*—*Hitch v. Gray & Co.*, 1 Marv. 400. *Ga.*—*Moye v. Walker*, 96 Ga. 769, 22 S. E. 276; *Burbage v. American National Bank*, 95 Ga. 503, 20 S. E. 240. *Ind.*—*Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748. *Kan.*—*Schott v. Linscott*, 80 Kan. 536, 103 Pac. 997; *Friend v. Green*, 43 Kan. 167, 23 Pac. 93. *Mo.*—*Byrd v. Steele*, 49

Mo. App. 419. *Neb.*—*Palmer v. Belcher*, 21 Neb. 58, 31 N. W. 262. *N. Y.*—*Stone v. Miller*, 62 Barb. 430. *Pa.*—*Sweeney v. Girolo*, 154 Pa. 609, 26 Atl. 600; *Bailey v. Jefferson*, 21 Pa. Co. Ct. 20. *Wis.*—*Frederick v. Clark*, 5 Wis. 191.

[a] **Leaving a copy of a summons with the plaintiff** with whom the defendant boards is not a sufficient service. *Robbitts v. Hurilko*, 10 Kulp (Pa.) 217.

[b] **A copy of summons left with a neighbor** will not constitute proper service unless the neighbor is at the time inside the defendant's dwelling house. *Dennis v. McGill*, 2 Blair Co. (Pa.) 180.

[c] **The dwelling house or usual place of abode of defendant** within the meaning of the statute is the place where he is actually living at the time when the service is made. *Mygatt v. Coe*, 63 N. J. L. 510, 44 Atl. 198.

[d] **When a defendant has several residences** which he permanently maintains occupying one at one season of the year and another at another season, a summons must be served on him at the dwelling house in which he is living at the time of service. It does not affect the legality of the service that he is temporarily away from it, if his family are still there. *Camden Safe Dep. & Trust Co. v. Barbour*, 66 N. J. L. 103, 48 Atl. 1008.

[e] **A service at the place of business** is not a compliance. *Sweeney v. Girolo*, 154 Pa. 609, 26 Atl. 600.

63. *Minn.*—*Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540. *N. J.*—*Polhemus v. Perkins*, 15 N. J. L. 435. *Ore.*—*Whittier v. Woods*, 57 Ore. 432, 112 Pac. 408; *Munroe v. Thomas*, 35 Ore. 174, 57 Pac. 419.

[a] **The officer must use ordinary diligence** to find the defendant before he can serve him by leaving copies with some person of the family. *Whittier v. Woods*, 57 Ore. 432, 112 Pac. 408; *Trullenger v. Todd*, 5 Ore. 36.

sometimes provided for,⁶⁴ but is not allowable unless statutory authority therefor exists.⁶⁵

If the defendant is a corporation, service must be made on the officer or agent designated in the statute.⁶⁶

f. *Privilege From Service.*⁶⁷ — Generally a party is privileged from the service of legal process in civil actions while in good faith he is in attendance either as a party or witness upon the hearing of a cause in court. This privilege exists during the time fairly occupied in going to and returning from the place of trial as well as during the time the party is in actual attendance, hence service of a summons on a non-resident while so attending a trial in a court is void and will be set aside on motion,⁶⁸ unless the party or witness by his conduct is deemed to have waived his privilege.⁶⁹

64. Ark.—Webster v. Daniel, 47 Ark. 131, 14 S. W. 550. Cal.—Ligare v. California So. R. Co., 76 Cal. 610, 18 Pac. 777; Seaver v. Fitzgerald, 23 Cal. 85. Mo.—State v. Staley, 76 Mo. 158; Byrd v. Steele, 49 Mo. App. 419. Neb.—Meyer v. Hibler, 52 Neb. 823, 73 N. W. 289; Smith v. Johnson, 43 Neb. 754, 62 N. W. 217. Nev.—Forsyth v. Chambers, 30 Nev. 341, 96 Pac. 932; Pratt v. Stone, 25 Nev. 365, 60 Pac. 514. Ohio.—Stone v. Whittaker, 61 Ohio St. 194, 55 N. E. 614; Halliday Hay Co. v. Cline, 9 Ohio Cir. Ct. 280. Tex.—Hambel v. Davis, 89 Tex. 256, 34 S. W. 439, 59 Am. St. Rep. 46 (the rules governing service by publication in district courts are applicable to justice's courts); Davis v. Robinson, 70 Tex. 394, 7 S. W. 749; Carpenter v. Anderson, 33 Tex. Civ. App. 484, 491, 77 S. W. 291. Wyo.—Cheeseman v. Fenton, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010. Wis.—De Laval Separator Co. v. Hofberger, 161 Wis. 344, 154 N. W. 387.

[a] Where service by publication has been ordered personal service is equivalent to publication. Pratt v. Stone, 25 Nev. 365, 60 Pac. 514.

[b] Where defendant's residence is unknown, service by publication cannot be had under a statute authorizing such service when the defendant is a nonresident. Stegall v. Huff, 54 Tex. 193.

65. Bieswaenger v. Werner, 5 Mo. App. 582.

66. Ala.—Hoffman v. Alabama D. & F. Co., 124 Ala. 542, 27 So. 485. N. Y.—Behan v. Phelps, 27 Misc. 718, 59 N. Y. Supp. 713. Wis.—Ruthe v. Green Bay, etc. R. Co., 37 Wis. 344.

See generally the title, "Corporations."

[a] To authorize the rendition of a judgment by default against a corporation, the record must show that proof was made to the court that the person on whom process was served was at the time of service, such an officer or agent of the defendant, as, by law, was authorized to receive service for and on behalf of the defendant. Hoffman v. Alabama D. & F. Co., 124 Ala. 542, 27 So. 485; Independent Pub. Co. v. American Press Assn., 102 Ala. 475, 15 So. 947.

67. See generally the title "Privilege."

68. U. S.—Bridges v. Sheldon, 7 Fed. 17, 18 Blatchf. 295, 507. Del. In re Dickenson, 3 Harr. 517. Ga. Henegar v. Spangler, 29 Ga. 217. Mich. Letherby v. Shaver, 73 Mich. 500, 41 N. W. 677. N. C.—Ballinger v. Elliott, 72 N. C. 596. Pa.—Kennedy v. Davidson, 1 Just. L. Rep. 149; Wilson v. Byrd, 14 W. N. C. 438; Ruger v. Keller, 12 W. N. C. 371. Tenn.—Martin v. Ramsey, 7 Humph. 260. Vt.—In re Healey, 53 Vt. 694, 38 Am. Rep. 713.

[a] Service of Summons on Witness Is a Contempt of Court.—In re Healey, 53 Vt. 694, 38 Am. Rep. 713.

[b] Mandamus will lie to set aside such service. Mitchell v. Huron Circ. Judge, 53 Mich. 541, 19 N. W. 176.

69. Nichols v. Horton, 14 Fed. 327, 4 McCrary 567.

[a] Privilege May Be Waived.—If a party or witness while in attendance on a trial lay aside their character of party or witness and for their own benefit give cause for the institution of an action against them by a third

5. Return.—a. *In General.*⁷⁰—To the jurisdiction of the justice it is not only necessary, where the defendant does not make a general appearance, that there be proper service of the summons upon him,⁷¹ but that the officer who made the service, make a legal return of such service.⁷²

b. *Sufficiency of Return.*—The return of process, issuing from a justice court, must be responsive to the mandate of the writ, and must affirmatively state the facts necessary to give the court jurisdiction over the person of the defendant,⁷³ and the time when service was

party they cannot invoke the privilege but must be deemed to have waived it. *Nichols v. Horton*, 14 Fed. 327, 4 McCrary 567.

70. See generally the title "Returns."

71. As to service, see *supra*, III, F, 4.

72. Ark.—*Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550. Cal.—*Rowley v. Howard*, 23 Cal. 401. Ga.—*Wood v. Callaway*, 119 Ga. 801, 47 S. E. 178; *News Printing Co. v. Brunswick Pub. Co.*, 113 Ga. 160, 38 S. E. 333; *Callaway v. Douglasville College*, 99 Ga. 623, 25 S. E. 850; *Fitzgerald v. Adams*, 9 Ga. 471. Ill.—*Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Pardon v. Dwire*, 23 Ill. 572. Ia.—*Milbourn v. Fouts*, 4 G. Gr. 346. Mich.—*Segar v. Muskegon Shingle, etc. Co.*, 81 Mich. 344, 45 N. W. 982; *Vliet v. Westenhaver*, 42 Mich. 593, 4 N. W. 448; *Adams v. Abram*, 38 Mich. 302. Mo.—*Jeffries v. Wright*, 51 Mo. 215. Neb.—*Searles v. Averhoff*, 28 Neb. 688, 44 N. W. 872. Nev.—*Martin v. District Court*, 13 Nev. 85. N. J.—*Rape v. Titus*, 11 N. J. L. 314; *Layton v. Cooper*, 2 N. J. L. 62. N. Y.—*Jackson v. Sherwood*, 50 Barb. 356; *Willins v. Wheeler*, 28 Barb. 669, 8 Abb. Pr. 116, 17 How. Pr. 93; *Reno v. Pinder*, 24 Barb. 423 (*reversed* in 20 N. Y. 298, on the ground that the return was sufficient in the case of collateral attack); *Snyder v. Schram*, 59 How. Pr. 404; *Wheeler v. Lampman*, 14 Johns. 481. Ore.—*Belfils v. Flint*, 15 Ore. 158, 14 Pac. 295. R. I.—*Brown v. Carroll*, 16 R. I. 604, 18 Atl. 283.

[a] The jurisdiction of the justice depends not on the fact of service, but the fact appearing of record, so that an amended return filed for the first time on appeal cannot be considered. *Rocheport Bank v. Doak*, 75 Mo. App. 332. *Stewart v. Smith*, 17 Wend. (N. Y.) 517; *Barnes v. Harris*, 4 Com. (N. Y.) 375.

[b] **Return Will Support Judgment Even Though False.**—Case *v. Redfield*, 7 Wend. (N. Y.) 398; *New York & E. R. Co. v. Purdy*, 18 Barb. (N. Y.) 574. But see *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149.

[c] The presumption, where no return of process appears, is that there was no service even though the justice states in his transcript on appeal that the summons was returned served. *Jaremillo v. Romero*, 1 N. M. 190.

[d] A justice should require distinct lawful evidence of personal service of the summons before rendering judgment against a defendant who has not appeared. *Smalley v. Lighthall*, 37 Mich. 348.

73. Ia.—*Little v. Devendorf*, 109 Iowa 47, 79 N. W. 476; *Bain v. Gal-year*, 10 Iowa 585; *Milbourn v. Fouts*, 4 G. Gr. 346. Mich.—*Shaw v. Moser*, 3 Mich. 71. Mo.—*McCloon v. Beattie*, 46 Mo. 391; *Parkinson v. The Robert Fulton*, 15 Mo. 258; *Trimble v. Elkin*, 88 Mo. App. 229. N. J.—See *Boylan v. Hooper*, 2 N. J. L. 95; *Shinn v. Earnest*, 2 N. J. L. 155. N. Y.—*Manning v. Johnson*, 7 Barb. 457; *Bromley v. Smith*, 2 Hill 517; *Marshall v. Canty*, 14 Abb. Pr. 237; *Willard v. Sperry*, 16 Johns. 121; *Syracuse Moulding Co. v. Squires*, 61 Hun 48, 15 N. Y. Supp. 321, 21 Civ. Proc. 58, 39 N. Y. St. 824; *McMullin v. Mackey*, 53 Hun 638, 6 N. Y. Supp. 885, 25 N. Y. St. 265; *Nichols v. Fanning*, 20 Misc. 73, 45 N. Y. Supp. 409. Ohio.—*Vandement v. Trisler*, 4 Ohio N. P. 37. Ore.—*Belfils v. Flint*, 15 Ore. 158, 14 Pac. 295. Pa.—*Brennan v. Miners Mills Borough*, 10 Pa. Dist. 64; *Sevitsky v. Clifford*, 28 Pa. Co. Ct. 445; *Com. v. Savery*, 1 Chest. Co. Rep. 79; *Philadelphia v. Cathcart*, 10 Phila. 103, 6 Leg. Gaz. 1. S. C.—*State v. Cohen*, 13 S. C. 198.

[a] The return of the officer (1) is presumed to show all that was done by him in making service and where it is

made,⁷⁴ without ambiguity.⁷⁵ In stating the fact of personal service, it has been held sufficient to state that the summons was "personally served,"⁷⁶ but in making a return of constructive or substituted service, the officer should state facts authorizing service in this manner,⁷⁷

necessary to serve a copy of the complaint with the summons and the return fails to show that such copy was served the justice acquires no jurisdiction. *State v. Harrington*, 31 Mont. 294, 78 Pac. 484. (2) But see *Van Kirk v. Wilds*, 11 Barb. (N. Y.) 520, holding that it will be presumed that the officer did all that was required by law and he is not required to state in his return the particulars of what he did to constitute the service.

[b] A presumption in favor of the fact that the officer making the return was a constable of the proper county will prevail. *Potter v. Whittaker*, 27 How. Pr. (N. Y.) 10.

[c] Aiding Return by Justice's Docket.—If the return fails to show sufficient service, an entry in the docket of the justice that "the summons was duly served" cannot be relied upon to give validity to the judgment. *Lowe v. Alexander*, 15 Cal. 296.

[d] Illustrations.—(1) A return "duly served" is not sufficient to give the justice jurisdiction. *Zane v. Pisant*, 2 N. J. L. 319; *Budd v. Marvin*, 4 N. J. L. 248. (2) A return "served the thirtieth day of January" is insufficient. *Layton v. Cooper*, 2 N. J. L. 62. (3) A return "served for the above date by copy" is defective. *Pedrick v. Shaw*, 2 N. J. L. 57; *Foster v. Hazen*, 12 Barb. (N. Y.) 547, although it is not a jurisdictional defect. (4) A return "served on defendant" is insufficient. *Hedden v. Van Ness*, 2 N. J. L. 84.

[e] Where the statute requires the leaving a copy of the summons with the defendant as well as reading it to him the return must show a compliance with both requirements of the statute to be sufficient. *Wilkinson v. Bayley*, 71 Wis. 131, 36 N. W. 836. See also *Matteson v. Smith*, 37 Wis. 333.

[f] The place where service was made need not be stated as it is presumed to have been in the county. Any fact as to residence depriving the justice of jurisdiction must be established by the defendant. *Gulf & S. I. R. Co. v. Ramsey*, 98 Miss. 863, 54 So. 440;

Beach v. Baker, 25 App. Div. 9, 48 N. Y. Supp. 1042.

[g] That either party is a resident of the county in which the action is brought need not be stated. *Syracuse Moulding Co. v. Squires*, 61 Hun 48, 15 N. Y. Supp. 321, 21 Civ. Proc. 58, 39 N. Y. St. 824.

[h] Form.—"This notice came into my hands on May 20th, 1882, and I certify that I personally served the same on the within-named Mary Little by reading the same to her, and delivering to her a true copy of the same, in Monroe township, Linn county, Iowa, on May 19th, 1882." [Signed.] Little v. Devendorf, 109 Iowa 47, 79 N. W. 476.

[i] Where service is made on a corporation the return must (1) set out the method of making service sufficiently to show that personal service was made up the proper agent or officer. *Hoffman v. Alabama D. & F. Co.*, 124 Ala. 542, 27 So. 485; *Independent Pub. Co. v. American Press Assn.*, 102 Ala. 475, 15 So. 947; *Oxanna Bldg. Assn. v. Agee*, 99 Ala. 571, 13 So. 279; *Manhattan F. Ins. Co. v. Fowler & Co.*, 76 Ala. 372; *Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713. (2) The name of the officer or agent served should be stated. *Singer v. Singer Mfg. Co.*, 2 Pa. Co. Ct. 578. See generally the title "Corporations."

[j] In a garnishment proceeding, the return must show notice of garnishment in writing as required by statute. *Mosher v. Banking House*, 6 Mo. App. 599.

74. *Ogle v. Coffey*, 2 Ill. 239; *Clemson v. Hamm*, 2 Ill. 176; *Wilson v. Greathouse*, 2 Ill. 174; *Littlestone v. Goldenberg*, 66 Ill. App. 673, 676; *Burt v. Davidson*, 5 Humph. (Tenn.) 425.

75. *Sevitsky v. Clifford*, 28 Pa. Co. Ct. 445. See *Fleming v. Nunn*, 61 Miss. 603, holding the justice may construe a return as imparting personal service where the return itself is equivocal.

76. *Tuttle v. Hunt*, 2 Cow. (N. Y.) 436; *Legg v. Stillman*, 2 Cow. (N. Y.) 418. Compare *Wood v. Callaway*, 119 Ga. 801, 47 S. E. 178.

77. Ill.—*Kepcha v. Lowman*, 249 Ill.

and facts showing compliance with the statute regulating such service.⁷⁴

If the officer fails to serve the summons, he is sometimes required to make a written return showing such fact and the reasons therefor.⁷⁵

Signature and Verification.—The officer making service of the process should sign the return,⁸⁰ and in some jurisdictions verify it.⁸¹

118, 94 N. E. 102. **Minn.**—*Bird v. Norquist*, 46 Minn. 318, 48 N. W. 1132. **N. Y.**—*Sperry v. Reynolds*, 65 N. Y. 179; *Bromley v. Smith*, 2 Hill 517. **Ore.**—*Whittier v. Woods*, 57 Ore. 432, 112 Pac. 408; *Trullenger v. Todd*, 5 Ore. 36.

[a] That the defendant was not found must be stated where a copy is left. *Polhemus v. Perkins*, 15 N. J. L. 435; *Whittier v. Woods*, 57 Ore. 432, 112 Pac. 408; *Trullenger v. Todd*, 5 Ore. 36. *Contra*, *Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540, following *Goener v. Woll*, 26 Minn. 154, 2 N. W. 163.

78. **Mich.**—*Adams v. Abram*, 38 Mich. 302. **Mo.**—*McCloon v. Beattie*, 46 Mo. 391. **Pa.**—*Deisher v. Flannery*, 27 Pa. Co. Ct. 286; *Bixby & Co. v. Mangan*, 11 Kulp 147; *Leightold v. Bulford*, 11 Pa. Dist. 232; *Yaple's Estate*, 9 Kulp 141; *McDonald v. Central Dist. etc. Co.*, 1 Just. L. Rep. 112; *Miller v. Pesto*, 1 Just. L. Rep. 21. **S. C.** *Henneman v. Thomson*, 8 S. C. 115.

[a] Where a copy of the summons was left at the defendant's place of abode, the return must show (1) the abode to be that of the defendant. *Polhemus v. Perkins*, 15 N. J. L. 435. (2) An omission of the word "last" before the words "usual place of abode" does not vitiate the return. *Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540. (3) And although better practice, it is not necessary to give the name of the person with whom the copy was left (*Vaule v. Miller*, 64 Minn. 485, 67 N. W. 540, following *Robison v. Miller*, 57 Miss. 237. See also *Purnell v. McBreen*, 23 Pa. Co. Ct. 442), (4) but the return must show him to be an adult (*Williams v. McDonald*, 1 Just. L. Rep. (Pa.) 121), (5) and a member of the family. *Laidlow v. Morrow*, 44 Mich. 547, 7 N. W. 191.

79. **N. Y.** Code Civ. Proc., §2885. See *McDoel v. Cook*, 2 N. Y. 110.

[a] Where service is had on a part

only of several joint defendants, the return must show those not served could not be found. *Ford v. Munson*, 4 N. J. L. 93. See *Stults v. Outcalt*, 6 N. J. L. 130; *McDoel v. Cook*, 2 N. Y. 110. But see *Brown v. Knop*, 137 Mich. 234, 100 N. W. 466, 101 N. W. 227; *Fogg v. Child*, 13 Barb. (N. Y.) 246.

80. **Ga.**—*Fitzgerald v. Adams*, 9 Ga. 471. **N. J.**—*Maires v. Smith*, 16 N. J. L. 360, holding to be good a return signed "C. D." constable for "S. C." constable. **Tex.**—*Foust v. Warren* (Tex. Civ. App.), 72 S. W. 404.

[a] The signature to the return should show the official designation of the person serving the process, but where signed merely with the name of the officer the presumption will be that he was the proper officer. *Foust v. Warren* (Tex. Civ. App.), 72 S. W. 404.

[b] A signature by the deputy as such was upheld in *Little v. Deventorf*, 109 Iowa 47, 79 N. W. 476, as the justice undoubtedly satisfied himself that the deputy was acting as sheriff and that the return was intended to be in his name.

[c] The absence of a signature will not render the judgment in the case void on certiorari. *Burton v. Creel*, 122 Ark. 349, 183 S. W. 745.

81. **Garey v. Redmond**, 12 Pa. Dist. 580; *Adler v. Patrick*, 1 Chest. Co. (Pa.) 465.

[a] A mere certificate (1) by a person specially appointed to serve process is invalid. *Pickard v. Marsh*, 62 Ore. 192, 124 Pac. 268. (2) But he need not verify the return where the statute gives him the same powers as a constable and does not require the constable to verify. *Betts v. Stevens*, 6 Wis. 398. See also *Winsor v. Goddard*, 10 Kan. 625; *Winsor v. Cole*, 10 Kan. 620.

[b] Verification by officer unnecessary where not required by statute. *Betts v. Stevens*, 6 Wis. 398.

Determining Sufficiency.—The sufficiency of returns is determined by the justice⁸² whose judgments are not subject to collateral attack.⁸³

c. **Conclusiveness.**—A return of service of summons in an action before a justice's court showing a compliance with the statute,⁸⁴ is prima facie evidence of the facts therein recited.⁸⁵ The return may be impeached in a direct proceeding,⁸⁶ as in a proceeding to vacate the judgment where no rights of third parties have intervened,⁸⁷ and it may be impeached by the defendant appearing specially on return day and objecting to the jurisdiction of the court over him,⁸⁸ and in an action against the officer for false return.⁸⁹ But the authorities differ

82. *Little v. Devendorf*, 109 Iowa 47, 79 N. W. 476; *Baker v. Jamison*, 73 Iowa 698, 36 N. W. 647. See also *Farmers' Ins. Co. v. Highsmith*, 44 Iowa 330; *Shawhan v. Loffer*, 24 Iowa 217.

[a] In determining their sufficiency, the justices will not scrutinize the returns with the technicality indulged in testing the returns of sheriffs and higher officers. *Stegall v. American Pigment & C. Co.*, 150 Mo. App. 251, 130 S. W. 144.

83. *Hume v. Conduitt*, 76 Ind. 598; *Baker v. Jamison*, 73 Iowa 698, 36 N. W. 647.

84. *King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518; *Gordon v. Sibley*, 59 Mich. 250, 26 N. W. 485.

85. Cal.—*Denmark v. Liening*, 10 Cal. 93. Ga.—*Fitzgerald v. Adams*, 9 Ga. 471. Ill.—*Leitch v. Colson*, 8 Ill. App. 458. Mich.—*King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518; *Gordon v. Sibley*, 59 Mich. 250, 26 N. W. 485; *Merrick v. Mayhew*, 40 Mich. 196. Minn.—*Flohrs v. Forsyth*, 78 Minn. 87, 80 N. W. 852. Miss.—*Quarles v. Hiern*, 70 Miss. 891, 14 So. 23. Mo.—*Perryman v. State*, 8 Mo. 208. Pa.—*Sweeney v. Girolo*, 154 Pa. 609, 26 Atl. 600; *Maines v. Black*, 8 Pa. Dist. 82. Tenn.—*Myers v. Hammond*, 6 Baxt. 61.

[a] Where Return and Justice's Docket Differ.—Where the return shows "service by copy" it is presumed service was made at the defendant's place of abode notwithstanding the justice's docket states the summons was served by leaving a copy at the defendant's place of business. *Sweeney v. Girolo*, 154 Pa. 609, 26 Atl. 600.

86. *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149.

[a] On certiorari the return of a constable is not conclusive between the

parties and may be impeached. *Com. v. Blankenmeyer*, 8 Del. Co. (Pa.) 400, citing local cases. But see *Delaware Mercantile Co. v. Fulton*, 8 Del. Co. (Pa.) 327.

[b] See *Vigers v. Mooney*, 3 N. J. L. 909, where the return showed service by "leaving a copy with defendant's wife" and on certiorari affidavits showing she did not live with the defendant were read as they did not contradict the record.

[c] Party may have judgment reversed on appeal where the constable falsely returned personal service, and judgment by default was rendered against him. *Fitch v. Devlin*, 15 Barb. (N. Y.) 47.

87. *Knutson v. Davies*, 51 Minn. 363, 53 N. W. 646; *Crosby v. Farmer*, 39 Minn. 305, 40 N. W. 71.

88. Ga.—*Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175. Mich.—*Lane v. Jones*, 94 Mich. 540, 54 N. W. 283; *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833; *Allen v. Mills*, 26 Mich. 123. N. J. *Chapman v. Cumming*, 17 N. J. L. 11. N. Y.—*Burbanks Hardware Co. v. Henkel*, 76 App. Div. 183, 78 N. Y. Supp. 365, 12 N. Y. Ann. Cas. 66; *Wheeler & W. Mfg. Co. v. McLaughlin*, 54 Hun 639, 8 N. Y. Supp. 95, 28 N. Y. St. 372. But see *Perry v. Tynen*, 22 Barb. 137.

[a] Defendant's equivocal denial will not impeach return. *Myers v. Hammond*, 6 Baxt. (Tenn.) 61.

[b] The mere statement of defendant's attorney that no copy of a summons was served, will not be allowed to contradict the sheriff's return on the original summons certifying that a true copy had been served on the defendant. *Higley v. Pollock*, 21 Nev. 198, 27 Pac. 895.

89. *Lane v. Jones*, 94 Mich. 540, 54 N. W. 283; *Michels v. Stork*, 52 Mich. 260, 17 N. W. 833.

when it is attempted to impeach the return collaterally, some holding the return conclusive against such attack,⁹⁰ and others holding the contrary.⁹¹

6 Alias Summonses. — Alias summonses may be issued when the original is returned without being served on any or all of the defendants.⁹² But a second summons cannot be lawfully issued after a dismissal of the action,⁹³ or where it is the duty of the justice to grant a pending motion to dismiss the action.⁹⁴

7. Objections and Waiver. — Although minor defects and irregularities in the process, its service and return will merely render the judgment voidable,⁹⁵ the defects may be such that the justice does not acquire jurisdiction over the person of the defendant in the absence of

90. *Ga.*—*Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175. And see *Wood v. Callaway*, 119 Ga. 801, 47 S. E. 178. *Mo.*—*Robertson v. Ackermann*, 173 Mo. App. 103, 155 S. W. 877; *Kerr v. Quincy, O. & K. C. R. Co.*, 113 Mo. App. 1, 87 S. W. 596. See also *State v. Finn*, 100 Mo. 429, 13 S. W. 712; *Decker v. Armstrong*, 87 Mo. 316. *N. Y.*—*New York & E. R. Co. v. Purdy*, 18 Barb. 574; *Putnam v. Man*, 3 Wend. 202, 20 Am. Dec. 686. *W. Va.*—*Johnson Milling Co. v. Read*, 85 S. E. 726.

[a] A return by a constable of service of a summons upon an agent of a railroad company will be held to be conclusive that the person served was such an agent as the law allows service to be made upon. *French v. Pennsylvania & N. Y. C. & R. Co.*, 1 Leg. Chron. (Pa.) 66. To same effect, *Robertson v. Ackermann*, 173 Mo. App. 103, 155 S. W. 877.

91. *Mastin v. Gray*, 19 Kan. 458, 27 Am. Rep. 149, an action of ejectment.

And see the title "Returns."

92. *Cal.*—*Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621. *Ill.*—*Bell v. Dart*, 54 Ill. 526. *Ind.*—*Kittering v. Norville*, 39 Ind. 183; *Root v. Dill*, 38 Ind. 169. *Mich.*—*Brown v. Knop*, 137 Mich. 234, 100 N. W. 466, 101 N. W. 227 (*distinguishing Reed v. Parker*, 134 Mich. 68, 95 N. W. 979); *Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661.

See generally the title "Process."

[a] **Changing Date on Original.** The issuance of the second summons may consist in changing the dates upon the original. *McKey v. Lockner*, 43 App. Div. 43, 59 N. Y. Supp. 640.

[b] **Authority to issue additional summons depends upon a compliance**

with the law making it the duty of the constable to diligently and in good faith endeavor to make personal service. *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613.

[c] **An irregularity in the issuance of an alias summons is not a jurisdictional defect and cannot be taken advantage of collaterally.** *Dore v. Dougherty*, 72 Cal. 232, 13 Pac. 621.

93. *Searl v. Shanks*, 9 N. D. 204, 82 N. W. 734.

94. *Searl v. Shanks*, 9 N. D. 204, 82 N. W. 734.

95. *Ark.*—*Webster v. Daniel*, 47 Ark. 131, 14 S. W. 550; *McCabe v. Payne*, 37 Ark. 450. *Cal.*—*Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838. *Ill.*—*Garden City W. & S. Co. v. Kause*, 67 Ill. App. 108. *Ia.*—*Hewett v. Jensen*, 85 N. W. 16 (where the copy instead of the notice itself was read to the defendant); *Shea v. Quintin*, 30 Iowa 58. *Kan.*—*Stewart v. Bodley*, 46 Kan. 397, 26 Pac. 719, 26 Am. St. Rep. 105 (holding that service of defective summons renders the judgment voidable but not void); *Friend v. Green*, 43 Kan. 167, 23 Pac. 93. *La.*—*State v. Riley*, 43 La. 177, 8 So. 598. *Minn.*—*Martin v. Lindstrom*, 73 Minn. 121, 75 N. W. 1038. *Vt.*—*Ingraham v. Leland*, 19 Vt. 304; *June v. Conant*, 17 Vt. 656.

[a] **A default judgment (1) based on personal service of a defective summons is voidable but not void and cannot be attacked collaterally.** *Keybers v. McComber*, 67 Cal. 395, 7 Pac. 838. (2) The same is true where personal service is made less than the statutory time before return day. *Shea v. Quintin*, 30 Iowa 58.

[b] **Mere clerical errors (1) or irregularities in a summons (Elliott & Co.**

any appearance.⁹⁶ To take advantage of such defects the defendant must make a special appearance before the justice and raise the objection,⁹⁷ for if he appears generally the process becomes *functus officio*,⁹⁸ and all defects in the process, its service or in its return are waived.⁹⁹ But an acceptance of service does not amount to an appearance so as to waive defects.¹

8. Amendments.—Jurisdiction of the subject-matter and of the parties to a suit,² will warrant a justice of the peace in allowing amendments for the purpose of curing defects of process or service,³

v. Jordan, 7 Baxt. [Tenn.] 376. See also *Mabbett v. Vick*, 53 Wis. 158, 10 N. W. 84), (2) or return (*Evans v. Calman*, 92 Mich. 427, 52 N. W. 787, 31 Am. St. Rep. 606), will not invalidate the judgment.

96. Ill.—*Schofield v. Pope*, 104 Ill. 130. **Ia.**—*Milbourn v. Fouts*, 4 G. Gr. 346. **Mich.**—*Segar v. Muskegon S. & L. Co.*, 81 Mich. 344, 45 N. W. 982; *Adams v. Abram*, 38 Mich. 302. **N. Y.** *Willins v. Wheeler*, 28 Barb. 669, 8 Abb. Pr. 116, 17 How. Pr. 93; *Reno v. Pinder*, 24 Barb. 423.

97. Ia.—*Milbourn v. Fouts*, 4 G. Gr. 346. **Kan.**—*Shaw v. Rowland*, 32 Kan. 154, 4 Pac. 146. **Mich.**—*Allen v. Mills*, 26 Mich. 123. **N. H.**—*Nichols v. Smith*, 26 N. H. 298. **N. Y.**—*Waring v. McKinley*, 62 Barb. 612; *Lindsay v. Tansley*, 63 Hun 635, 18 N. Y. Supp. 317, 44 N. Y. St. 653; *Hoose v. Sherrill*, 16 Wend. 33; *Bromley v. Smith*, 2 Hill 517; *Hanlenbeck v. Gillies*, 2 Hilt. 238.

See *infra*, III, G, 2, and the titles "Appearances;" "Jurisdiction."

98. Higley v. Pollock, 21 Nev. 198, 27 Pac. 895.

99. See infra, III, G, 4, b.

1. Fulmer v. Kinney, 5 Pa. Co. Ct. 426, an acceptance of service is a substitute for actual service, nothing more or less. And see *Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024, holding an acceptance of service made without the county shows it to be made where the process has no legal force.

[a] But see *Benson v. Carrier*, 28 S. C. 119, 5 S. E. 272, under a statute authorizing service by written admission of the defendant, holding a written acceptance waives the omission of the name of the trial justice on the summons.

2. Me.—*Bragg v. Greenleaf*, 14 Me. 295. **Mass.**—*Hart v. Waitt*, 3 Allen 532; *McIniffe v. Wheelock*, 1 Gray

600; *Kimball v. Wilkins*, 2 Cush. 555. **Mich.**—*King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518. **N. Y.** *Arnold v. Maltby*, 4 Denio 498; *Hoffman v. Fish*, 18 Abb. Pr. 76; *McGill v. Weil*, 19 Civ. Proc. 43, 10 N. Y. Supp. 246; *Chadwick v. Navel*, 33 Misc. 683, 68 N. Y. Supp. 1110. **N. C.** *Baker v. Brem*, 126 N. C. 367, 35 S. E. 630.

[a] Amendments may be made to show but not to confer jurisdiction under statute. *Baker v. Brem*, 126 N. C. 367, 35 S. E. 630.

[b] A court which has not jurisdiction over the person of the defendant cannot amend its process by correcting the name of such defendant. *McGill v. Weil*, 19 Civ. Proc. 43, 10 N. Y. Supp. 246.

3. Ala.—*Parmer v. Ballard*, 3 Stew. 326. **Ga.**—*Telford v. Coggins*, 76 Ga. 683; *Woods v. Johnson*, 58 Ga. 138. **Ill.**—*Wadhams v. Hotchkiss*, 80 Ill. 437. **Mass.**—*Lapham v. Locke*, 103 Mass. 555; *Hart v. Waitt*, 3 Allen 532; *McIniffe v. Wheelock*, 1 Gray 600. **N. J.**—*Abrahams v. Jacoby*, 69 N. J. L. 178, 54 Atl. 525; *Drake v. Berry*, 42 N. J. L. 60. **N. Y.**—*Snyder v. Schram*, 59 How. Pr. 404; *Bradbury v. Van Nostrand*, 45 Barb. 194; *Arnold v. Maltby*, 4 Denio 498; *Brace v. Benson*, 10 Wend. 213. **N. C.**—*Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212; *Singer Mfg. Co. v. Barrett*, 95 N. C. 36. **Pa.**—*Lewis Lumber, etc. Co. v. Ruggles*, 2 Pa. Dist. 34. **S. C.**—*Pierce v. Varn, Byrd & Co.*, 76 S. C. 359, 57 S. E. 184. **W. Va.**—*Weimer v. Rector*, 43 W. Va. 735, 28 S. E. 761.

[a] **Amending by Giving Partners' Individual Names.**—A summons in justice court which contained a partnership name without showing the Christian name of each partner is not a nullity but is merely irregular and may be cured by amendment. *Morgridge v. Stoefer*, 14 N. D. 430, 104 N. W.

at any stage of the proceedings before final judgment,⁴ but amendments which would change the cause of action will not be allowed.⁵ The officer upon proper proof either by affidavit or otherwise will be allowed to amend his return to the summons to make it conform to the facts, at any time, either before or after judgment.⁶

G. APPEARANCES.⁷—1. **Necessity for.**—A defendant who has been served with summons must appear in answer thereto, and if he does not do so, the justice may enter default against him.⁸

2. **Nature and Kinds of Appearance.**—There must be something more than the mere presence of the defendant at the time and place of trial to constitute an appearance.⁹ There must be something in-

1112. See also *Red River Valley Cotton Co. v. J. W. Stalcup M. Co.*, 41 Okla. 34, 136 Pac. 1115.

[b] An omission to describe a justice of the peace as of the county for which he is elected, may be cured by amendment. *Drake v. Berry*, 42 N. J. L. 60.

4. *King v. Bates*, 80 Mich. 367, 45 N. W. 147, 20 Am. St. Rep. 518; *Foster v. Alden*, 21 Mich. 507. But see *Dolbear v. Hancock*, 19 Vt. 388.

5. Ala.—*Hallmark v. Hopper*, 119 Ala. 78, 24 So. 563, 72 Am. St. Rep. 900. Colo.—*Union Pac. D. & G. R. Co. v. Perkins*, 7 Colo. App. 184, 42 Pac. 1047. W. Va.—*Phillips v. Deveny*, 47 W. Va. 653, 35 S. E. 821.

[a] The statement of the same cause of action in a different form does not necessarily introduce a new form of action. *Central of Georgia Ry. Co. v. Crapps*, 4 Ga. App. 550, 61 S. E. 1126.

6. Ga.—*Freeman v. Carhart Bros. & Co.*, 17 Ga. 348. Ill.—*Dunn v. Rodgers*, 43 Ill. 260; *Morris v. Trustees of School*, 15 Ill. 266. Mo.—*Martin v. Castle*, 182 Mo. 216, 81 S. W. 426; *Turner v. K. C. St. J. & C. B. R. Co.*, 78 Mo. 578; *Kitchen v. Reinsky*, 42 Mo. 427; *Daniel v. Atkins*, 66 Mo. App. 342; *Fee v. Kansas City, Ft. S. & M. R. Co.*, 58 Mo. App. 90. Neb. *Wittstruck v. Temple*, 58 Neb. 16, 19, 78 N. W. 456; *Phoenix Ins. Co. v. King*, 52 Neb. 562, 565, 72 N. W. 855; *Shufeldt v. Barlass*, 33 Neb. 785, 51 N. W. 134. N. Y.—*Perry v. Tynen*, 22 Barb. 137. Wis.—*Bacon v. Bassett*, 19 Wis. 45.

See generally the title "Returns."

[a] Where actual service of a summons is made but the return does not show good service, it is proper to allow an amended return to be made.

Call v. Rocky Mountain Bell Tel. Co., 16 Idaho 551, 102 Pac. 146, 133 Am. St. Rep. 135. But see *Gardner v. Small*, 17 N. J. L. 162.

[b] Where the same person occupies a dual capacity as town marshal and special constable he will not be allowed to amend a return to a writ made by him as constable, to show that he made service as town marshal. *Mitchell v. Shaw*, 53 Mo. App. 652.

[c] A notice of motion served on a person neither attorney nor agent for the party defendant does not confer jurisdiction to amend the return. *Clark v. McGregor*, 55 Mich. 412, 21 N. W. 866.

7. See generally the title "Appearances."

8. Conn.—*Hollister v. Hollister*, 38 Conn. 178, 181. Ga.—Georgia, etc. R. Co. v. Sheppard, 3 Ga. App. 241, 59 S. E. 717; *Maddox v. Central of Georgia Ry. Co.*, 1 Ga. App. 46-57, 57 S. E. 1062. Md.—*Wagner v. Shank*, 59 Md. 313. N. Y.—*Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Armstrong v. Smith*, 44 Barb. 120, 126; *Cudner v. Dixon*, 10 Johns. 106.

As to entry of default, see *infra*, III, M, 5.

As to failure to appear at trial, see *infra*, III, L, 1, c, (I); III, M, 4 and 5.

9. Cal.—*Steinbach v. Leese*, 27 Cal. 295, holding that a defendant cannot appear in an action so as to give the court jurisdiction of his person except by answering, demurring or giving plaintiff written notice that he appears. Colo.—*Crary v. Barber*, 1 Colo. 172. Ind.—*Rhoades v. Delaney*, 50 Ind. 468. Ia.—*Holmes v. Hull*, 48 Iowa 177. Mass.—*Wright v. Andrews*, 130 Mass. 149, holding that the presence of a party as a witness in the case will not

diative of an intention to submit to the jurisdiction of the court, as where the party gives formal notice of his appearance, or takes part in the proceedings.¹⁰

Appearances in the justice's court may be of two kinds, general and special.¹¹ A special appearance is one made solely for the purpose of objecting to the jurisdiction of the court over the person so appearing,¹² while a voluntary appearance for any other purpose con-

stitute an appearance. **Minn.**—Higgins v. Beveridge, 35 Minn. 285, 28 N. W. 506. **Mo.**—Smith's Admr. v. Rollins, 25 Mo. 408. **Neb.**—Newlove v. Woodward, 9 Neb. 502, 4 N. W. 237. **Nev.**—Regan v. King, 156 Pac. 688. **Pa.**—Givens v. Miller, 62 Pa. 133. **Wash.**—McCoy v. Bell, 1 Wash. 504, 20 Pac. 595.

10. See cases in preceding notes.

11. See cases cited *infra*, this section, and the title "Appearances."

12. **Fla.**—Ray v. Trice, 48 Fla. 297, 37 So. 582; Dudley v. White, 44 Fla. 264, 31 So. 830; Oppenheimer v. Guck-enheimer, 34 Fla. 13, 15 So. 670. **Kan.**—Downing v. W. J. Gow & Bros. Mortg. Inv. Co., 53 Kan. 246, 36 Pac. 335; Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146. **Me.**—Flint v. Comly, 95 Me. 251, 49 Atl. 1044. **Mo.**—Smith v. Simpson, 80 Mo. 634. **N. Y.**—Stevens v. Benton, 39 How. Pr. 13. **Wash.**—Morris v. Healy Lumb. Co., 33 Wash. 451, 74 Pac. 662; Walters v. Field, 29 Wash. 558, 70 Pac. 66. **W. Va.**—State v. Thacker Coal & Coke Co., 49 W. Va. 140, 38 S. E. 539; Blankenship v. Kan-awha & M. Ry. Co., 43 W. Va. 135, 27 S. E. 355; Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

See *supra*, III, F, 7.

[a] Only questions relating to jur-isdiction can be considered, on special appearance. **U. S.**—National Furnace Co. v. Moline M. I. Works, 18 Fed. 863. **Cal.**—Olcese v. Justice's Court, 156 Cal. 82, 103 Pac. 317; *In re* Clarke, 125 Cal. 388, 58 Pac. 22. **Fla.**—Seaboard Air Line R. Co. v. Rentz & Little, 60 Fla. 429, 54 So. 13; Ray v. Trice, 48 Fla. 297, 37 So. 582. **Mich.**—Munroe v. Standish, 46 Mich. 12, 8 N. W. 571; McLean v. Isbell, 44 Mich. 129, 6 N. W. 210. **Ore.**—Kinkade v. Meyers, 17 Ore. 470, 21 Pac. 557. **S. C.**—Wideman v. Pruitt, 52 S. C. 84, 29 S. E. 405.

[b] An appearance (1) in a motion to quash service (Whittier v. Woods, 57 Ore. 432, 112 Pac. 408), (2) or in a motion to dismiss for insufficient

service (Downing v. W. J. Gow & Bros. Mortg. Inv. Co., 53 Kan. 246, 36 Pac. 335), is not a general appearance.

[c] Filing by mail a written motion to quash proceedings before a justice because the summons is not the one provided for a nonresident of the county, constitutes a special appearance. Nelson v. Hillen, 164 Mich. 507, 129 N. W. 717.

[d] An answer (1) for the purpose of raising the issue as to the justice's jurisdiction, which confines itself to facts relevant to that purpose, does not constitute a general appearance. Chesapeake, O. & S. W. R. Co. v. Heath's Admr., 87 Ky. 651, 9 S. W. 832; Ham-burger v. Baker, 35 Hun (N. Y.) 455. (2) But see Fairbanks & Co. v. Blum, 2 Tex. Civ. App. 479, 21 S. W. 1009, under a statute providing in substance that a defendant who files any de-fensive pleadings makes such an ap-pearance as gives the court jurisdiction over his person. Compare 2 STANDARD PROC. 492, 506, 510.

[e] An appearance after judgment by motion to set aside the judgment for want of service is not a general ap-pearance waiving defects in service, especially where there is no statute authorizing justices to set aside their judgments. Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146.

[f] An appearance on appeal from a justice's court for the purpose of moving to set aside the judgment is not such an appearance as will cure want of service. Lutes v. Perkins, 6 Mo. 57.

[g] Giving Notice of Appeal Where Not Required.—Where defendant ap-pears specially for the purpose of ob-jecting to the jurisdiction of the court only and upon the motion being denied gives notice in open court that he will appeal, such notice not being a neces-sary step in perfecting an appeal he does not enter a general appearance thereby. Haney v. De Long (Okla.), 159 Pac. 468.

stitutes a general appearance.¹³ The arrest of the defendant on a warrant issued by a justice and the bringing of him before such justice does not constitute a voluntary appearance,¹⁴ unless he thereafter does some voluntary act such as asking for a continuance.¹⁵ If an appearance is in effect general the fact that the party recites that he appears specially, will not change the character of the appearance.¹⁶ After a general appearance a special appearance cannot be entered unless the general appearance is withdrawn by leave of court,¹⁷ or the

13. Colo.—Paul v. Rocks, 16 Colo. App. 44, 63 Pac. 711. Del.—Davis v. Rees, 3 Harr. 490. Ind.—Kirkpatrick Const. Co. v. Central Elec. Co., 159 Ind. 639, 65 N. E. 913; Smith v. Jeffries, 25 Ind. 376; Cox v. Pruitt, 25 Ind. 90. Mich.—Waldron v. Palmer, 104 Mich. 556, 62 N. W. 731; Stevens v. Harris, 99 Mich. 230, 58 N. W. 230; Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. Mo.—Wencker v. Thompson's Admr., 96 Mo. App. 59, 69 S. W. 743. Mont.—Kleinschmidt v. Morse, 1 Mont. 100. Neb.—Dryfus v. Moline, M. & S. Co., 43 Neb. 233, 61 N. W. 599. Ore.—McAnish v. Grant, 44 Ore. 57, 74 Pac. 396. Utah.—McMillan v. Forsythe, 47 Utah 571, 154 Pac. 959. W. Va.—Blankenship v. Kanawha & M. Ry. Co., 43 W. Va. 135, 27 S. E. 355; Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123; Valley Bank v. Berkeley Bank, 3 W. Va. 386.

[a] An unqualified entry in a justice's docket "that the parties appeared" constitutes a general appearance. Fulton v. State, 103 Wis. 238, 79 N. W. 234; Lowe v. Stringham, 14 Wis. 241; Cron v. Krones, 17 Wis. 401.

[b] A voluntary appearance and motion to dissolve an attachment is a general appearance and will give a justice of the peace jurisdiction even though the defendant appear specially on the trial day and object to the jurisdiction. Carver v. Shelly & Co., 17 Kan. 472.

14. Mich.—Warren v. Crane, 50 Mich. 300, 15 N. W. 465; Matter of Stephenson, 32 Mich. 60; Brown v. Kelley, 20 Mich. 27. N. Y.—Ramsay v. Robinson, 86 Hun 511, 33 N. Y. Supp. 910, 67 N. Y. St. 685. Wis.—Brosde v. Sanderson, 86 Wis. 368, 57 N. W. 49.

15. Holz v. Rediske, 119 Wis. 563, 97 N. W. 162.

16. Cal.—*In re* Clarke, 125 Cal. 388, 58 Pac. 22; McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125. Colo.—Paul v.

Rocks, 16 Colo. App. 44, 63 Pac. 711. Fla.—Ray v. Trice, 48 Fla. 297, 37 So. 582; Scarlett v. Hicks, 13 Fla. 314. Ill.—Nicholes v. People *ex rel.* Kochersperger, 165 Ill. 502, 46 N. E. 237. Kan.—Thompson v. Pfeiffer, 66 Kan. 368, 71 Pac. 828. Mont.—State *ex rel.* Mackey v. District Court, 40 Mont. 359, 106 Pac. 1098, 135 Am. St. Rep. 622. Nev.—Bancroft v. Pike, 33 Nev. 53, 110 Pac. 1. N. C.—Grant v. Grant, 159 N. C. 528, 75 S. E. 734. S. D.—Rogers v. Penobscot Min. Co., 28 S. D. 72, 132 N. W. 792, Ann. Cas. 1914A, 1184. Va.—Norfolk & O. V. Ry. Co. v. Consolidated Turnpike Co., 111 Va. 131, 68 S. E. 346, Ann. Cas. 1912A, 239.

[a] An appearance to cross-examine witnesses, even though a general appearance is disclaimed, will confer jurisdiction. Rahn v. Greer, 37 Iowa 627.

17. U. S.—United States v. Armejo, 131 U. S. Appendix lxxxii, 18 L. ed. 247; Briggs v. Stroud, 58 Fed. 717. Fla.—Parkhurst v. Stone, 36 Fla. 456, 18 So. 594, holding that after a general appearance a defendant cannot limit or restrict such appearance in a plea subsequently filed. Ga.—Savannah F. & W. Ry. Co. v. Atkinson, 94 Ga. 780, 21 S. E. 1010. Idaho.—Willman v. Friedman, 4 Idaho 209, 299, 38 Pac. 937, 95 Am. St. Rep. 59. Ill.—Roberts v. Thomson, 28 Ill. 79. Ind.—Sargent v. Flaid, 90 Ind. 501. Kan.—Anglo-American Packing & P. Co. v. Turner Casing Co., 34 Kan. 340, 8 Pac. 403. Mich.—Lane v. Leach, 44 Mich. 163, 6 N. W. 228. N. Y.—Galt v. Provident Sav. Bank, 18 Abb. N. C. 431; Mack v. American Express Co., 20 Misc. 215, 45 N. Y. Supp. 362; Woodruff v. Austin, 16 Misc. 543, 38 N. Y. Supp. 787, 74 N. Y. St. 138. N. D.—Benoit v. Revoir, 8 N. D. 226, 77 N. W. 605. Wash.—Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497. W. Va.—State v. Thacker Coal & Coke Co., 49 W. Va. 140, 38 S. E. 539.

court allows the defendant to amend by limiting his general appearance to a special one.¹⁸

3. How Made.—a. *Generally.*—Parties in justices' courts may appear and act in person,¹⁹ or by attorney,²⁰ unless by law they are incompetent to do so, in which case provision is generally made for the appointment of a guardian ad litem.²¹

b. *By Attorney.*—Since justice's courts have no licensed attorneys as do courts of record, any person authorized by the party may act as his attorney,²² except the constable by whom the summons or jury process was served or such other persons as may be prohibited by statute.²³ If the authority of the attorney is not questioned, proof thereof need not be made,²⁴ as the opposing party is deemed to have admitted the authority and is held to have waived the right to object thereto.²⁵ Proof must be made, however, if the authority²⁶ is ques-

[a] But see *Nelson v. Campbell*, 1 Wash. 261, 24 Pac. 539, holding that where the defendant appeared and asked for a continuance which was granted that he was not estopped from raising an objection to the jurisdiction.

As to withdrawal of appearance; see *infra*, III, G, 5.

18. *United States v. Yates*, 6 How. (U. S.) 605, 12 L. ed. 575; *Hohorst v. Hamburg-American P. Co.*, 38 Fed. 273.

19. *Cal.*—*Steinbach v. Leese*, 27 Cal. 295. *Mich.*—*Talbot v. Kuhn*, 89 Mich. 30, 50 N. W. 791, 28 Am. St. Rep. 273. *N. Y.*—*Rogers v. McLean*, 31 Barb. 304.

20. *Talbot v. Kuhn*, 89 Mich. 30, 50 N. W. 791, 28 Am. St. Rep. 273. See *infra*, III, G, 3, b.

21. See generally the statutes and the title "Guardian ad Litem."

22. *Bowlsby v. Johnston*, 13 N. J. L. 349; *McWhorter v. Bloom*, 3 N. J. L. 545; *Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713; *Peck v. Hayes*, 14 Civ. Proc. 110, 3 N. Y. Supp. 836; *Hughes v. Mulvey*, 1 Sandf. (N. Y.) 92.

[a] The appearance (1) of such agent or attorney in fact is the appearance of the party. *Ia.*—*Rahn v. Greer*, 37 Iowa 627. *N. J.*—*Morgan v. Eldridge*, 3 N. J. L. 658. *N. Y.*—*Armstrong v. Craig*, 18 Barb. 387. (2) But see *Covart v. Haskins*, 39 Kan. 571, 18 Pac. 522, holding that where an attorney for the defendant appeared for the purpose of asking for a continuance because the defendant was absent, which continuance was refused and the attorney thereupon left

the court and the trial was proceeded with, that the defendant was "absent" within the meaning of the statute notwithstanding the action of his attorney.

[b] Parol authority is sufficient to authorize the appearance of an attorney for a party. *Murray v. House*, 11 Johns. (N. Y.) 464; *Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237; *Pixley v. Butts*, 2 Cow. (N. Y.) 421; *Tullock v. Cunningham*, 1 Cow. (N. Y.) 256; *Gaul v. Groat*, 1 Cow. (N. Y.) 113.

23. See generally the statutes and *Cal. Code Civ. Proc.*, §842; *Wilkinson v. Vorce*, 41 Barb. (N. Y.) 370.

24. *Hirsh v. Fisher*, 138 Mich. 95, 101 N. W. 48.

25. *Rickey v. Christie*, 40 Hun (N. Y.) 278; *Ackerman v. Finch*, 15 Wend. (N. Y.) 652; *Armstrong v. Craig*, 13 Barb. (N. Y.) 387; *Miller v. Larmon*, 38 How. Pr. (N. Y.) 417; *Roberts v. Burrell*, 3 Thomp. & C. (N. Y.) 30; *Sperry v. Reynolds*, 5 Lans. (N. Y.) 407; *Peck v. Hayes*, 14 Civ. Proc. 110, 3 N. Y. Supp. 836.

[a] By demanding a plea before considering an adjournment the party is not deemed to have waived the right to object to the attorney's want of authority. *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544.

26. *Clark v. McGregor*, 55 Mich. 412, 21 N. W. 866; *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544; *Woodbridge v. Robinson*, 49 Mich. 228, 13 N. W. 527; *Sperry v. Reynolds*, 65 N. Y. 179; *Miller v. Larmon*, 38 How. Pr. (N. Y.) 417; *Hirshfield v. Landman*, 3 E. D. Smith (N. Y.) 208; *Peck v.*

tioned, or, under some statutes, when the opposing party fails to appear.²⁷

Where a person enters an unauthorized appearance for a party, it has been held that the supposed principal is not precluded by the acts of such unauthorized agent.²⁸

4. Effect of Appearance.—a. *Generally.*—By a voluntary general appearance, a defendant submits himself to the jurisdiction of the court and thereby waives all objections going to jurisdiction over his person,²⁹ and the necessity for summons or notice and the service

Hayes, 14 Civ. Proc. 110, 3 N. Y. Supp. 836. See *Stoddard v. Holmes*, 1 Cow. (N. Y.) 245.

[a] **Authority may be proved** by the oath of the attorney or by other competent evidence. *Andrews v. Harrington*, 19 Barb. (N. Y.) 343; *Tullock v. Cunningham*, 1 Cow. (N. Y.) 256; *Hirshfield v. Landman*, 3 E. D. Smith (N. Y.) 208; *McMinn v. Richtmyer*, 3 Hill (N. Y.) 236 (holding that general authority to collect a note when shown to exist on the oath of the attorney implies authority to appear in a suit founded upon the note); *Syracuse Molding Co. v. Squires*, 61 Hun 48, 15 N. Y. Supp. 321, 21 Civ. Proc. 58, 39 N. Y. St. 824.

[b] **Where an officer of a corporation is present and testifies** at a trial, it will be proof of the authority of the person appearing as attorney even though he does not swear to his authority. *Crown Point Iron Co. v. Fitzgerald*, 47 Hun 638, 14 N. Y. St. 427.

[c] **Letters** (1) from a client with general direction to take such steps as may be necessary or advisable in the collection of a debt will establish an attorney's authority. *Bush v. Miller*, 13 Barb. (N. Y.) 481. (2) But a letter from a third person requesting the attorney to appear is not sufficient in the absence of proof that such third person had authority to make the request. *Westbrook v. Blood*, 50 Mich. 443, 15 N. W. 544.

[d] **Filing a verified complaint** in which he is set out as attorney for plaintiff is sufficient proof of authority to act as such. *Barnes v. Sutliff*, 24 Misc. 526, 53 N. Y. Supp. 974.

[e] **No one is a standing attorney for a party to a justice's judgment** and as such entitled to receive service of notice in relation thereto without special authorization. *Clark v. McGregor*, 55 Mich. 412, 21 N. W. 866.

[f] **A justice's judgment cannot be**

attacked collaterally upon the ground of failure to make proof of attorney's authority as required by the statute. *Reed v. Gage*, 33 Mich. 179.

27. *Churchill v. Goldsmith*, 64 Mich. 250, 31 N. W. 187; *Woodbridge v. Robinson*, 49 Mich. 228, 13 N. W. 527; *Seofield v. Cahoon*, 31 Mich. 206.

[a] **Statute Is Imperative.**—*Seofield v. Cahoon*, 31 Mich. 206.

28. *Miller v. Larmon*, 38 How. Pr. (N. Y.) 417; *Allen v. Stone*, 10 Barb. (N. Y.) 547, *overruling Denton v. Noyes*, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237.

[a] **Statement of Rule.**—In courts of record, attorneys are sworn officers of the court, and if the attorney who appears without authority is responsible the court will sometimes turn the party over to his action for damages or if the attorney is irresponsible the court will set aside the proceedings. As justice's courts are without the latter power, the party will not be held to be conclusively determined by the judgment obtained on such an appearance. *Miller v. Larmon*, 38 How. Pr. (N. Y.) 417. But see *Armstrong v. Craig*, 18 Barb. (N. Y.) 387; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561; *Meacham v. Dudley*, 6 Johns. (N. Y.) 514; *Denton v. Noyes*, 6 Johns. 296, 5 Am. Dec. 237; *Campbell v. Bristol*, 19 Wend. (N. Y.) 101; *Reinholdt v. Alberti*, 1 Binn. (Pa.) 469; *McCullough v. Guetner*, 1 Binn. (Pa.) 214, applying the rule obtaining in courts of record.

29. **Ark.**—*Wheeler & Wilson Mfg. Co. v. Donahoe*, 49 Ark. 318, 5 S. W. 342; *Sykes v. Laferry*, 25 Ark. 99. **Cal.**—*Hibernia Sav. & L. Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Holbrook v. Superior Court*, 106 Cal. 589, 39 Pac. 936; *Mahlstadt v. Blanc*, 34 Cal. 577; *Hayes v. Shattuck*, 21 Cal. 51. **Colo.**—*Paul v. Rocks*, 16 Colo. App.

thereof.³⁰ But he does not, by such act, waive questions relating to the jurisdiction of the court over the subject-matter of the action,³¹

44, 63 Pac. 711; *People v. Weiss-Chapman Drug Co.*, 10 Colo. App. 507, 51 Pac. 1010. **Ill.**—*Randolph v. Ralls*, 18 Ill. 31; *Nelson v. Rockwell*, 14 Ill. 375; *Rosenbleet v. Rosenbleet*, 122 Ill. App. 408; *Goode v. Illinois Trust & Sav. Bank*, 121 Ill. App. 161; *Jackson v. Sherman House Hotel Co.*, 120 Ill. App. 507; *Dickerson v. Johnson*, 119 Ill. App. 325; *Franklin Life Ins. Co. v. Hickson*, 97 Ill. App. 387. **Ind.**—*Day v. Henry*, 104 Ind. 324, 4 N. E. 44; *Vanschoiack v. Farrow*, 25 Ind. 310. **Me.**—*Webb v. Goddard*, 46 Me. 505; *Maine Bank v. Herbey*, 21 Me. 38. **Mich.**—*Marr v. Cook*, 147 Mich. 425, 111 N. W. 116; *Ramsby v. Bigler*, 129 Mich. 570, 89 N. W. 344; *Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230; *Olson v. Muskegon Circ. Judge*, 49 Mich. 85, 13 N. W. 369; *Gott v. Brigham*, 41 Mich. 227, 2 N. W. 5; *Grand Rapids, etc. R. Co. v. Gray*, 38 Mich. 461. **Minn.**—*Anderson v. Hanson*, 28 Minn. 400, 10 N. W. 429, *overruling* *Rahilly v. Lane*, 15 Minn. 447. **Mo.**—*Bohn v. Devlin*, 28 Mo. 319; *Bonney v. Baldwin*, 3 Mo. 49; *Miller-Arthur Drug Co. v. Curtis* (Mo. App.), 67 S. W. 712; *Abington v. Steinberg*, 86 Mo. App. 639; *Livingston v. Allen*, 80 Mo. App. 521; *State v. Hopper*, 72 Mo. App. 171; *Ashby v. Holmes*, 68 Mo. App. 23; *Rechnitzer v. Missouri, etc. R. Co.*, 60 Mo. App. 409. **Neb.**—*Dryfus v. Moline, Milburn & Stoddard Co.*, 43 Neb. 233, 61 N. W. 599; *Leake v. Gallogly*, 34 Neb. 857, 52 N. W. 824. **N. Y.**—*Allen v. Edwards*, 3 Hill 499; *Wright v. Jeffrey*, 5 Cow. 15 (holding that a general appearance waives the defect of a summons returnable on Sunday); *Stevens v. Benton*, 2 Lans. 156; *Burkle v. Eckhart*, 3 Const. 132; *Paulding v. Hudson Mfg. Co.*, 3 Code Rep. 223; *Rowe v. Heiber*, 30 App. Div. 173, 51 N. Y. Supp. 889; *Wilkinson v. New York City R. Co.*, 50 Misc. 652, 99 N. Y. Supp. 380; *Behan v. Phelps*, 27 Misc. 718, 59 N. Y. Supp. 713. **N. D.**—*Deering & Co. v. Venne*, 7 N. D. 576, 75 N. W. 926. **Ohio.**—*Pittsburgh, etc. R. Co. v. Flemming*, 30 Ohio St. 480; *Miller v. Creighton*, 7 Ohio Dec. (Reprint) 602. **Okla.**—*Kennedy v. Pulliam*, 158 Pac. 1140. **Ore.**—*McAnish v. Grant*, 44 Ore. 57, 74 Pac. 396; *Kinkade v. Myers*, 17 Ore.

470, 21 Pac. 557. **Pa.**—*Daley v. Iselin*, 212 Pa. 279, 61 Atl. 919. **S. C.**—*Bird v. Sullivan*, 58 S. C. 50, 36 S. E. 494. **Utah.**—*State ex rel. Neilson v. Third Judicial Dist. Court*, 36 Utah 223, 102 Pac. 868; *Kuhn v. Mount*, 13 Utah 108, 44 Pac. 1036. **Wis.**—*Brosde v. Sanderson*, 86 Wis. 368, 57 N. W. 49. **Wyo.**—*Pointer v. Jones*, 15 Wyo. 1, 85 Pac. 1050.

See generally the title "Appearances."

[a] Appearance must be voluntary to operate as a waiver. *Holz v. Rediske*, 119 Wis. 563, 97 N. W. 162.

[b] A plea of general issue in an action before a justice's court waives only such jurisdictional defects as appear on the face of the declaration. *Segar v. Muskegon Shingle & L. Co.*, 81 Mich. 344, 45 N. W. 982.

[c] A party by taking an appeal from a judgment of a justice of the peace waives all questions of jurisdiction of the person, as this amounts to a general appearance. *Union Pac. R. Co. v. Wolfe*, 26 Colo. App. 567, 144 Pac. 330.

30. **U. S.**—*Pollard v. Dwight*, 4 Cranch 421, 2 L. ed. 666; *Picquet v. Swan*, 5 Mason 35, 48, 19 Fed. Cas. No. 11,134. **Ark.**—*Jester v. Hopper*, 13 Ark. 43. *Compare* *Woolford v. Howell*, 2 Ark. 1. **Colo.**—*Paul v. Rooks*, 16 Colo. App. 44, 63 Pac. 711. **Ga.**—*Western & A. R. R. Co. v. Pitts*, 79 Ga. 532, 4 S. E. 921. **Ill.**—*Reynolds v. Foster*, 89 Ill. 257; *Wasson v. Cone*, 86 Ill. 46; *Hohmann v. Eiterman*, 83 Ill. 92; *Bliss v. Harris*, 70 Ill. 343; *Fink v. Disbrow*, 69 Ill. 76; *Egbert v. Morrison*, 163 Ill. App. 484; *McMurray v. Thede*, 86 Ill. App. 555; *Whitehead v. Jones*, 71 Ill. App. 219; *Udell v. Slocum*, 56 Ill. App. 216. **Ind.**—*Smith v. Emerson*, 16 Ind. 355; *Fletcher v. Barton*, 58 Ind. App. 233, 108 N. E. 137. **Ia.**—*Acres v. Hancock*, 4 Iowa 568. **Mass.**—*Lawrence v. Bassett*, 5 Allen 140. **Mo.**—*Bonney v. Baldwin*, 3 Mo. 49; *State v. Boettger*, 39 Mo. App. 684. **N. Y.**—*Conway v. Hitchins*, 9 Barb. 378; *Malone v. Clark*, 2 Hill 657. **S. D.**—*Jewett v. Sundback*, 5 S. D. 111, 58 N. W. 20. **Wis.**—*Heeron v. Beckwith*, 1 Wis. 17.

31. **U. S.**—*Daily v. Doe*, 3 Fed. 903; *The G. H. Montague*, 4 Blatchf. 461,

nor will his appearance give validity to a collateral proceeding in garnishment, if the latter would otherwise be void because of the defects.³² A special appearance, on the other hand, for the purpose of objecting to the jurisdiction of the court over the defendant, does not confer jurisdiction over the defendant.³³ The courts are not in accord as to whether the lack of jurisdiction is waived by pleading to the merits after the overruling of an objection properly made by special appearance, some holding that it is,³⁴ and others that it is not waived.³⁵

10 Fed. Cas. No. 5,377. **Ala.**—*De Jarnette v. Dreyfus*, 166 Ala. 138, 51 So. 932. **Cal.**—*Arroyo D. & W. Co. v. Superior Court*, 92 Cal. 47, 28 Pac. 54, 27 Am. St. Rep. 91, holding that where the case was such as could not be transferred from a justice to a superior court it was not waived by going to trial after the objection was overruled. **Conn.**—*Perkins v. Perkins*, 7 Conn. 558, 18 Am. Dec. 120, holding that appearance in a case in the appellate court in a case not appealable will not confer jurisdiction. **Del.**—*Breeding v. Adams*, 2 Marv. 378, 43 Atl. 251. **Ia.**—*Hynds v. Fay*, 70 Iowa 433, 30 N. W. 683; *McMeans v. Cameron*, 51 Iowa 691, 49 N. W. 856; *Boyer v. Moore*, 42 Iowa 544; *Chapman v. Morgan*, 2 G. Gr. 374. **Minn.**—*Rahilly v. Lane*, 15 Minn. 447; *Larrabee v. Morrison*, 15 Minn. 196. **Mo.**—*Abernathy v. Moore*, 83 Mo. 65; *Fields v. Maloney*, 78 Mo. 172; *Stone v. Corbett*, 20 Mo. 350; *Grant v. Stubblefield*, 138 Mo. App. 555, 120 S. W. 647; *White v. Missouri, K. & T. Ry. Co.*, 72 Mo. App. 400. **N. J.**—*Gould v. Brown*, 9 N. J. L. 165; *Leary v. Van Dyke*, 2 N. J. L. 370. **N. Y.**—*Dudley v. Mayhew*, 3 N. Y. 9. **N. C.**—*Leathers v. Morris*, 101 N. C. 184, 7 S. E. 783; *McMinn v. Hamilton*, 77 N. C. 300. **S. D.**—*Benedict v. Johnson*, 4 S. D. 387, 57 N. W. 66. **W. Va.**—*Layne v. Ohio River R. Co.*, 35 W. Va. 438, 14 S. E. 123. **Wis.**—*Griswold v. Nichols*, 111 Wis. 344, 87 N. W. 300; *Detroit Safe Co. v. Kelly*, 78 Wis. 134, 47 N. W. 187.

[a] **Excessive Amount in Controversy.**—(1) An appearance will not confer jurisdiction over an action involving a claim in excess of the justice's jurisdiction (*Hynds v. Fay*, 70 Iowa 433, 30 N. W. 683. See the title "Jurisdiction"), (2) unless the excess is relinquished. *Mahry v. Little*, 19 Tex. 337. (3) If under attachment proceedings in excess of a justice's

jurisdiction the defendant appears and answers to the merits, the attachment will be quashed and the rest of the proceedings will be allowed to stand. *Fair v. Hamlin*, 9 Pa. Co. Ct. 8.

32. *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613. And see *Michels v. Stork*, 44 Mich. 2, 5 N. W. 1034, holding that a general appearance before a justice cannot be considered a submission to jurisdiction in attachment when taken in connection with defendant's motion to dismiss the writ for want of proper service.

33. **Ill.**—*McNab v. Bennett*, 66 Ill. 157; *Sinsabaugh v. Dun*, 114 Ill. App. 523. **Kan.**—*Downing v. W. J. Gow & Bros. Mortg. Inv. Co.*, 53 Kan. 246, 36 Pac. 335; *Shaw v. Rowland*, 32 Kan. 154, 4 Pac. 146. **Me.**—*Maine Bank v. Hervey*, 21 Me. 38. **Mass.**—*Blake v. Jones*, 7 Mass. 28. **Mich.**—*McLean v. Isbell*, 44 Mich. 129, 6 N. W. 210. **Minn.**—*Higgins v. Beveridge*, 35 Minn. 285, 28 N. W. 506.

34. *Dailey v. Kennedy*, 64 Mich. 208, 31 N. W. 125, 7 West. Rep. 467; *Grand Rapids, etc. R. Co. v. Grav*, 38 Mich. 461; *Hart v. Blake*, 31 Mich. 278; *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251. See 2 STANDARD PROC. 534.

[a] Where without saving exceptions to the overruling of the motion to dismiss, the party appears generally, he submits to the jurisdiction of the court. *Chandler v. Hill*, 13 S. D. 176, 82 N. W. 397. Compare *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251, holding that by moving for a change of venue after overruling an objection made on special appearance, the party waives the benefit of the special appearance, although he saved an exception.

35. **U. S.**—*Harkness v. Hyde*, 98 U. S. 476, 25 L. ed. 237. **Ky.**—*Chesapeake, O. & S. W. R. Co. v. Heath's Admr.*,

b. *As a Waiver of Defects in Process and Service.*—Although a special appearance does not,³⁶ the entry of a general appearance operates as a waiver of all defects in the process or notice,³⁷ or in service of the same and the return thereon.³⁸ This is the case when the

87 Ky. 651, 9 S. W. 832. **Minn.**—Perkins v. Mellicke, 66 Minn. 409, 69 N. W. 220. **N. Y.**—Dewey v. Greene, 4 Denio 93; Wheeler v. Lampman, 14 Johns. 481; Shannon v. Comstock, 21 Wend. 457, 34 Am. Dec. 262; Avery v. Slack, 17 Wend. 95. **Wash.**—Knoff v. Puget Sound Co-op. Colony, 1 Wash. 57, 24 Pac. 27.

See 2 STANDARD PROC. 533.

36. Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146; Perkins v. Mellicke, 66 Minn. 409, 69 N. W. 220.

[a] A special appearance for the purpose of setting aside a judgment on account of no service does not waive defect. Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146.

37. **Colo.**—Downing v. Tipton, 48 Colo. 364, 110 Pac. 70; School Dist. No. 38 v. Waters, 20 Colo. App. 106, 77 Pac. 255. **Del.**—Bishop v. Carpenter, 1 Houst. 526. **Ill.**—McManus v. McDonough, 107 Ill. 95; Wasson v. Cone, 86 Ill. 46; Bliss v. Harris, 70 Ill. 343; Rosenberg v. Barrett, 2 Ill. App. 386. **Ind.**—Sargent v. Flaid, 90 Ind. 501; Smith v. Emerson, 16 Ind. 355; Dudley v. Fisher, 7 Blackf. 553; Vermilya v. Davis, 7 Blackf. 158; Rittenour v. McCausland, 5 Blackf. 540; Swift v. Woods, 5 Blackf. 97; Wibright v. Wise, 4 Blackf. 137. **Ia.**—Hedinger v. Silsbee, 2 G. Gr. 363. **Kan.**—Ames v. Freeman, 83 Kan. 585, 112 Pac. 160. **Mass.**—Cahoon v. Harlow, 7 Allen 151; Briggs v. Humphrey, 1 Allen 371. **Mich.**—Dailey v. Kennedy, 64 Mich. 208, 31 N. W. 125, 7 West. Rep. 467; Manhard v. Schott, 37 Mich. 234. **Miss.**—Armitage v. Rector Ratliff & Co., 62 Miss. 600. **Mo.**—Boulware v. Chicago & A. R. Co., 79 Mo. 494; Peters v. St. Louis, etc. R. Co., 59 Mo. 406; Griffen v. Van Meter, 53 Mo. 430. But see Williams v. Bower, 26 Mo. 601, which, however, was decided under a statute. **Mont.**—Shilling v. Reagan, 19 Mont. 508, 48 Pac. 1109. **Nev.**—Sweeney v. Schultes, 19 Nev. 53, 6 Pac. 44, 8 Pac. 768; Armstrong v. Paul, 1 Nev. 134. **N. J.**—Palmer v. Sanders, 51 N. J. L. 408, 17 Atl. 1084; Drake v. Berry, 42 N. J. L. 60; Foulkes v. Young, 21 N. J. L. 438. **N. Y.**

Clapp v. Graves, 26 N. Y. 418; Andrews v. Thorp, 1 E. D. Smith 615; Day v. Wilber, 2 Caines 134, **Colem.** & C. Cas. 381; Heilner v. Barras, 3 Code Rep. 17. **N. D.**—Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926. **Pa.**—Weidenhamer v. Bertle, 103 Pa. 448; Stroup v. McClure, 4 Yeates 523; Gallagher v. McLean, 7 Pa. Super. 408; Temple v. Myers, 16 Pa. Co. Ct. 232; Kaier v. Leahy, 15 Pa. Co. Ct. 243; Myers v. Stauffer, 5 Pa. Co. Ct. 657; Shannon v. Madden, 1 Phila. 254; Adams v. Com., 1 Woodw. 417. **S. C.**—Baker v. Irvine, 62 S. C. 293, 40 S. E. 672; Rosamond v. Earle, 46 S. C. 9, 24 S. E. 44; Benson v. Carrier, 28 S. C. 119, 5 S. E. 272. **Tex.**—Hillsman v. Cline (Tex. Civ. App.), 145 S. W. 726. **Wash.**—Baxter v. Seoland, 2 Wash. Ter. 86, 3 Pac. 638. **W. Va.**—Blair v. Henderson, 49 W. Va. 282, 38 S. E. 552; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Blankenship v. Kanawha & M. Ry. Co., 43 W. Va. 135, 27 S. E. 355; Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123. **Wis.**—Fairfield v. Madison Mfg. Co., 38 Wis. 346.

[a] However defective the summons may be, the justice has complete jurisdiction over the defendant when he appears and proceeds to trial. Schofield v. Pope, 104 Ill. 130.

[b] Appearance Cures Defect in Issuing a Capias Instead of Summons. Ewbanks v. Ashley, 36 Ill. 177.

38. **Colo.**—Colorado Cent. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542. **Ill.**—Reynolds v. Foster, 89 Ill. 257. **Ia.**—Church v. Crossman, 49 Iowa 444. **Kan.**—Shaw v. Rowland, 32 Kan. 154, 4 Pac. 146. **Ky.**—Forsythe v. Huey, 25 Ky. L. Rep. 147, 74 S. W. 1088. **Mass.**—Briggs v. Humphrey, 1 Allen 371; Loomis v. Wadhams, 8 Gray 557; Carlisle v. Weston, 21 Pick. 535. **Mich.**—Fisher v. Hardwood Mfg. Co., 120 Mich. 490, 79 N. W. 693; Waldron v. Palmer, 104 Mich. 556, 62 N. W. 731; Olson v. Muskegon Circ. Judge, 49 Mich. 85, 13 N. W. 369. **Minn.**—Steinhart v. Pitcher, 20 Minn. 102; Tyrrell v. Jones, 18 Minn. 312, in this case the appearance was special for

defendant demurs or otherwise attacks the sufficiency of the complaint or declaration,³⁹ where he obtains or consents to a continuance,⁴⁰ where he pleads in bar of the action,⁴¹ or to the merits and goes to trial,⁴² or where he appeals from the judgment.⁴³

the purpose of objecting to the jurisdiction on other grounds, but the court held that the defect in service was waived as the question was not raised before the justice. **Mo.**—Fitterling v. Missouri Pac. Ry. Co., 79 Mo. 504; Gant v. Chicago, etc. R. Co., 79 Mo. 502; Hendrickson v. Trenton Nat. Bank, 81 Mo. App. 332. **Neb.**—Keely Institute v. Riggs, 5 Neb. (Unof.) 612, 99 N. W. 833. **Nev.**—Baneroft v. Pike, 33 Nev. 53, 110 Pac. 1. **N. Y.**—Grafton v. Brigham, 70 Hun 131, 24 N. Y. Supp. 54, 54 N. Y. St. 103; Behan v. Phelps, 27 Misc. 718, 59 N. Y. Supp. 713. **N. C.**—Johnson v. Reformers, 135 N. C. 385, 47 S. E. 463. **N. D.**—Deering & Co. v. Venne, 7 N. D. 576, 75 N. W. 926. **Ohio.**—Shafer v. Hockheimer & Son, 36 Ohio St. 215; Russell v. Giles, 31 Ohio St. 293; Godfred v. Godfred, 30 Ohio St. 53. **Pa.**—Rickets v. Goldstein, 24 Pa. Co. Ct. 1; Brensinger v. Eachus, 8 Del. Co. 457. **Tex.**—Hillsman v. Cline (Tex. Civ. App.), 145 S. W. 726. **W. Va.**—Chesapeake & O. Ry. Co. v. Wright, 50 W. Va. 653, 41 S. E. 147; Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123. **Wis.**—Griswold v. Nichols, 111 Wis. 344, 87 N. W. 300; Fairfield v. Madison Mfg. Co., 38 Wis. 346; Krueger v. Pierce, 37 Wis. 269; Lowe v. Stringham, 14 Wis. 222; Heeron v. Beckwith, 1 Wis. 17.

39. McDonald v. Agnew, 122 Cal. 448, 55 Pac. 125; Stevens v. Harris, 99 Mich. 230, 58 N. W. 230.

40. **Ark.**—Jester v. Hopper, 13 Ark. 43. **Ind.**—Kirkpatrick Const. Co. v. Central Electric Co., 159 Ind. 639, 65 N. E. 913; Smith v. Jeffries, 25 Ind. 376; Cox v. Pruitt, 25 Ind. 90; Michigan S. & N. I. R. Co. v. Shannon, 13 Ind. 171; Thayer v. Dove, 8 Blackf. 567. **Me.**—Otis v. Ellis, 78 Me. 75, 2 Atl. 851. **Mich.**—Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017. **Mo.**—Bohn v. Devlin, 28 Mo. 319. **S. C.**—Hill v. Garrett, 83 S. C. 572, 65 S. E. 821. **Tex.**—Chance v. Pace (Tex. Civ. App.), 151 S. W. 843. **W. Va.**—Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

But see Uihlein v. Gladieux, 74 Ohio

St. 232, 78 N. E. 363; Nelson v. Campbell, 1 Wash. 261, 24 Pac. 539.

41. **Dudley v. Fisher**, 7 Blackf. (Ind.) 553; Rittenour v. McCausland, 5 Blackf. (Ind.) 540; Wibright v. Wise, 4 Blackf. (Ind.) 137; Early v. Patterson, 4 Blackf. (Ind.) 449.

42. **Ala.**—Hamner v. Holman, 116 Ala. 368, 22 So. 286. **Colo.**—Lyman v. Schwartz, 13 Colo. App. 318, 57 Pac. 735; People v. Weiss-Chapman Drug Co., 10 Colo. App. 507, 51 Pac. 1010. **Ia.**—Houston v. Walcott, 1 Iowa 86. **Mich.**—Slattery v. Hilliker, 39 Mich. 573. **Minn.**—McKee v. Metrau, 31 Minn. 429, 18 N. W. 148. **Mo.**—Kronski v. Missouri Pac. R. Co., 77 Mo. 362. **Mont.**—Shilling v. Reagan, 19 Mont. 508, 48 Pac. 1109. **N. Y.**—Bray v. Andreas, 1 E. D. Smith 387; Leggett v. Raymond, 6 Hill 639. *Compare* Belden v. New York & H. R. Co., 15 How. Pr. 17, holding where the defendant seasonably raises the jurisdictional objection that he does not waive the objection by appearing and pleading after the objection is overruled. **N. C.**—Cherry v. Lilly, 113 N. C. 26, 18 S. E. 76. **Tex.**—Hillsman v. Cline (Tex. Civ. App.), 145 S. W. 726; Fulton v. Thomas & Co., 2 Wills. Civ. Cas., §243. **Utah.**—Kuhn v. Mount, 13 Utah 108, 44 Pac. 1036. **Vt.**—University of Vermont v. Joslyn, 21 Vt. 52. **W. Va.**—Chesapeake & O. Ry. Co. v. Wright, 50 W. Va. 653, 41 S. E. 147; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Blankenship v. Kanawha & M. Ry. Co., 43 W. Va. 135, 27 S. E. 355; Layne v. Ohio River R. Co., 35 W. Va. 438, 14 S. E. 123.

43. **Ark.**—German Inv. Co. v. Westbrook, 101 Ark. 124, 141 S. W. 510; Kansas City, etc. R. Co. v. Summers, 45 Ark. 295. **Colo.**—Colorado Cent. R. Co. v. Caldwell, 11 Colo. 545, 19 Pac. 542; Deitz v. Central, 1 Colo. 323; Paul v. Rooks, 16 Colo. App. 44, 63 Pac. 711. **Ga.**—Talbot v. Collier, 102 Ga. 550, 28 S. E. 225. **Ill.**—Roberts v. Formballs, 46 Ill. 66; Olsen v. Stark, 94 Ill. App. 556; Hatterman v. Thompson, 83 Ill. App. 217; Willerton v. Shoemaker, 60 Ill. App. 126. **Ind.**—Toledo & W. Ry. Co. v. Talbert, 23 Ind. 438; Balti-

c. *As Waiver of Objections as to Venue*.—This matter is discussed elsewhere in this article.⁴⁴

5. Withdrawal of Appearance.—Where a justice of the peace has acquired jurisdiction over the person of the defendant by his appearance, a withdrawal of his appearance by the defendant will not defeat the jurisdiction of the court unless made by leave of court,⁴⁵ which must first be obtained by proper application to the court,⁴⁶ on notice to the plaintiff or his attorney.⁴⁷ A withdrawal will usually be granted where the appearance has been entered through fraud or mistake,⁴⁸ or where it is unauthorized.⁴⁹ If the justice at the request of an appearing attorney erases his appearance from the docket, he cannot then proceed to try or determine the case without notice to the party or such attorney.⁵⁰

H. ARREST AND BAIL.⁵¹—The statutes of some states provide for procuring the appearance of the defendant by warrant of arrest under certain circumstances set forth in the several statutes,⁵² which must be shown to exist by oath or affidavit.⁵³ The warrant of arrest must

more & O. R. Co. v. Tess, 2 Ind. App. 507, 28 N. E. 721. **Kan.**—Haas v. Lees, 18 Kan. 449. **Mass.**—Briggs v. Humphrey, 1 Allen 371. **Minn.**—Seurer v. Horst, 31 Minn. 479, 18 N. W. 283. **Mo.**—Witting v. St. Louis, & S. F. R. Co., 101 Mo. 631, 14 S. W. 743, 20 Am. St. Rep. 636, 10 L. R. A. 602; Wencker v. Thompson's Admr., 96 Mo. App. 59, 69 S. W. 743. **Mont.**—Shilling v. Reagan, 19 Mont. 508, 48 Pac. 1109; Gage v. Maryatt, 9 Mont. 263, 23 Pac. 337. **Neb.**—Dean v. Kinman, 15 Neb. 492, 20 N. W. 112. **N. D.**—Lyons v. Miller, 2 N. D. 1, 48 N. W. 514. **Pa.**—Sillely v. Burt, 21 Pa. Super. 618.

44. See *supra*, III, D, 2, a; III, D, 2, b, (I), (H).

45. **Mich.**—Stevens v. Harris, 99 Mich. 230, 58 N. W. 230. **Mo.**—State v. Hopper, 72 Mo. App. 171. **Ore.**—White v. Thompson, 3 Ore. 115.

[a] **Jurisdiction when once conferred cannot be withdrawn** by the act of the party without the consent of the court or of the prosecuting party, but a special application must be made to the court and the leave obtained before the appearance can be withdrawn. *Dana v. Adams*, 13 Ill. 691.

[b] **A withdrawal of a pleading is not a withdrawal of appearance.** *Stevens v. Harris*, 99 Mich. 230, 58 N. W. 230.

46. **U. S.**—*United States v. Armejo*, 131 U. S. Appendix lxxxii, 18 L. ed. 247; *In re Ulrich*, 3 Ben. 355, 24 Fed. Cas. No. 14,327. **Ill.**—*Dana v. Adams*, 13 Ill. 691. **N. Y.**—*Galt v. Provident*

Sav. Bank, 18 Abb. N. C. 431. **Pa.**—*Daley v. Iselin*, 212 Pa. 279, 61 Atl. 919.

47. *Daley v. Iselin*, 212 Pa. 279, 61 Atl. 919.

48. **Cal.**—*Forbes v. Hyde*, 31 Cal. 342. **Ill.**—*Dana v. Adams*, 13 Ill. 691. **Mass.**—*Tilden v. Johnson*, 6 Cush. 354. **Minn.**—*Allen v. Coates*, 29 Minn. 46, 11 N. W. 132. **N. Y.**—*Hunt v. Brennan*, 1 Hun 213.

49. *Dillingham v. Barron*, 6 Misc. 600, 26 N. Y. Supp. 1109, 57 N. Y. St. 870.

50. *King v. McKenzie*, 51 Mich. 461, 16 N. W. 813.

51. See generally the title "**Arrest in Civil Cases.**"

52. See generally the statutes, and *Britton v. State*, 54 Ind. 535; *McFarlan v. McJinsey*, 6 Blackf. (Ind.) 85; *Dearborn v. Kent*, 14 Wend. (N. Y.) 183; *Reed v. Gillet*, 12 Johns. (N. Y.) 296.

53. *Whitney v. Shufelt*, 1 Denio (N. Y.) 592; *Bissell v. Hills*, 3 Wend. (N. Y.) 389 (holding that the oath of a party applying for a warrant is proof within the meaning of the statute whereon the necessity and propriety of issuing a warrant may be determined); *Gold v. Bissell*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; *Van Steenberg v. Kortz*, 10 Johns. (N. Y.) 167; *Brown v. Hinchman*, 9 Johns. (N. Y.) 75, holding that a justice cannot issue a warrant against a freeholder on the oath of the plaintiff, but proof of the defendant's being about to depart must be by other and legal evidence. See

contain the names of the parties,⁵⁴ a statement of a cause of action within the jurisdiction of the justice,⁵⁵ and if founded on a penal statute a reference to such statute,⁵⁶ and it must direct the officer to take the defendant and forthwith bring him before the justice.⁵⁷ It is not necessary that a warrant issuing from a justice of the peace should bear a seal.⁵⁸ The warrant may be served by any indifferent person specially deputized for such purpose.⁵⁹ The defendant is entitled to be discharged upon giving a sufficient bond,⁶⁰ where the warrant is vacated upon showing the nonexistence of the grounds on which it issued,⁶¹ or where, after issuance of the order of arrest, the time of payment is extended.⁶²

I. ATTACHMENT. — 1. Generally.⁶³ — Although under some statutes a writ of attachment is an extraordinary process for the commencement of actions,⁶⁴ generally attachment is a provisional remedy ancillary to the action in which it is sued out.⁶⁵

also *McFarlan v. McJinsey*, 6 Blackf. (Ind.) 85; *Walker v. Cruikshank*, 2 Hill (N. Y.) 296; *Linnell v. Sutherland*, 11 Wend. (N. Y.) 568.

54. *Duffy v. Averitt*, 27 N. C. 455; *Hamilton v. Jervis*, 19 N. C. 227.

[a] **Where Issued in Firm Name.** No objection can be taken to a warrant issued by a justice of the peace in the firm name of the plaintiffs, and on appeal the names may be recited at length in the statement or declaration. *Snow & Co. v. Ray*, 2 Ala. 344.

55. *Emmit v. McMillan*, 35 N. C. 7; *Duffy v. Averitt*, 27 N. C. 455; *Hamilton v. Jervis*, 19 N. C. 227; *Hamilton v. McCarty*, 18 N. C. 226.

56. *Duffy v. Averitt*, 27 N. C. 455; *State v. Muse*, 20 N. C. 319; *Buncombe Tpk. Co. v. McCarson*, 18 N. C. 306.

[a] **Use of Criminal Warrant.** Where a party is proceeded against for a forfeiture of a penal statute which is enforceable only by civil action, the fact that the form of warrant in criminal cases is used will not deprive the justice of jurisdiction. *Carter v. Dow*, 16 Wis. 298, 317.

57. *Colvin v. Luther*, 9 Cow. (N. Y.) 61.

[a] **Cannot Confine in Jail.**—Where an order of arrest commands an officer to arrest the debtor and take him forthwith before the justice the officer is not justified in arresting and confining him in jail, even though the debtor is intoxicated at the time of arrest. *Hynes v. Jungren*, 8 Kan. 391.

[b] **When the justice is outside his jurisdiction at the time of the debtor's arrest it is proper for the officer not**

to comply with the request of the defendant to be taken before the justice forthwith as the justice could not act outside of his jurisdiction. Under such circumstances the officer would be justified in committing the prisoner to jail for safe keeping. *Whitcomb's Admr. v. Cook*, 38 Vt. 477.

[c] **In North Carolina** a warrant in a civil case need not on its face be returnable on any certain day or at any certain place but only within thirty days. *Duffy v. Averitt*, 27 N. C. 455.

58. *Parker v. Gilreath*, 29 N. C. 400; *Duffy v. Averitt*, 27 N. C. 455.

59. *Kelsey v. Parmelee*, 15 Conn. 260; *Britton v. State*, 54 Ind. 535, 540.

60. *Wass v. Bartlett*, 10 Gray (Mass.) 490; *Richards v. Porter*, 7 Johns. (N. Y.) 137.

61. **Kan.**—*Cross Shoe Mfg. Co. v. Gardner*, 1 Kan. App. 570, 42 Pac. 266.

N. H.—*Barker v. Warren*, 46 N. H. 124.

N. Y.—*Mott v. Jerome*, 7 Cow. 518; *Torrey v. Waters*, 69 Hun 614, 23 N. Y. Supp. 1145, 53 N. Y. St. 402; *Shaugnessy v. Chase*, 43 Hun 640, 7 N. Y. St. 293; *Fitch v. McMahon*, 41 Hun 642, 3 N. Y. St. Rep. 147.

62. *Foxell v. Fletcher*, 11 Hun (N. Y.) 643.

63. See generally the title, "**Attachment.**"

64. *Heman v. Larkin* (Mo. App.), 70 S. W. 907; *Barnes v. Harris*, 4 N. Y. 374, for present rule in New York, see next note.

65. **U. S.**—*Naumburg v. Hyatt*, 24 Fed. 898. **Ia.**—*Danforth, Davis & Co. v. Rupert*, 11 Iowa 547. **Ky.**—*Duncan v. Wickliffe*, 4 Metc. 118. **Mont.**—*Lang-*

The right of attachment being purely statutory, the party seeking an attachment must follow the statute regulating the right.⁶⁶

If a justice of the peace has jurisdiction of the amount sued for the fact that the valuation of the attached property is in excess of his jurisdictional limitation, will not divest him of jurisdiction.⁶⁷

2. Causes of Action in Which Attachment May Issue.—Statutes sometimes prescribe and limit the causes of action in which attachments in a justice's court may be had.⁶⁸ Thus they allow attachments where the action is for the breach of a contract, express or implied.⁶⁹

3. Grounds for Attachment.—An attachment may issue from a justice's court as a general rule in those cases when it may issue from a court of record or general jurisdiction.⁷⁰ Thus an attachment may issue when it is shown by affidavit to the satisfaction of the justice

staff *v.* Miles, 5 Mont. 554, 6 Pac. 356. Neb.—Rhodes *v.* Samuels, 67 Neb. 1, 93 N. W. 148. N. Y.—Tucker *v.* Malloy, 48 Barb. 85; Garrison *v.* Marshall, 44 How. Pr. 193; Lynde *v.* Montgomery, 15 Wend. 461; Taylor *v.* Heath, 4 Denio 592; Adkins *v.* Brewer, 3 Cow. 206, 15 Am. Dec. 264; Vosburgh *v.* Welch, 11 Johns. 175; Frazer *v.* Greenhill, 3 Code Rep. 172, 2 Edw. Sel. Cas. 356; Rosenthal *v.* Grouse, 7 Civ. Proc. 135, 1 How. Pr. (N. S.) 447. N. D.—Taughner *v.* Northern Pac. R. Co., 21 N. D. 111, 129 N. W. 747. Ohio.—Ward *v.* Ward, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656.

66. Ark.—Ferguson *v.* Glidewell, 48 Ark. 195, 2 S. W. 711. Colo.—Paul *v.* Rooks, 16 Colo. App. 44, 63 Pac. 711. Md.—Halley *v.* Jackson, 48 Md. 254. Mich.—Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Fairbanks *v.* Bennett, 52 Mich. 61, 17 N. W. 696. Mo. Beach *v.* Baldwin, 14 Mo. 597. S. D. Deering & Co. *v.* Warren, 1 S. D. 35, 44 N. W. 1068. Tex.—Culbertson *v.* Cabeen, 29 Tex. 247.

[a] The statute must be substantially complied with in every material respect. Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964; Langstaff *v.* Miles, 5 Mont. 554, 6 Pac. 356.

[b] A strict compliance is necessary. Md.—Halley *v.* Jackson, 48 Md. 254. Mich.—Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620. Tex.—Culbertson *v.* Cabeen, 29 Tex. 247. Wis. Maguire *v.* Bolen, 94 Wis. 48, 68 N. W. 408.

67. Fly *v.* Grieb's Admr., 62 Ark. 209, 35 S. W. 214; Mills *v.* Thomson, 61 Mo. 415; Springfield Engine, etc. Co. *v.* Glazier, 55 Mo. App. 95.

As to amount in controversy as affecting jurisdiction of justice of peace, see the title "Jurisdiction."

68. See generally the statutes.

[a] **Suits for Necessaries.**—(1) In Ohio, the statute authorizes the issuance of an attachment, in a suit for necessities, without reference to the existence of other grounds. Rancourt *v.* Hahn, 30 Ohio Cir. Ct. 245. (2) Coal to be used for domestic purposes is a necessary within the statute. Collins *v.* Bingham Bros., 22 Ohio Cir. Ct. 533, 12 Ohio Cir. Dec. 825.

69. Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964; Blackwood *v.* Jones, 27 Wis. 498; Elliott *v.* Jackson, 3 Wis. 649.

[a] **Unliquidated Damages.**—An action upon a contract where the damages are unliquidated is within the statute. Baumgardner *v.* Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964.

[b] **Where Action Is Not on Contract.**—Whenever it appears, either from the declaration or evidence, that the true cause of action is not an indebtedness due upon contract, it is the duty of the justice to dismiss the case, it being a case commenced by attachment. Elliott *v.* Jackson, 3 Wis. 649.

70. Idaho.—Kimball *v.* Raymond, 9 Idaho 176, 72 Pac. 957. Mo.—Tipton *v.* Christopher, 135 Mo. App. 619, 116 S. W. 1125. Nev.—Pratt *v.* Stone, 25 Nev. 365, 60 Pac. 514. N. Y.—Rosenthal *v.* Grouse, 1 How. Pr. (N. S.) 447, 7 Civ. Proc. 135. Ohio.—Collins *v.* Bingham, 22 Ohio Cir. Ct. 533, 12 Ohio Cir. Dec. 825. Ore.—Perry *v.* Gholson, 39 Ore. 438, 65 Pac. 601, 87 Am. St. Rep. 685.

See the title "Attachment."

that the debtor has departed, or is about to depart from the state,⁷¹ or from the county of his residence with intent to defraud his creditors or to avoid the service of summons,⁷² that he keeps himself concealed with like intent;⁷³ or that he has removed or is about to remove, dispose of, or secrete, his property, with the intent to defraud his creditors;⁷⁴ or that the defendant is a foreign corporation.⁷⁵

4. What May Be Attached.—Only goods and chattels of the defendant not exempt from execution, including money and bank notes⁷⁶ capable of manual seizure,⁷⁷ can be attached upon a writ of attachment issued out of a justice court. Choses in action are not subject to attachment unless covered by the statute authorizing attachment.⁷⁸ Goods already levied upon cannot be levied upon by another officer

71. Ill.—*Outlaw v. Davis*, 27 Ill. 467. **Miss.**—*Davidson v. Martin*, 33 Miss. 530. **S. C.**—*McKenzie v. Buchan*, 1 Nott & McC. 205; *Goss v. Gowing*, 5 Rich. L. 477.

72. Tucker v. Malloy, 48 Barb. (N. Y.) 85; *Morgan v. Avery*, 7 Barb. (N. Y.) 656; *Garrison v. Marshall*, 44 How. Pr. (N. Y.) 193; *Adkins v. Brewer*, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; *Goss v. Gowing*, 5 Rich. L. (S. C.) 477; *McKenzie v. Buchan*, 1 Nott & McC. (S. C.) 205.

73. Brewer v. Mock, 14 Colo. App. 454, 60 Pac. 578; *Lynde v. Montgomery*, 15 Wend. (N. Y.) 461; *Finn v. Mehrbach*, 30 Civ. Proc. 242, 65 N. Y. Supp. 250. And see the cases in preceding note.

[a] **Avoiding Criminal Process.** The concealment by the debtor must be for the purpose of avoiding the service of civil process and if it is for the purpose of avoiding criminal process attachment cannot issue. *Lynde v. Montgomery*, 15 Wend. 461. See also *Finn v. Mehrbach*, 30 Civ. Proc. 242, 65 N. Y. Supp. 250.

74. Minn.—*Guile v. McNanny*, 14 Minn. 520. **Mo.**—*Bullene v. Smith*, 73 Mo. 151; *Beach v. Baldwin*, 14 Mo. 597. **N. Y.**—*Sturz v. Fischer*, 15 Misc. 410, 36 N. Y. Supp. 893, 25 Civ. Proc. 202, 2 N. Y. Ann. Cas. 365, 72 N. Y. St. 252. **S. C.**—*Goss v. Gowing*, 5 Rich. L. 477. **Tex.**—*Carpenter v. Pridgen*, 40 Tex. 32; *Culbertson v. Cabeen*, 29 Tex. 247. **W. Va.**—*Lewis v. Bragg*, 47 W. Va. 707, 35 S. E. 943.

[a] **Affidavit Confusing Two Grounds.**—That a party is about to transfer his property for the purpose of defrauding his creditors is one ground; that he is about to secrete it for the same purpose is another ground;

so that an affidavit that he is about "to transfer or secrete" his property is ambiguous. *Culbertson v. Cabeen*, 29 Tex. 247.

[b] The mere deposit for safe keeping, with a third person, of a promissory note, or other personal property, is not a fraudulent disposition thereof as against creditors, which will authorize an attachment. *Couldren v. Caughey*, 29 Wis. 317.

75. Davidson v. Fox, 120 Mich. 385, 79 N. W. 1106.

76. U. S.—*Turner v. Fendall*, 1 Cranch 117, 133, 2 L. ed. 53. **Mass.** *Sheldon v. Root*, 16 Pick. 567, 28 Am. Dec. 266. **Miss.**—*Plummer v. West*, 41 Miss. 69. **Mo.**—*Tipton v. Christopher*, 135 Mo. App. 619, 116 S. W. 1125. **N. H.**—*Spencer v. Blaisdell*, 4 N. H. 198, 17 Am. Dec. 412. **N. Y.**—*Handy v. Dobbin*, 12 Johns. 220; *Ulma v. Bennett*, 30 App. Div. 324, holding that a chose in action is not subject to attachment. **Pa.**—*Thomas v. Morasco*, 5 Pa. Dist. 133. **Vt.**—*Prentiss v. Bliss*, 4 Vt. 513, 24 Am. Dec. 631.

As to what is exempt, see the title "Judgments and Decrees, Enforcement of."

Property subject to execution, see *infra*, III, N, 2, e, and the title "Judgments and Decrees, Enforcement of."

77. Wolbert v. Fackler, 32 Pa. 452; *Thomas v. Morasco*, 5 Pa. Dist. 133; *Dawson v. Kirby*, 6 Pa. Dist. 13.

78. Ill.—*Bidle v. Hamilton*, 161 Ill. App. 587. **Md.**—*Harding v. Stevenson*, 6 Har. & J. 264. **N. Y.**—*Bogert v. Perry*, 17 Johns. 351, 8 Am. Dec. 411; *Denton v. Livingston*, 9 Johns. 96, 6 Am. Dec. 264; *Ingalls v. Lord*, 1 Cow. 240.

See 3 STANDARD PROC. 292, et seq.

under another writ,⁷⁹ even if the property is in the hands of a recipient,⁸⁰ or even though the officer had levied upon more than sufficient to satisfy the writ under which he was acting.⁸¹

5. Affidavit or Oath.—a. *Necessity of.*—The statutes require proof by affidavit or oath of the facts justifying the issuance of an attachment as a condition precedent to the issuance of the writ. A compliance with this requirement is necessary to give the court jurisdiction to issue the writ.⁸² As a general rule, it is the legal sufficiency of the affidavit, not its truth which confers jurisdiction on the justice.⁸³

b. *Who May Make.*—The statutes generally allow the affidavit to be made by the plaintiff or someone on his behalf.⁸⁴

As to garnishment, see *infra*, III, J, 4, and the title "Garnishment."

79. Conn.—Beers v. Place, 36 Conn. 579. Ky.—Oldham v. Scrivener, 3 B. Mon. 579. Me.—Strout v. Bradbury, 5 Greenl. 313; Walker v. Foxcroft, 2 Greenl. 270. Mass.—Burlingame v. Bell, 16 Mass. 318; Vinton v. Bradford, 13 Mass. 114, 7 Am. Dec. 119; Watson v. Todd, 5 Mass. 271. N. H. Moore v. Graves, 3 N. H. 408. Pa. Com. v. Kelley, 23 Pa. Co. Ct. 357. Vt.—West River Bank v. Gorham, 38 Vt. 649; Burroughs v. Wright, 16 Vt. 619.

Property in custodia legis, see 15 STANDARD PROC. 895, et seq.

80. Walker v. Foxcroft, 2 Greenl. (Me.) 270.

81. Vinton v. Bradford, 13 Mass. 114, 7 Am. Dec. 119.

82. Ark.—Butler v. Wilson, 10 Ark. 313. Kan.—Connelly v. Woods, 31 Kan. 359, 2 Pac. 773. Mich.—Dutcher v. Grand Rapids Fire Ins. Co., 131 Mich. 671, 92 N. W. 345; Borland v. Kingsburg, 65 Mich. 59, 31 N. W. 620; Burnside v. Davis, 65 Mich. 74, 31 N. W. 619. N. Y.—Davis v. Marshall, 14 Barb. 96; Van Kirk v. Wilds, 11 Barb. 520; Adkins v. Brewer, 3 Cow. 206, 15 Am. Dec. 264. But see Clark v. Luce, 15 Wend. 479, holding that an attachment may issue against a nonresident, under the non-imprisonment act without any affidavit. Ohio.—Ward v. Ward, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656. Pa.—Curwensville Mfg. Co. v. Bloom, 10 Pa. Co. Ct. 295. Tenn. Walker v. Wynne, 3 Yerg. 62. W. Va. Kesler v. Lapham, 46 W. Va. 293, 33 S. E. 289; Colborn v. Booth, 41 W. Va. 289, 23 S. E. 556. Wis.—Givans v. Searle, 136 Wis. 608, 118 N. W. 202; Maguire v. Bolen, 94 Wis. 48, 68 N. W. 408; Elliott v. Jackson, 3 Wis. 649.

[a] In an action commenced by attachment if no affidavit is filed, or the affidavit is defective in matters of substance, and its defects are not waived by a general appearance, the justice has no jurisdiction to proceed further in the suit. Borland v. Kingsbury, 65 Mich. 59, 31 N. W. 620.

[b] A verified petition dispenses with the affidavit. Burnam v. Romans, 2 Bush (Ky.) 191. See also Franklin Sav. Inst. v. M. M. Bank, 1 Metc. (Ky.) 156.

[c] "Satisfactory Proof."—Under a statute requiring satisfactory proof of the ground before issuance of the writ, proof as used in the act means legal evidence or such evidence as would be received in the ordinary cause of judicial proceedings. Vossburgh v. Welch, 11 Johns. (N. Y.) 175. For present law in New York, see Code Civ. Proc., §2906.

83. Lovier v. Gilpin, 6 Dana (Ky.) 321; Schoonmaker v. Spencer, 54 N. Y. 366. See also Van Steenbergh v. Kortz, 10 Johns. (N. Y.) 167, holding that attachment may be issued on oath of plaintiff, and if the facts stated under oath are not true that the attachment is erroneous but not void.

[a] Existence of Facts Essential. But under a statute providing for the issuance of an attachment upon the filing of an affidavit stating certain facts, and an amendment authorizing the filing of a new affidavit containing "allegations of facts existing at the time of making the former affidavit," the jurisdiction of the justice depends not on the preliminary showing, but the actual existence of those facts. Givans v. Searle, 136 Wis. 608, 118 N. W. 202.

84. See generally the statutes and Mich.—Burnside v. Davis, 65 Mich. 74, 31 N. W. 619. Mo.—Norman v. Horn,

c. *Who May Take*.—The affidavit must be taken before the persons authorized by law.⁸⁵

d. *Form and Sufficiency*.—In drawing an affidavit for a writ of attachment, a compliance with any requirements imposed by the statute is essential,⁸⁶ but mere formal defects in the affidavit will be disregarded.⁸⁷ An insufficient affidavit does not render the attachment void, but voidable only.⁸⁸

The affidavit which is the basis of an attachment must state not only the nature of the plaintiff's claim,⁸⁹ but also the amount of his de-

36 Mo. App. 419. Wis.—Maguire v. Bolen, 94 Wis. 48, 68 N. W. 408.

As to recital thereof in the affidavit, see *infra*, III, I, 4, d.

85. See generally the statutes.

[a] *Before Attorney*.—Under a statute authorizing the taking of an affidavit before any person authorized to take depositions, an affidavit cannot be taken before an attorney of a party, he being prohibited from taking depositions. Ward v. Ward, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656.

86. Ala.—Graham v. Ruff, 8 Ala. 171. Mich.—Mathews v. Densmore, 43 Mich. 461, 5 N. W. 669; Cross v. McMaken, 17 Mich. 511, 97 Am. Dec. 203. Minn.—Baumgardner v. Dowagiac Mfg. Co., 50 Minn. 381, 52 N. W. 964. N. Y. Kelly v. Archer, 48 Barb. 68; Van Kirk v. Wilds, 11 Barb. 520; Loder v. Phelps, 13 Wend. 46; Morse v. McQuade, 54 Misc. 166, 105 N. Y. Supp. 862. Pa.—Griffs v. Swick, 12 Pa. Co. Ct. 389. Tex.—Moody v. Levy & Co., 58 Tex. 532.

[a] *Oath in Writing*.—It is not necessary that the oath taken before the justice should be in writing. McKenzie v. Buchan, 1 Nott & McC. (S. C.) 205; Devall v. Taylor, Cheves (S. C.) 5, holding that though the oath need not be in writing it must be recited in the writ.

[b] If the words of the affidavit are in substantial compliance with the terms of the statute it is sufficient. Ala.—Graham v. Ruff, 8 Ala. 171; Ware v. Todd, 1 Ala. 199. Ga.—Kenyon v. Evans, 36 Ga. 89. Ia.—Drake v. Hager, 10 Iowa 556. Minn.—Curtis v. Moore, 3 Minn. 29.

[c] The title of the act under which a defendant corporation is incorporated need not be given. Ruthe v. Green Bay & M. R. Co., 37 Wis. 344.

87. Norman v. Horn, 36 Mo. App.

419; Pach v. Orr, 15 Civ. Proc. 176, 1 N. Y. Supp. 760, 17 N. Y. St. 367; Bean v. Tonnele, 24 Hun (N. Y.) 353, 1 Civ. Proc. 33.

[a] The omission of a venue is not fatal if the affidavit in any way tells the authority of the officer and indicates of what county he is an officer. Kesler v. Lapham, 46 W. Va. 293, 33 S. E. 289.

88. Ala.—Parmer v. Ballard, 3 Stew. 326. Ia.—State v. Foster, 10 Iowa 435. Ky.—Bailey v. Beadles, 7 Bush 383.

[a] *Construction of Affidavit To Give Jurisdiction*.—Where an affidavit for an attachment issued by a justice is such that the justice might so construe it as to give him jurisdiction, the attachment cannot be held void in collateral proceedings. Ketchum v. Vidrard, 4 Thomp. & C. (N. Y.) 138. See also Skinnion v. Kelley, 18 N. Y. 355; Van Alstyne v. Erwine, 11 N. Y. 331; Miller v. Brinkerhoff, 4 Denio (N. Y.) 118, 47 Am. Dec. 242; Kissock v. Grant, 34 Barb. (N. Y.) 144.

[b] Although informal, if it contains enough to satisfy the justice of the facts authorizing the warrant, the justice has jurisdiction and the attachment is not subject to collateral attack. Bascom v. Smith, 31 N. Y. 595; Kissock v. Grant, 34 Barb. (N. Y.) 144.

89. Mich.—Freer v. Hamilton, 127 Mich. 381, 86 N. W. 824. Nev.—Pratt v. Stone, 25 Nev. 365, 60 Pac. 514. Ohio.—Driscoll v. Kelly, 4 Ohio Dec. 124, 5 Ohio N. P. 243. Tenn.—Sherry v. Divine, 11 Heisk. 722. W. Va. Kesler v. Lapham, 46 W. Va. 293, 33 S. E. 289; Lively v. Southern Bldg. & L. Assn., 46 W. Va. 180, 33 S. E. 93. Wis.—Ruthe v. Green Bay & M. R. Co., 37 Wis. 344; Blackwood v. Jones, 27 Wis. 498; Elliott v. Jackson, 3 Wis. 649.

[a] An omission to allege that the debt was "due upon a contract, ex-

mand.⁹⁰ and, in some states, that the property to be attached is not exempt.⁹¹ It must appear on the face of the affidavit that it was made by plaintiff,⁹² or by some person in his behalf,⁹³ although this has been held unnecessary where such fact is disclosed by the record.⁹⁴

Grounds.—In addition thereto, the affidavit must state the ground or grounds relied on for the issuance of the attachment.⁹⁵ The plaintiff may state as many statutory grounds as he chooses, if he states them in the conjunctive and if he sustains any one of them, the writ

press or implied," renders the affidavit void. *Blackwood v. Jones*, 27 Wis. 498.

[b] **The nature of the claim** (1) should be stated with some legal definiteness. If the affidavit merely states it is "for professional services rendered by the plaintiff," it is insufficient. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289. (2) The words "the nature of plaintiff's claim" mean an account, note or judgment, or a like description of the nature of the claim. An allegation that it is for goods sold and delivered is insufficient. *Driscoll v. Kelly*, 4 Ohio Dec. 124, 5 Ohio N. P. 243. (3) But an allegation stating that the defendant is indebted to plaintiff in a certain sum for work, labor and services done and performed by him at his special instance and request is a sufficient showing that the cause of action is on contract express or implied. *Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

[c] **In an action founded on contract** it is not necessary to specify in the affidavit for an attachment whether the claim is on a contract express or implied. *Freer v. Hamilton*, 127 Mich. 381, 86 N. W. 824.

90. *Minn.*—*Baumgardner v. Dowagiac Mfg. Co.*, 50 Minn. 381, 52 N. W. 964. *N. Y.*—*Kelly v. Archer*, 48 Barb. 68, "over and above all discounts." *Ohio*.—*Driscoll v. Kelly*, 4 Ohio Dec. 124, 5 Ohio N. P. 243. *W. Va.*—*Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289. *Wis.*—*Oliver v. Town*, 28 Wis. 328.

[a] **Form.**—An affidavit stating that the defendant was "indebted to the plaintiff in the sum of \$100, as near as may be, over and above all legal set-offs," follows the language of the statute and is sufficient. *Oliver v. Town*, 28 Wis. 328, 334. See *Baumgardner v. Dowagiac Mfg. Co.*, 50 Minn. 381, 52 N. W. 964, holding the

affidavit to be in substantial compliance with the statute.

[b] That "affiant believes that plaintiff ought to recover" a certain sum is sufficiently positive as to amount. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

91. *Ward v. Ward*, 9 Ohio Dec. 690; *Driscoll v. Kelly*, 4 Ohio Dec. 124, 5 Ohio N. P. 243.

92. *Kingsbury v. Borland*, 65 Mich. 59, 31 N. W. 620.

[a] **Where There Are Several Plaintiffs.**—If an affidavit shows that the person making it is one of several plaintiffs and does not show who the others are, it is void. *Burnside v. Davis*, 65 Mich. 74, 31 N. W. 619.

93. *Kingsbury v. Borland*, 65 Mich. 59, 31 N. W. 620; *Maguire v. Bolen*, 94 Wis. 48, 68 N. W. 408.

[a] **Unsworn Recital Insufficient.** An affidavit reciting that the affiant "for and on behalf of R. T. & S. hereinafter named, being duly sworn, on oath doth say," is insufficient as the recital is not sworn to. *Maguire v. Bolen*, 94 Wis. 48, 68 N. W. 408.

94. *Mandel v. Peet*, 18 Ark. 236, 244; *West v. Berg*, 66 Minn. 287, 68 N. W. 1077; *Smith v. Victorin*, 54 Minn. 338, 56 N. W. 47.

95. *Ia.*—*Upp v. Neuhring*, 127 Iowa 713, 104 N. W. 350. *Minn.*—*Curtis v. Moore*, 3 Minn. 29. *Nev.*—*Pratt v. Stone*, 25 Nev. 365, 60 Pac. 514. *N. Y.*—*Bascom v. Smith*, 31 N. Y. 595; *Kelly v. Archer*, 48 Barb. 68; *Stewart v. Brown*, 16 Barb. 367; *Comport v. Gillespie*, 13 Wend. 404. *Pa.*—*Spencer v. Bloom*, 149 Pa. 106, 24 Atl. 185; *Griffs v. Swick*, 12 Pa. Co. Ct. 389. *Tex.*—*Starr v. Taylor* (Tex. Civ. App.), 56 S. W. 543. *W. Va.*—*Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

[a] **An allegation in substantial compliance with the statute is required.** If the affidavit does not state that a defendant about to remove permanently out of the state "refuses to

will issue,⁹⁶ but if he states the grounds in the alternative, his affidavit is indefinite and void.⁹⁷ It is sometimes required that the facts and circumstances tending to prove the grounds set forth, be stated,⁹⁸ but this is not necessary under other statutes.⁹⁹ The facts and circumstances must be stated positively, not on information and belief.¹

Fact of Filing.—As the docket and transcript are required to show the proceedings in the case,² the affidavit need not show that it was filed in the justice's court.³

pay or secure the debt due the plaintiff," as provided by statute, it is insufficient. *Upp v. Neuhring*, 127 Iowa 713, 104 N. W. 350.

[b] A showing of a ground as existing long antecedently is insufficient. *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

[c] **Belief.**—Where the statute requires deponent to swear that he "knows or has good reason to believe," he must depose to facts and belief so that if he swears to good reasons, he must also swear he believes them. *Anonymous*, 2 Mich. N. P. 118.

[d] If the defendant is an absconding debtor, the affidavit must state that he was a resident of the state. *Dickinson v. Barnes*, 3 Gill (Md.) 485.

[e] **Omission of Word "Not."** Where the ground of attachment is that the defendant is a nonresident, the omission of the word "not" in the averment that "he has not resided in the state for one month, etc.," will render the affidavit a nullity. *Freer v. White*, 91 Mich. 74, 51 N. W. 807.

[f] **Intent To Defraud.**—Where attachment is sought on the ground that the defendant has departed the county with intent to defraud his creditors the affidavit is insufficient unless the plaintiff states that the departure was made by defendant with the intent to defraud his creditors. *Colver v. Van Valen*, 6 How. Pr. (N. Y.) 102; *Kelly v. Archer*, 48 Barb. (N. Y.) 68.

[g] **Presumption in Favor of Affidavit.**—Where the affidavit is not entered at length on the docket of the justice, the presumption will be that it contained a legal ground for attachment. *Carper v. Richards*, 13 Ohio St. 219.

96. *Ga.*—*Kennon v. Evans, Gardner & Co.*, 38 Ga. 89. *Ill.*—*Lawver v. Langhams*, 85 Ill. 138; *Rosenheim v.*

Fifield, 12 Ill. App. 302. *Ind.*—*McCollem v. White*, 23 Ind. 43. *Minn.* *Curtis v. Moore*, 3 Minn. 29. *W. Va.* *Kuhl v. Rogers*, 29 W. Va. 779, 2 S. E. 798.

[a] **Grounds under two statutes** may be stated. *Reinmiller v. Skidmore*, 7 Lans. (N. Y.) 161.

97. *Dutcher v. Grand Rapids F. Ins. Co.*, 131 Mich. 671, 92 N. W. 345; *Culbertson v. Cabeen*, 29 Tex. 249.

98. *Garlock v. James*, 55 How. Pr. (N. Y.) 306; *Ex parte Robinson*, 21 Wend. (N. Y.) 672; *Comport v. Gillespie*, 13 Wend. (N. Y.) 404; *Tallman v. Bigelow*, 10 Wend. (N. Y.) 420; *Stewart v. Brown*, 16 Barb. (N. Y.) 367; *Frost v. Willard*, 9 Barb. (N. Y.) 440; *Dewey v. Greene*, 4 Denio (N. Y.) 93; *Bump v. Dehany*, 59 Hun 619, 12 N. Y. Supp. 901; *Thompson v. Dater*, 57 Hun 316, 10 N. Y. Supp. 613, 32 N. Y. St. 361; *Gates v. Bloom*, 149 Pa. 107, 24 Atl. 184; *Curwensville Mfg. Co. v. Bloom*, 10 Pa. Co. Ct. 295.

[a] **An affidavit is sufficient if the proof has a legal tendency to make out in all its parts a case for the issuing of the attachment and if the facts and circumstances fairly call upon the magistrate for the exercise of his judgment.** *Schoonmaker v. Spencer*, 54 N. Y. 366.

99. *Curtis v. Moore*, 3 Minn. 29.
1. *Tallman v. Bigelow*, 10 Wend. (N. Y.) 420; *Dewey v. Greene*, 4 Denio (N. Y.) 93; *Curwensville Mfg. Co. v. Bloom*, 10 Pa. Co. Ct. 295.

[a] **But the intent with which the debtor absconds may be stated on information and belief.** *Ketchum v. Vidvard*, 4 Thomp. & C. (N. Y.) 138. See also *Schoonmaker v. Spencer*, 54 N. Y. 366.

2. See *Butler v. Wilson*, 10 Ark. 313, holding that the affidavit should be copied in the transcript so that the appellate court can determine whether it is sufficient to authorize the writ.

3. *Lively v. Southern B. & L. Assn.*, 46 W. Va. 180, 33 S. E. 93.

Signature and Verification. — The affidavit must be signed at the end by the affiant,⁴ and it must be sworn to before a disinterested person.⁵ In the absence of a statute requiring it, it is not necessary that it should be made before the justice issuing the attachment.⁶

e. Amendment. — Amendments to the affidavit may be allowed,⁷ as to nonjurisdictional defects,⁸ even after appeal;⁹ or a new affidavit may be filed in a proper case.¹⁰

6. Bond or Undertaking. — **a. Necessity for.** — Although not always required,¹¹ generally the statutes require a good and sufficient bond or undertaking as a condition precedent to the issuance of an attachment.¹²

b. Requisites and Sufficiency. — The bond given must be in substantial compliance with the statute¹³ both as to its conditions and

4. Norman v. Horn, 36 Mo. App. 419.

[a] A signature in a firm name is insufficient. *Norman v. Horn*, 36 Mo. App. 419.

5. Dickinson v. Barnes, 3 Gill (Md.) 485; *Ward v. Ward*, 9 Ohio Dec. 690.

6. Dickinson v. Barnes, 3 Gill (Md.) 485, holding that it is not ground for quashing the attachment that the affidavit was made before a justice of another county. To same effect, *Kessler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

7. State v. Lynn, 51 Mo. 114; *Givans v. Searle*, 136 Wis. 608, 118 N. W. 202. *Contra*, *Halley v. Jackson*, 48 Md. 254, 258.

[a] The amendment relates back to the date of the original levy. *State v. Lynn*, 51 Mo. 114.

8. Ruthe v. Green Bay & M. R. Co., 37 Wis. 344, variance in name of plaintiff may be cured.

9. Sherrill v. Bench, 37 Ark. 560.

10. Savage v. Atkins, 124 Ala. 378, 27 So. 514, where the plaintiff sued out an attachment in excess of the justice's jurisdiction. See *Webb v. McPherson & Co.*, 142 Ala. 540, 38 So. 1009, holding the plaintiff may remit the amount in excess of the justice's jurisdiction in the case of an attachment so as to bring it within the jurisdiction either before or at the time of rendition of judgment.

11. Young v. Mitchell, 33 Ark. 222; *Stewart v. Houston*, 25 Ark. 311; *Snyder v. Gillott* (Md.), 32 Atl. 245.

[a] In Nebraska an attachment against a nonresident or a foreign corporation may issue without a bond. *Marsh v. Steele*, 9 Neb. 96, 1 N. W. 869, 31 Am. Rep. 406.

12. Mich.—*Marr v. Cook*, 147 Mich. 425, 111 N. W. 116. **N. Y.**—*Bennett v. Brown*, 4 N. Y. 254, 1 Code Rep. (N. S.) 267; *Kelly v. Archer*, 48 Barb. 68; *Davis v. Marshall*, 14 Barb. 96; *Adkins v. Brewer*, 3 Cow. 206, 15 Am. Dec. 264; *Homan v. Brinkerhoff*, 1 Denio 184. **Ohio.**—*Driscoll v. Kelly*, 4 Ohio Dec. 124, 5 Ohio N. P. 243. **Pa.** *Downard & Co. v. Jordan*, 7 Pa. Dist. 273. **S. C.**—*Perminster v. McDaniel*, 1 Hill 267, 26 Am. Dec. 179.

[a] The justice obtains no jurisdiction if no bond is filed in the attachment suit. *Marr v. Cook*, 147 Mich. 425, 111 N. W. 116.

[b] Before the attachment is levied, the bond must be taken. *Benedict v. Bray*, 2 Cal. 251, 56 Am. Dec. 332.

13. Cal.—*Hisler v. Carr*, 34 Cal. 641. **Ill.**—*Hibbard v. McKindley*, 28 Ill. 240, 255; *Love v. Fairfield*, 10 Ill. 303. **Ind.**—*Marnine v. Murphy*, 8 Ind. 272. **Miss.**—*Amos v. Allnutt*, 2 Smed. & M. 215; *McIntyre v. White*, 5 How. 298; *Proskey v. West*, 8 Smed. & M. 711. **N. Y.**—*Tiffany v. Lord*, 65 N. Y. 310; *Barnard v. Viele*, 21 Wend. 88; *Homan v. Brinkerhoff*, 1 Denio 184; *Kelly v. Archer*, 48 Barb. 68. **Ohio.**—*Driscoll v. Kelly*, 4 Ohio Dec. 124, 5 Ohio N. P. 243. **Pa.**—*Simon v. Johnson*, 7 Kulp 166; *Downard & Co. v. Jordan*, 7 Pa. Dist. 273. **S. C.**—*Harville v. Meyers*, 1 Brev. 23. **Tenn.**—*Lucky v. Miller*, 8 Yerg. 90.

[a] A bond which omits part of the conditions specified in the statute is nevertheless valid as to the conditions contained therein. *State v. Berry*, 12 Mo. 376.

[b] A bond (1) for less than the statutory amount invalidates the attachment. *Downard & Co. v. Jordan*, 7

obligations. It must be taken, by the justice issuing the process,¹⁴ must be under seal where bonds are required to be sealed,¹⁵ and all blanks must be filled before filing the same.¹⁶

Irregularities, in the form of the bond, or in the number of sureties, will not be fatal to a judgment subsequently rendered,¹⁷ and an attachment will not be quashed because of the insufficiency of the bond given unless the plaintiff declines, on opportunity afforded, to substitute a sufficient bond.¹⁸

c. *Amendment*.—An attachment bond is amendable with the consent of the sureties as to nonjurisdictional defects,¹⁹ and when the plaintiff has obtained leave to file an amended bond, and does so, it will be considered as having been filed from the commencement of the suit.²⁰ Statutes sometimes expressly allow the filing of a new bond if that given is defective or insufficient.²¹

7. *Writ or Warrant of Attachment*.—a. *By Whom Issued*.—The statutes sometimes prescribe who shall issue the writ or warrant.²²

Pa. Dist. 273. (2) But a technical fixing of amount is not required. So that an undertaking more than double the face of the claim but a little less than double the face of the claim and the interest thereon is valid. *Driscoll v. Kelly*, 4 Ohio Dec. 124, 5 Ohio N. P. 243.

[c] The omission of a date is no objection as the statute does not require the bond to be dated. *Plumpton v. Cook*, 2 A. K. Marsh. (Ky.) 450; *Claffin v. Hoover*, 20 Mo. App. 314.

[d] The bond is sufficient as against collateral attack where accepted by the justice as sufficient. *Bascom v. Smith*, 31 N. Y. 595; *Harman v. Brotherson*, 1 Denio (N. Y.) 537.

14. *Permitter v. McDaniel*, 1 Hill (S. C.) 267, 26 Am. Dec. 179.

15. Ill.—*Lea v. Vail*, 3 Ill. 473. Mo.—*State v. Chamberlin*, 54 Mo. 338; *State v. Thompson*, 49 Mo. 188. N. Y. *Tiffany v. Lord*, 65 N. Y. 310; *Van Loon v. Lyons*, 61 N. Y. 22; *Rockefeller v. Hoysradt*, 2 Hill 616; *Homan v. Brinckerhoff*, 1 Denio 184.

[a] But see *McLain v. Simington*, 37 Ohio St. 484, holding although erroneously called a bond, the undertaking required is in no sense a bond and need not be under seal.

[b] An amendment to affix proper seal must be granted on proper application. *Lea v. Vail*, 3 Ill. 473.

16. Ala.—*Copeland v. Cunningham*, 63 Ala. 394. Ind.—*Louisville, N. A. & C. Ry. Co. v. Lake*, 5 Ind. App. 450, 32 N. E. 590. La.—*Lehman v. Broussard*, 45 La. Ann. 346, 12 So. 504.

S. C.—*Boyd v. Boyd*, 2 Nott & McC. 125; *Permitter v. McDaniel*, 1 Hill 267, 26 Am. Dec. 179.

[a] Where the name of a surety to an attachment bond is left blank but the recital in the bond shows that there was intended to be a surety the omission of such name will not affect the validity of the bond or the obligation of the surety where the surety has signed the bond. *McLain v. Simington*, 37 Ohio St. 484. See also *Afeld v. People*, 12 Ill. App. 502.

17. *Branch of State Bank v. Morris*, 13 Iowa 136.

18. Ala.—*Lowe v. Derrick*, 9 Port. 415; *Alford v. Johnson*, 9 Port. 320; *Lowry v. Stowe*, 7 Port. 483. Ga.—See *Irvin v. Howard*, 37 Ga. 18. Ill.—*Lea v. Vail*, 3 Ill. 473.

As to amendments, see III, I, 6, c.

19. Ga.—*Irvin v. Howard*, 37 Ga. 18. Mich.—Anonymous, 2 Mich. N. P. 118. N. Y.—*Bell v. Moran*, 25 App. Div. 461, 50 N. Y. Supp. 982.

20. Ala.—*Lowry v. Stowe*, 7 Port. 483. Ill.—*Lea v. Vail*, 3 Ill. 473. N. Y. *Riley v. Skidmore*, 2 Silv. 573, 53 Hun 632, 6 N. Y. Supp. 107.

21. *Kidd v. Dougherty*, 59 Mich. 240, 26 N. W. 510.

22. See generally the statutes.

[a] In Kentucky.—An attachment can be regularly issued only from a justice of the peace of the county where the debtor was or had been last a resident. *Plumpton v. Cook*, 2 A. K. Marsh. (Ky.) 450.

[b] In Maryland, the justice of the peace who issues the warrant must be of the county where the attachment is

A writ of attachment may be issued by a de facto justice.²³

b. *When Issued.*—Under some statutes the writ of attachment may be issued at any time either before or after the commencement of the action,²⁴ while in others it must be issued on or after the commencement of the suit.²⁵ As the ground for attachment should exist at the time the proceeding is commenced, the time which intervenes between the making of the affidavit and the issuance of the writ should not be unreasonable.²⁶

c. *Form and Requisites.*—The statutes regulating attachments prescribe what the writ or warrant of attachment must contain,²⁷ and in order to confer jurisdiction on the justice, they must be complied with.²⁸ It is generally required that the writ or warrant of attachment briefly recite the ground of attachment,²⁹ or in some states, set forth the oath or affidavit on which it is issued,³⁰ and that it be under

to be issued. *Dickinson v. Barnes*, 3 Gill (Md.) 485.

23. *Altman & Co. v. Wall*, 111 Miss. 198, 71 So. 318.

24. *Seibert v. Switzer*, 35 Ohio St. 661; *Mawicke v. Wolf*, 7 Ohio Dec. (Reprint) 299; *Reid v. Mickles* (Tex. Civ. App.), 29 S. W. 563.

25. *Ark.*—*Butler v. Wilson*, 10 Ark. 313. *Cal.*—*Seaver v. Fitzgerald*, 23 Cal. 85. *Ind.*—*Wilkinson v. Moore*, 79 Ind. 397. *Mont.*—*Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203. *N. D.*—*Taughner v. Northern Pac. R. Co.*, 21 N. D. 111, 129 N. W. 747. *Okla.*—*Bilby v. Jones*, 39 Okla. 613, 136 Pac. 414, holding that an attachment of goods in an action in which there is no service of summons or appearance, is void and will not support a sale of the goods. *Wyo.*—*Cheeseman v. Fenton*, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010.

As to when an action is commenced, see *supra*, III, A.

[a] *After the Filing of a Complaint.*—*Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203.

[b] *Until after summons is issued*, an attachment cannot issue. *Taughner v. Northern Pac. R. Co.*, 21 N. D. 111, 129 N. W. 747; *Perry v. Gholson*, 39 Ore. 438, 65 Pac. 601, 87 Am. St. Rep. 685.

[c] *Where Summons Is Not Served.* An attachment issued at the time of the issuance of the summons is not invalidated by the failure to serve the summons where on return thereof an affidavit that defendant conceals himself is made and service by publication is had. The writ does not issue before

the issuance of summons in such case. *Seaver v. Fitzgerald*, 23 Cal. 85. See also *Stone v. Whittaker*, 61 Ohio St. 194, 55 N. E. 614.

[d] *Return Unserved.*—(1) Unless the attachment is based on an affidavit alleging that the debtor conceals himself (*Mawicke v. Wolf*, 7 Ohio Dec. [Reprint] 299), (2) a return of process unserved in the principal action is necessary to authorize the issuance of the writ under some statutes. *Doyle v. Richards*, 7 Fed. Cas. No. 4,054.

[e] *In mechanic's lien cases* in a justice's court, attachment may be sued out simultaneously with the warrant, but not before. *Warner v. Yates & Co.*, 118 Tenn. 548, 102 S. W. 92.

26. *Foster v. Illinski*, 3 Ill. App. 345; *Kesler v. Lapham*, 46 W. Va. 293, 33 S. E. 289.

27. See generally the statutes.

[a] *Annexation of the affidavit to the writ* or the copy served on the defendant is not contemplated by the statute of Michigan. *Burnside v. Davis*, 65 Mich. 74, 31 N. W. 619.

28. *Colo.*—*Conway v. John*, 14 Colo. 30, 23 Pac. 170. *Minn.*—*Beseman v. Weber*, 53 Minn. 174, 54 N. W. 1053. *N. C.*—*Clark v. Quinn*, 27 N. C. 175.

[a] *That the justice issuing the writ is of the county* where the defendant was or has been last a resident need not be stated. *Plumpton v. Cook*, 2 A. K. Marsh. (Ky.) 450. And see *McDaniel v. Sappington*, Hard. (Ky.) 94; *McLorty v. Davis*, Ky. Dec. 57.

29. *McLorty v. Davis*, Ky. Dec. 57; *McCulloch v. Foster*, 4 Yerg. (Tenn.) 162.

30. *Devall v. Taylor*, Cheves (S. C.) 5.

seal.³¹ In some jurisdictions if the writ is issued at the commencement of the action, it is required to contain the substance of a summons, and no summons is then necessary.³² It must be directed to the proper officer for service,³³ or, in some jurisdictions, to some indifferent person,³⁴ commanding that he attach and safely keep goods of the defendant, not exempt from execution, sufficient to satisfy plaintiff's demand, stating the amount,³⁵ and that he make a return of his proceedings thereon at a certain time and place.³⁶ The amount stated in the warrant must correspond with the amount as stated in the affidavit,³⁷ or in some states, as stated in the complaint,³⁸ and must not be in excess of the justice's jurisdiction.³⁹

31. *McCulloch v. Foster*, 4 Yerg. (Tenn.) 162; *Walker v. Wynne*, 3 Yerg. (Tenn.) 62.

[a] A private seal used by a justice after his name is sufficient to render the writ valid. *Lowry v. Stowe*, 7 Port. (Ala.) 483; *King v. Thompson*, 59 Ga. 380.

32. *Cheeseman v. Fenton*, 13 Wyo. 436, 451, 80 Pac. 823, 110 Am. St. Rep. 1010. See *Marston v. Hurlburt*, 49 Wis. 630, 6 N. W. 316.

[a] But see *Langtry v. Wayne Circuit Judges*, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; *Borland v. Kingsbury*, 65 Mich. 59, 31 N. W. 620, holding that although the writ contains no command to the officer to summon the defendant, the justice shall proceed thereon as upon a summons personally served if the attachment is personally served.

As to process by which to commence the action, see *supra*, I, III, F, 1.

[b] Omission of Name of Town. An attachment directing the defendant to appear "at my office in said county" without naming the town, is sufficient. *Beseman v. Weber*, 53 Minn. 174, 54 N. W. 1053.

33. *Drewry v. Leinkauff*, 84 Ala. 486, 10 So. 352; *Buchanan v. Sterling*, 63 Ga. 227.

[a] May be directed to officer of another county, but this authority is limited to the purpose of causing an attachment of property in such county. *Perkins v. Meilicke*, 66 Minn. 409, 69 N. W. 220.

[b] In Alabama the act which requires that process issued from the clerk's office of any court in the state should be directed to any sheriff of the state of Alabama, etc., does not embrace attachments issued by justices of the peace. *Alford v. Johnson*, 9 Port. (Ala.) 320.

[c] Where the attachment is levied by the proper officer, any mistake in directing it is amendable and therefore the misdirection will invalidate neither the process nor the levy. *Warren v. Purtell*, 63 Ga. 428. See also *Buchanan v. Sterling*, 63 Ga. 227.

34. *Kelsey v. Parmelee*, 15 Conn. 260; *Kellogg v. Wadhams*, 9 Conn. 201; *Tyler v. Atwater*, 2 Root (Conn.) 72. But see *Marr v. Cook*, 147 Mich. 425, 111 N. W. 116; *Marsh v. Williams*, 63 N. C. 371, the statute provides for service by an indifferent person only in criminal matters.

35. Me.—*Hanson v. Dow*, 51 Me. 165; *Osgood v. Holyoke*, 48 Me. 410; *Neally v. Judkins*, 48 Me. 566; *Saco v. Hopkinton*, 29 Me. 268. Minn. *Hines v. Chambers*, 29 Minn. 7, 11 N. W. 129. Tex.—*Munzenheimer v. Manhattan, etc. Co.*, 79 Tex. 318, 15 S. W. 389.

36. *Sedalia Mill. Co. v. Stafford County Flour Mills*, 169 Mo. App. 460, 155 S. W. 70; *Houston v. Porter*, 32 N. C. 174; *Clark v. Quinn*, 27 N. C. 175; *Washington v. Sanders*, 13 N. C. 343, 21 Am. Dec. 336.

As to returns generally, see the title "Returns."

[a] Cure of Omission.—The omission of the magistrate to set out in the writ the return day, being a mere irregularity, is cured by judgment. *McLane v. Moore*, 51 N. C. 520.

37. *The Clarion v. Harris*, 18 Ill. 502; *Munzenheimer v. Manhattan, etc. Co.*, 79 Tex. 318, 15 S. W. 389.

38. Cal. Code Civ. Proc., §868.

39. *Hines v. Chambers*, 29 Minn. 7, 11 N. W. 129; *Automatic Mds. Co. v. Delaware & H. Co.*, 233 Pa. 581, 82 Atl. 939.

Jurisdiction as affected by amount in controversy, see the title "Jurisdiction."

The writ or warrant of attachment should usually be returnable, before the justice issuing it,⁴⁰ at the time prescribed by the statute,⁴¹ but in some cases it is proper to make it returnable before some other justice or court.⁴²

d. *Amendment*.—A justice of the peace has authority to allow an amendment to a writ or warrant of attachment.⁴³

8. *Levy and Inventory*.—The writ or warrant of attachment must be levied by the officer or person authorized by the statute⁴⁴ upon the property of the defendant, and in the manner⁴⁵ as well as at the

40. *Mitchell v. Lawrence*, 123 Ala. 498, 26 So. 500; *Caldwell v. Meador*, 4 Ala. 755; *Griggs v. French Piano & O. Co.*, 70 Miss. 211, 14 So. 24.

[a] Where there is a failure to state in the writ before whom further proceedings are to be had the presumption will prevail that they will be had before the justice issuing the writ. *Bruner v. Kinsel*, 42 Ala. 493.

41. *Ind.*—*Carey v. Butler*, 11 Ind. 391. *Miss.*—*Baldwin v. Flash*, *Preston & Co.*, 58 Miss. 593. *N. C.*—*Houston v. Porter*, 32 N. C. 174; *Clark v. Quinn*, 27 N. C. 175; *Washington v. Sanders*, 13 N. C. 343, 21 Am. Dec. 336. *Pa.* *Automatic M. Co. v. Delaware & H. Co.*, 233 Pa. 581, 82 Atl. 939; *Pantall v. Dickey*, 123 Pa. 431, 16 Atl. 789; *Protzman v. Wolff*, 4 Pa. Dist. 473; *Roberts v. Wright*, 2 Pa. Co. Ct. 175; *Shores v. Carpenter*, 1 Just. L. Rep. 64.

[a] If the affidavit upon which the writ issues states two grounds for attachment one of which would authorize a return of the writ in three days and the other in six, either may be rejected as surplusage and the other will be sufficient to give the justice jurisdiction. *Curtis v. Moore*, 3 Minn. 29.

42. *Ala.*—*Carter v. Ellis*, 90 Ala. 138, 7 So. 531; *Peebles v. Weir*, 60 Ala. 413; *Langdon v. Raiford*, 20 Ala. 532, where in excess of fifty dollars, returnable to circuit court. *Ga.*—*Wanet v. Corbet*, 13 Ga. 441. *Miss.*—*Griggs v. French Piano & O. Co.*, 70 Miss. 211, 14 So. 24; *Crizer v. Gorren*, 41 Miss. 563. *N. C.*—*Clark v. Quinn*, 27 N. C. 175.

43. *Ala.*—*Peebles v. Weir*, 60 Ala. 413. *Mass.*—*McGuire v. Davis*, 8 Cush. 256. *N. Y.*—*Near v. Van Alstyne*, 14 Wend. 230.

Contra, *Halley v. Jackson*, 48 Md. 254.

[a] *Before or During Trial*.—*Peebles v. Weir*, 60 Ala. 413.

[b] *Mistake in direction* is amendable. *Warren v. Purtell*, 63 Ga. 428.

[c] *A failure to state the amount of claim in the writ may be cured by amendment*. *Munzenheimer v. Manhattan, etc. Co.*, 79 Tex. 318, 15 S. W. 389.

[d] *May Amend by Adding Signature of Justice*.—Where a writ of attachment is properly dated and the date of issuance is endorsed on the back and signed by the justice issuing it the writ can be amended by having the justice's signature affixed to the face of the writ if necessary. *Rule Mercantile Co. v. Opry* (Tex. Civ. App.), 163 S. W. 331.

44. *Ala.*—*Carter v. Ellis*, 90 Ala. 138, 7 So. 531; *Peebles v. Weir*, 60 Ala. 413; *Brinsfield v. Austin*, 39 Ala. 227; *Martin v. Dollar*, 32 Ala. 422. *Conn.*—*Kelsey v. Parmelee*, 15 Conn. 260; *Kellogg v. Wadhams*, 9 Conn. 201; *Tyler v. Atwater*, 2 Root 72. *N. J.* *Orenstine v. Schaffer*, 58 N. J. L. 344, 33 Atl. 285. *N. C.*—*Marsh v. Williams*, 63 N. C. 371.

[a] *A sheriff is legally authorized under the Kentucky code to levy an attachment from a justice of the peace*. *Turners v. Howard*, 2 Duv. (Ky.) 112.

[b] *A constable may levy an attachment issued by a justice of the peace*. *Langdon v. Raiford*, 20 Ala. 532.

[c] *Must Be Served by the Officer to Whom Directed*.—Where the writ of attachment is directed to a certain constable service by another constable will not give jurisdiction of the attachment proceedings. *Friar v. McGuire*, 70 Mo. App. 581.

45. *Cal.*—*Seaver v. Fitzgerald*, 23 Cal. 85. *Ill.*—*Borders v. Murphy*, 78 Ill. 81. *Md.*—*Campbell v. Webb*, 11 Md. 471. *Mich.*—*Grand Haven Military Club v. Mulholland*, 170 Mich. 592, 136

time⁴⁶ prescribed by law, after which he must make an inventory of the property levied on.⁴⁷

9. Service of Summons, Warrant and Inventory on Defendant.⁴⁸ The officer having levied the attachment and inventoried the property⁴⁹ is required, within the time specified in the statute,⁵⁰ to serve upon the defendant personally, if he can be found in the county,⁵¹ the summons, together with copies of the writ of attachment and the inventory.⁵² Some statutes provide that he shall serve in the same manner⁵³ as a

N. W. 397; *Segar v. Muskegon Shingle, etc. Co.*, 81 Mich. 344, 45 N. W. 982; *Langtry v. Wayne Circuit Judges*, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657. Minn.—*Bird v. Norquist*, 46 Minn. 318, 48 N. W. 1132. Mo.—*McCloon v. Beattie*, 46 Mo. 391. N. J.—*Dittmar Powder Mfg. Co. v. Leon*, 42 N. J. L. 540; *Lentz v. Callin*, 26 N. J. L. 218. N. Y.—*Stone v. Miller*, 62 Barb. 430. Ohio.—*Orr v. Schackel*, 5 Ohio N. P. 246. W. Va.—*Colborn v. Booth*, 41 W. Va. 289, 23 S. E. 556. Wis.—*Marston v. Hurlburt*, 49 Wis. 630, 6 N. W. 316; *Champion v. Argall*, 25 Wis. 521.

As to manner of levy generally, see the titles "Attachment;" "Judgments and Decrees, Enforcement of."

[a] When the officer can reach the goods it is his duty to take them into his possession and hold them subject to the order of the justice, and if he fails to do this there is no levy. *Lyeth v. Griffiths*, 44 Kan. 159, 24 Pac. 59.

46. *Grand Haven Military Club v. Mulholland*, 170 Mich. 592, 136 N. W. 397; *Davidson v. Fox*, 120 Mich. 385, 79 N. W. 1106, the writ shall be executed at least six days before the return thereof.

[a] Levy Before Service of Summons.—Property may be levied upon and seized under a writ of attachment before actual service of the summons in the action, if such summons has been issued and placed in the hands of the officer with a bona fide intent that it shall be served. *Maguire v. Bolen*, 94 Wis. 48, 68 N. W. 408. And see *Seaver v. Fitzgerald*, 23 Cal. 85; *Wehlen v. Macke*, 9 Ohio Dec. (Reprint) 565, if the summons is not served a new one may be issued.

47. *Knack v. Berlin*, 150 Mich. 550, 114 N. W. 342. See generally the title "Attachment."

[a] Insufficient Inventory.—An inventory "one carload of household furniture" is not such an inventory as will under the statute serve to give jurisdiction in an attachment suit before a justice of the peace. *Knack v. Berlin*, 150 Mich. 550, 114 N. W. 342.

48. As to service of process generally, see the title "Service of Process and Papers."

49. As to levy, see *supra*, III, I, 8.

50. *Grand Haven M. Club v. Mulholland*, 170 Mich. 592, 136 N. W. 397; *Tunningly v. Butcher*, 106 Mich. 35, 63 N. W. 994.

[a] Substituted service of the copy of the attachment, as well as personal service, must be made at least six days before the return day thereof. *Grand Haven M. Club v. Mulholland*, 170 Mich. 592, 136 N. W. 397; *Tunningly v. Butcher*, 106 Mich. 35, 63 N. W. 994.

51. *Langtry v. Wayne Circuit Judges*, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; *Town v. Tabor*, 34 Mich. 262; *Farley v. Day*, 26 N. H. 527.

[a] If the defendant is a corporation, the copy must be served on the officers designated by the statute. *Hinman v. Andrews Opera Co.*, 49 Ill. App. 135. See generally the title "Corporations."

52. N. Y. Code Civ. Proc., §2910.

53. Ill.—*Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636; *Borders v. Murphy*, 78 Ill. 81. Minn.—*Flohrs v. Forsyth*, 78 Minn. 87, 80 N. W. 852, holding that when property is attached, service of summons on a non-resident, in the county of his residence will give jurisdiction to render judgment at least to the extent of the attached property. Mo.—*McCloon v. Beattie*, 46 Mo. 391. Ohio.—*Kelly v. Flanagan*, 20 Ohio Cir. Ct. 391, 11 Ohio Cir. Dec. 111.

summons, copies of the writ or warrant and of the inventory.⁵⁴ If the defendant cannot be found within the county, then substituted service may be had as provided for by the statute,⁵⁵ as by leaving a copy at the defendant's last place of residence if there be any such place in the county,⁵⁶ and if not, then by leaving the same with the custodian of the property.⁵⁷ Notice by publication and posting is sometimes provided for.⁵⁸ A failure to give the statutory notice will

54. *Grand Haven M. Club v. Mulholland*, 170 Mich. 592, 136 N. W. 397; *Jones v. Peek*, 101 Mich. 389, 59 N. W. 659; *White v. Prior*, 88 Mich. 647, 50 N. W. 655; *Segar v. Muskegon S. & L. Co.*, 81 Mich. 344, 45 N. W. 982; *Langtry v. Wayne Circuit Judges*, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; *Kidd v. Dougherty*, 59 Mich. 240, 26 N. W. 510.

[a] **Failure to serve copy of inventory** of the property attached does not affect the validity of the writ. *West v. Berg*, 66 Minn. 287, 68 N. W. 1077.

[b] **Appraisal need not be served.** *Jones v. Peek*, 101 Mich. 389, 59 N. W. 659.

[c] **Service as in the case of a short summons** is contemplated. *Champion v. Argall*, 25 Wis. 521.

55. See generally the statutes and **Colo.**—*Conway v. John*, 14 Colo. 30, 23 Pac. 170. **Del.**—*Moneyweight Scale Co. v. Edwards*, 3 Penne. 85, 50 Atl. 62. **Mich.**—*Craig v. Brown*, 169 Mich. 161, 134 N. W. 1121; *Town v. Tabor*, 34 Mich. 262. **Mo.**—*McCloon v. Beattie*, 46 Mo. 391. **N. Y.**—*Stone v. Miller*, 62 Barb. 430; *Marshall v. Canty*, 14 Abb. Pr. 237; *Umla v. Bennett*, 30 App. Div. 324, 51 N. Y. Supp. 932. **N. C.**—*Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61. **Ohio.**—*Foote v. Central A. C. Co.*, 7 Ohio C. C. (N. S.) 531, 16 Ohio Cir. Dec. 378, when property of the defendant has been attached and service of the summons cannot be made, publication of summons may be made. **Tenn.** *Rumbough v. White*, 11 Heisk. 260.

[a] **Duty of Officer.**—(1) The officer must hold the writ and endeavor to find the defendant so as to serve him, until the time to make such service has expired. *Kidd v. Dougherty*, 59 Mich. 240, 26 N. W. 510, citing local cases. See *Davidson v. Fox*, 120 Mich. 385, 79 N. W. 1106 (holding return shows sufficient search); *Withington v. Southworth*, 26 Mich. 381. (2) The officer must use due diligence to obtain personal service. *Bargh v. L. R. Ermeling & Co.*, 110 Mich. 164, 67 N. W.

1083; *White v. Prior*, 88 Mich. 647, 50 N. W. 655; *Noyes v. Hillier*, 65 Mich. 636, 32 N. W. 872; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613; *Town v. Tabor*, 34 Mich. 262.

56. *Segar v. Muskegon S. & L. Co.*, 81 Mich. 344, 45 N. W. 982; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657.

57. *Grand Haven M. Club v. Mulholland*, 170 Mich. 592, 136 N. W. 397; *Davidson v. Fox*, 120 Mich. 385, 79 N. W. 1106. See *Marshall v. Canty*, 14 Abb. Pr. (N. Y.) 237, service on the custodian cannot be made unless the defendant is a nonresident of the county.

58. **Colo.**—*Conway v. John*, 14 Colo. 30, 23 Pac. 170, sufficient compliance with statute shown. **Del.**—*Burton v. Frame*, 5 Penne. 14, 58 Atl. 804; *Moneyweight Scale Co. v. Edwards*, 3 Penne. 85, 50 Atl. 62. **Wis.**—*Champion v. Argall*, 25 Wis. 521. **Wyo.**—*Cheeseman v. Fenton*, 13 Wyo. 436, 80 Pac. 823, 110 Am. St. Rep. 1010.

[a] **It is only after property of a defendant has been attached and his failure to appear at the return of the writ, the writ being either the summons or an attachment writ containing a summons, that an order for publication can be made.** That the defendant cannot be summoned is to be determined from the officer's return upon the summons or writ as the case may be. *Cheeseman v. Fenton*, 13 Wyo. 436, 452, 80 Pac. 823, 110 Am. St. Rep. 1010.

[b] **A defect in the original notice returned "not found" does not affect the jurisdiction of the justice over the res, as this is not the notice relied on to confer jurisdiction over it, service being made by posting on such return.** *Johnson v. Dodge*, 19 Iowa 106.

[c] **Notice Need Not State Township in Which Action Is Pending.** *Johnson v. Dodge*, 19 Iowa 106.

[d] **Failure to mention the attachment proceedings in the citation of publication, will not render a judgment**

make any judgment rendered erroneous,⁵⁹ and even void and open to collateral attack, if the defendant does not appear.⁶⁰ On the other hand, if no property is attached, the justice has jurisdiction over the person of a defendant who is duly served with a writ and the summons,⁶¹ but it is otherwise where the defendant, in an action commenced by an attachment, is merely served with a writ of attachment not required to contain a summons clause.⁶²

10. Custody and Disposition of Attached Property.—An officer attaching property, under a writ of attachment issuing from a justice of the peace, has the same rights and duties as to the custody and disposition of such property, as though the writ issued from a court of general jurisdiction.⁶³

11. Appearance.—The rules governing appearances in actions before justices of the peace generally, obtain in proceedings by attachment.⁶⁴ In one state at least, a defendant wishing to appear in an attachment suit must file a bond to the plaintiff on or before the day of trial.⁶⁵ A voluntary general appearance, as in actions generally, confers jurisdiction over the defendant's person and operates as a waiver of defects in the proceedings, such as irregularities⁶⁶ in the

thereon subject to collateral attack. *Reid v. Mickles* (Tex. Civ. App.), 29 S. W. 563.

[e] **Personal Judgment on Substituted Service.**—Substituted service of a writ of attachment, by leaving a copy with the defendant's wife at his last place of residence will not support a personal judgment against the defendant. *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657.

59. *McCloon v. Beattie*, 46 Mo. 391; *Rumbough v. White*, 11 Heisk. (Tenn.) 260.

60. **III.**—*Borders v. Murphy*, 78 Ill. 81. N. Y.—*Kingsford v. Butler*, 71 Hun 598, 24 N. Y. Supp. 1094; *Wheeler v. Lampman*, 14 Johns. 481; *Putnam v. Man*, 3 Wend. 202, 20 Am. Dec. 686. Wis.—*Selby v. Platts*, 3 Pinn. 170, 3 Chand. 183.

61. *Kelly v. Flanagan*, 20 Ohio Cir. Ct. 391, 11 Ohio Cir. Dec. 111.

62. *Langtry v. Wayne Circuit Judges*, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352.

63. **Kan.**—*Morgan v. Saline Valley Bank*, 4 Kan. App. 668, 46 Pac. 61. **Mont.**—*State v. Eddy*, 10 Mont. 311, 25 Pac. 1032. **Nev.**—*Alexander v. Archer*, 21 Nev. 22, 24 Pac. 373. **Pa.**—*Wolbert v. Fackler*, 32 Pa. 452; *McNamara v. Roderick*, 11 Pa. Co. Ct. 37.

[a] **Perishable property** may be ordered sold, and the lien will attach to the proceeds. **Ala.**—*Young v. Davis*,

30 Ala. 213. **Ga.**—*Wilson v. Garrick*, 72 Ga. 660. **Mo.**—*Snead v. Wegman*, 27 Mo. 176. **Tex.**—*Brasher v. Cuchia*, 4 Tex. Civ. App. 690, 24 S. W. 85.

[b] **A delivery of the property to the plaintiff** cannot be ordered by the justice. *Blake v. Shaw*, 7 Mass. 505; *Welch v. Jamison*, 1 How. (Miss.) 160.

[c] **By executing a forthcoming bond** in compliance with the statute, the defendant may retain possession of the property. **Cal.**—*Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac. 804. **Ill.**—*Conard v. Ehrman*, 61 Ill. App. 128. **Kan.**—*Stow v. Shay*, 54 Kan. 574, 38 Pac. 784. **Mich.**—*Borland v. Kingsbury*, 65 Mich. 59, 31 N. W. 620.

[d] **After judgment the execution of a forthcoming bond** is not authorized. *Woodward v. Witascheck*, 38 Kan. 760, 17 Pac. 658; *Terrail v. Tinney*, 20 La. Ann. 444.

64. See cases cited *infra*, this section, and *supra*, III. G.

65. *Hazlitt v. Morrow*, 55 N. J. L. 547, 26 Atl. 885; *Leeds v. Mueller*, 51 N. J. L. 467, 17 Atl. 954; *Davis v. Mahany*, 38 N. J. L. 104.

66. **Colo.**—*Paul v. Rooks*, 16 Colo. App. 44, 63 Pac. 711. **Ind.**—*Wilkinson v. Moore*, 79 Ind. 397, venue. **Ia.**—*Deshler v. Foster*, Morris 403. **Mich.**—*Austin v. Burroughs*, 62 Mich. 181, 28 N. W. 862; *Manhard v. Schott*, 37 Mich. 234; *O'Hara v. McEnny*, 2 Mich. N. P. 164. **Mo.**—*Rechnitzer v. Mis-*

service, defects in the affidavit filed as a basis for the writ,⁶⁷ and even an omission to file such an affidavit.⁶⁸ A special appearance for the purpose of questioning the jurisdiction of the court because of defects in the attachment proceeding will not have this effect, however.⁶⁹ If neither party appears on the return day of the writ, a written request on the part of the plaintiff for a continuance is sufficient to give the justice jurisdiction to grant such continuance.⁷⁰

12. Return of Writ.—The officer making the levy is required to make a return⁷¹ in writing,⁷² signed by him,⁷³ showing the receipt of the writ,⁷⁴ and specifically what he has done in its execution,⁷⁵ in

souri, K. & T. R. Co., 60 Mo. App. 49; McDonald & Co. v. Fist, 60 Mo. 172. **Vt.**—Hammond v. Wilder, 25 Vt. 342. **Wis.**—Givans v. Searle, 136 Wis. 608, 118 N. W. 202; Fairfield v. Madison Mfg. Co., 38 Wis. 346; Ruthe v. Green Bay, etc. R. Co., 37 Wis. 344; Baizer v. Lasch, 28 Wis. 268; Woodruff v. Sanders, 18 Wis. 161.

But see Brennan v. Taylor, 1 W. N. C. (Pa.) 484, holding that an appearance would not cure a defect in the process being returnable at a wrong day.

[a] **Filing plea in abatement is not the entry of a general appearance.** Sherry v. Divine, 11 Heisk. (Tenn.) 722.

[b] **An appearance on motion to quash the attachment is general.** Colo. Paul v. Rocks, 16 Colo. App. 44, 63 Pac. 711. **Ia.**—Deshler v. Foster, Morris 403. **Miss.**—McClanahan v. Brack, 46 Miss. 246. **Mo.**—Evans v. King, 7 Mo. 411; Whiting v. Budd, 5 Mo. 443.

[c] **Even if the Appearance Is Stated To Be Special.**—Paul v. Rocks, 16 Colo. App. 44, 63 Pac. 711.

[d] **Pleading After Overruling Special Appearance.**—A defendant served by a writ of attachment in another county who appears specially and moves to dismiss the action and who is required to plead thereafter does not thereby enter a general appearance. Perkins v. Meilicke, 66 Minn. 409, 69 N. W. 220. But see *supra*, III, G, 4, b; and 2 STANDARD PROC. 533.

67. **Mo.**—Holman v. Kerr, 44 Mo. App. 481. **Tenn.**—Sherry v. Divine, 11 Heisk. 722. **Wis.**—Givans v. Searle, 136 Wis. 608, 118 N. W. 202; Blackwood v. Jones, 27 Wis. 498. But see Steen v. Norton, 45 Wis. 412.

[a] **The necessity for amending the affidavit is obviated by a general appearance.** McClanahan v. Brack, 46 Miss. 246; Givans v. Searle, 136 Wis. 608, 118 N. W. 202.

68. Dutcher v. Grand Rapids F. Ins. Co., 131 Mich. 671, 92 N. W. 345.

69. **La.**—Bonner v. Brown, 10 La. Ann. 334. **Mich.**—Knack v. Berlin, 150 Mich. 550, 114 N. W. 342; Bushey v. Rath, 45 Mich. 181, 7 N. W. 802; Michels v. Stork, 44 Mich. 2, 5 N. W. 1034; Wright v. Russell, 19 Mich. 346. **Ohio.**—Mawiecke v. Wolf, 7 Ohio Dec. (Reprint) 476. **Tenn.**—Sherry v. Divine, 11 Heisk. 722. **Wis.**—Baizer v. Lasch, 28 Wis. 268; Blackwood v. Jones, 27 Wis. 498.

[a] **Appearance "Without Prejudice."**—In an attachment suit before a justice where the service is defective an appearance by the defendant and a consent to an adjournment "without prejudice" does not waive the defective service. Tunningly v. Butcher, 106 Mich. 35, 63 N. W. 994.

70. Paul v. Rocks, 16 Colo. App. 44, 63 Pac. 711; Wagner v. Kellogg, 92 Mich. 616, 52 N. W. 1017.

71. **Mich.**—White v. Prior, 88 Mich. 647, 50 N. W. 655; Langtry v. Wayne Circuit Judges, 68 Mich. 451, 36 N. W. 211, 13 Am. St. Rep. 352; Alverson v. Dennison, 40 Mich. 179; Adams v. Abram, 38 Mich. 302; Town v. Tabor, 34 Mich. 262. **Mo.**—Rocheport Bank v. Doak, 75 Mo. App. 332. **N. Y.** Barnaman v. Williams, 18 Abb. Pr. 158, 23 How. Pr. 59. **Wis.**—Selby v. Platts, 3 Pinn. 170, 3 Chand. 183.

72. Kidd v. Dougherty, 59 Mich. 240, 26 N. W. 510.

73. Kidd v. Dougherty, 59 Mich. 240, 26 N. W. 510.

74. Hart v. Forbes, 60 Miss. 745.

75. **Ark.**—Gibson v. Wilson, 5 Ark. 422. **Cal.**—Swain v. Chase, 12 Cal. 283. **Del.**—Johnson v. Layton, 5 Harr. 252. **Mich.**—Segar v. Muskegon S. & L. Co., 81 Mich. 344, 45 N. W. 982; Kidd v. Dougherty, 59 Mich. 240, 26 N. W. 510. **Miss.**—Crizer v. Gorren, 41 Miss.

order that the court may determine whether his acts constitute an attachment. A description of the property attached, serving to identify it, must be given either in the return or in an annexed schedule,⁷⁶ and where service other than personal is had, facts and circumstances warranting such service,⁷⁷ and showing a full compliance with the statute,⁷⁸ must be stated. The return need not be verified by the officer making it,⁷⁹ and it may be amended so as to conform to the facts.⁸⁰ When made, the return is conclusive upon the parties so that if a compliance with the law is shown, the justice will have jurisdiction even though it may be false.⁸¹

13. Attachment Lien.—By a sufficient levy of a writ of attachment properly issued, a lien upon the property is created which is subject to all existing valid liens,⁸² but which is lost or terminated by

563; *Rankin v. Dulaney*, 43 Miss. 197.

[a] The place of seizure need not be stated in the return for in the absence of proof to the contrary it will be presumed that the writ was executed in the county. *Bushey v. Rath*, 45 Mich. 181, 7 N. W. 802.

[b] That the copies served on the defendant were certified need not be shown. *Van Kirk v. Wilds*, 11 Barb. (N. Y.) 520.

[c] Must Show Service on Defendant.—A return which states that the constable "served the within summons on the within named defendant," naming one not a defendant, there is no service of the attachment. *Morse v. McQuade*, 54 Misc. 166, 105 N. Y. Supp. 862.

[d] Where there are two joint debtors to a suit by attachment the return must show service on both. *Cook v. McDoel*, 3 Denio (N. Y.) 317.

76. *Pierce v. Strickland*, 2 Story 292, 19 Fed. Cas. No. 11,147; *Baxter v. Rice*, 21 Pick. (Mass.) 197.

77. Mich.—*Davidson v. Fox*, 120 Mich. 385, 79 N. W. 1106; *Farr v. Kilgour*, 117 Mich. 227, 75 N. W. 457; *Matthews v. Forslund*, 113 Mich. 416, 71 N. W. 854; *Noyes v. Hillier*, 65 Mich. 636, 32 N. W. 872; *Rolfe v. Dudley*, 58 Mich. 208, 24 N. W. 657. N. Y.—*Bell v. Moran*, 25 App. Div. 461, 50 N. Y. Supp. 982; *Barnaman v. Williams*, 18 Abb. Pr. 158, 28 How. Pr. 59. Pa.—*Griffs v. Swick*, 12 Pa. Co. Ct. 389.

78. *White v. Prior*, 88 Mich. 647, 50 N. W. 655; *Segar v. Muskegon Shingle, etc. Co.*, 81 Mich. 344, 45 N. W. 982; *Michels v. Stork*, 44 Mich. 2, 5 N. W. 1634; *Town v. Tabor*, 34 Mich. 262; *Bascom v. Smith*, 31 N. Y. 595; *Stone*

v. Miller, 62 Barb. (N. Y.) 430; *Rosenfield v. Howard*, 15 Barb. (N. Y.) 546; *Egbert v. Watson*, 21 How. Pr. (N. Y.) 429.

[a] Search for Defendant.—Where substituted service is depended on to confer jurisdiction, the return must show that search was made for the defendant, until the time allowed for personal service had expired. *Brown v. Williams*, 39 Mich. 755.

[b] A return showing publication of notice by posting must show the posting of notices in the prescribed number of public places, in the proper county, the required time before appearance day. *McCloon v. Beattie*, 46 Mo. 391.

79. *Flohers v. Forsyth*, 78 Minn. 87, 80 N. W. 852.

80. *Kidd v. Dougherty*, 59 Mich. 240, 26 N. W. 510.

81. *Shanklin v. Francis*, 59 Mo. App. 178.

82. Ala.—*Langdon v. Raiford*, 20 Ala. 532. La.—*Tiernan v. Murrah*, 1 Rob. 443. Neb.—*Rhodes v. Samuels*, 67 Neb. 1, 93 N. W. 148. N. Y.—*Wheeler v. Smith*, 11 Barb. 345.

[a] The issuance of the attachment does not affect rights in the defendant's property in the absence of a contrary statute. *Kuhn v. Graves*, 9 Iowa 303.

[b] Nor (1) will the delivery of the writ to the officer create a lien (Ala. *Langdon v. Raiford*, 20 Ala. 532. Ia. *Kuhn v. Graves*, 9 Iowa 303. Md.—*May v. Buckhannon R. L. Co.*, 70 Md. 448, 17 Atl. 274. Mo.—*McIntosh v. Smiley*, 32 Mo. App. 125. Va. Va.—*Poling v. Flanagan*, 41 W. Va. 191, 23 S. E. 685), (2) unless the statute so pro-

the giving of a forthcoming bond for the possession of the property,⁸³ by the vacation or dissolution of the attachment,⁸⁴ by the settlement or discontinuance of the case,⁸⁵ by an illegal exchange of justices by agreement of parties,⁸⁶ or by agreeing upon a judgment at any other day than that set in the writ.⁸⁷ If the lien is subsequently reinstated it will not take precedence over intervening attaching creditors.⁸⁸ A party having a claim carrying a privilege or lien on property attached at the suit of another, in a justice court, may by proper proceedings establish the priority of his claim over the attachment.⁸⁹ An attaching creditor in a suit before a justice cannot, by petition attack the validity of a prior attachment in a higher court,⁹⁰ but a superior court out of which an attachment is issued and served on the property attached in the justice's court, may in some jurisdictions require the plaintiff in the justice's court to become a party to determine the priorities.⁹¹

vides. *Merriman v. Sarlo*, 63 Ark. 151, 37 S. W. 879.

[c] **Statutory requirements must be complied with** (1) before the lien will attach. *Fairbanks v. Bennett*, 52 Mich. 61, 17 N. W. 696. (2) So that if the writ is prematurely served, no lien as against subsequent attaching creditors is created. *Nelson v. Denison*, 17 Vt. 73.

[d] **Two Attachments by Same Officer.**—Where the same officer levys on the same property under two writs, the lien of the subsequent attachment will by operation of law attach to the surplus, if any, on a sale under the first attachment. *Wheeler v. Smith*, 11 Barb. (N. Y.) 345.

[e] **The Idaho statute** providing that on attachment any creditor who within sixty days after notice thereof shall prosecute to final judgment his action against the defendant shall share pro rata with the attaching creditor does not apply to justices of the peace. *Kimball v. Raymond*, 9 Idaho 176, 72 Pac. 957.

83. *Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac. 804.

84. See *infra*, III, I, 14.

85. *Felker v. Emerson*, 17 Vt. 101; *Dean v. Bailey*, 12 Vt. 142.

[a] **By Payment of Judgment Without Costs.**—Where judgment is rendered in favor of the plaintiff and costs are not taxed because of the pendency of a motion to quash the attachment, payment of the judgment will not discharge the lien, and when the order of the justice quashing the attachment is reversed, the property in

the hands of the officer is subject to a lien for the unpaid costs. *Rhodes v. Samuels*, 67 Neb. 1, 93 N. W. 148.

86. *Wells v. Mansur*, 52 Vt. 239.

87. *Murray v. Eldridge*, 2 Vt. 388.

88. *O'Connor v. Blake*, 29 Cal. 312.

[a] **The lien is not reinstated** by the allowance of a motion to set aside a nonsuit already granted. *Brown v. Harris*, 2 G. Gr. (Ia.) 505.

89. Cal.—*Mohle v. Tschirch*, 63 Cal. 381. La.—*Tiernan v. Murrah*, 1 Rob. 443. Nev.—*Alexander v. Archer*, 21 Nev. 22, 24 Pac. 373.

[a] **The justice may order the sheriff to pay the claim of a miner or mechanic** if the sheriff improperly refuses to do so after the claimant has complied with the statute authorizing the filing of such preferred claims against property attached by the sheriff. *Alexander v. Archer*, 21 Nev. 22, 24 Pac. 373.

[b] **If the claim having a privilege is in excess of the justice's jurisdiction**, the creditor may protect himself in the district court by enjoining the officer from proceeding with the execution of the attachment or by a rule to show cause why he should not be paid by preference out of the proceeds of the attached property. *Shiff & Co. v. Carprette*, 14 La. Ann. 801.

90. *Putnam v. Bixby*, 6 Gray (Mass.) 528. See *State Bank v. Steinberg*, 44 Mo. App. 401, as to the proper method of applying the proceeds of attached property under such circumstances.

91. *Moody v. McRiniman*, 7 Tex. Civ. App. 582, 27 S. W. 780.

14. The Action.—a. *Pleading.*—The general rules governing pleadings before a justice of the peace apply to attachment proceedings before him.⁹² In some jurisdictions it is necessary that a complaint be filed before the issuance of an attachment,⁹³ but in others a declaration or complaint in attachment suits in a justice's court need not be filed,⁹⁴ or the affidavit will serve the purpose of both an affidavit and complaint.⁹⁵ A failure of the defendant to avail himself by plea before the justice or on appeal, of matters in abatement of the attachment proceeding, amounts to a confession of the grounds of attachment.⁹⁶

b. *Trial.*—The general rules relating to trials in justice's courts obtain in attachment proceedings.⁹⁷

c. *Judgment and Execution.*⁹⁸—Before a judgment can be rendered on service other than personal, it must appear that the statutory requirements have been complied with, unless the defendant enters a general appearance.⁹⁹ The judgment, when property is attached, and there has been no personal service or appearance, will be in rem and not in personam,¹ although in some jurisdictions a judgment personal in form, may be rendered, which will be limited, in its effect, to the

92. See *infra*, III, K.

93. *Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203, the action being commenced by filing of a complaint. And see *supra*, III, A; III, I, 7, b.

94. *Smith v. Wilson*, 58 Ga. 322; *Henry v. Blaseo*, 1 White & W. Civ. Cas. (Tex.), §765.

95. Ark.—*Hawes v. Robinson*, 44 Ark. 308; *Tignor v. Bradley*, 32 Ark. 781; *Hanner v. Bailey*, 30 Ark. 681. Ga.—*Smith v. Wilson*, 58 Ga. 322. Ind. *Minehrod v. Windoes*, 29 Ind. 288; *Perkins v. Smith*, 4 Blackf. 299. Ia.—*Collins & Co. v. Rodolph*, 3 G. Gr. 299; *Taylor v. Barber*, 2 G. Gr. 350. Mo. *Deck v. Wright*, 135 Mo. App. 536, 116 S. W. 31; *Holman v. Kerr*, 44 Mo. App. 481. N. M.—*Crolet v. Maloy*, 2 N. M. 198. Wis.—*Ruthe v. Green Bay & M. R. Co.*, 37 Wis. 344.

[a] **Affidavit and Complaint May Be Combined.**—Even though the statute contemplates that, in an action by attachment before a justice, the statement of the cause of action should be separately stated and filed, that practice is not essential to the jurisdiction of the justice and his jurisdiction will attach even if the statement of the cause of action and the affidavit are incorporated in one. *Holman v. Kerr*, 44 Mo. App. 481.

96. *Musgrove v. Mott*, 90 Mo. 107 (holding that when a defendant makes no plea to an attachment affidavit he

thereby confesses the matters stated therein); *Rechnitzer v. Missouri, K. & T. Ry. Co.*, 60 Mo. App. 409; *Hubbard v. Quisenberry*, 28 Mo. App. 20.

97. See *infra*, III, L.

[a] **Time of Trial.**—If the attachment proceedings are regular it is the duty of the justice to proceed with the trial of the cause on the return day of the writ. *Weed v. Lewis*, 80 Md. 126, 30 Atl. 610; *Field v. Mo-Vickar*, 9 Johns. (N. Y.) 130. But see *Noyes v. Hillier*, 65 Mich. 636, 32 N. W. 872.

98. See *infra*, III, M and N.

99. Ill.—*Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636. Minn.—*Bird v. Norquist*, 46 Minn. 318, 48 N. W. 1132. Mo.—*McCloon v. Beatie*, 46 Mo. 391. Vt.—*Hammond v. Wilder*, 25 Vt. 342.

1. Ga.—*Reeves v. Chattahoochee Brick Co.*, 85 Ga. 477, 11 S. E. 837; *Carithers v. Venable*, 52 Ga. 389. Ill. *Borders v. Murphy*, 78 Ill. 81; *Smith v. Yargo*, 28 Ill. App. 594. Mich. *Segar v. Muskegon Shingle & L. Co.*, 81 Mich. 344, 45 N. W. 982; *Churchill v. Goldsmith*, 64 Mich. 250, 31 N. W. 187. N. Y.—*Grevell v. Whiteman*, 32 Misc. 279, 65 N. Y. Supp. 974. Wis. *Selby v. Platts*, 3 Pinn. 170, 3 Chand. 183.

See generally the title "Proceedings in Rem."

property attached.² And if rendered for an amount greater than that claimed in the affidavit in such a case, the judgment is erroneous,³ but not void.⁴ If the justice renders a void judgment in the absence of personal service, he may set aside the judgment, issue a new summons, and proceed anew.⁵ Statutes sometimes prohibit the issuance of a general execution against the property of the defendant in an attachment suit, unless the defendant gives bond and security or has appeared and made defense,⁶ or the plaintiff gives defendant the statutory notice of the attachment proceeding.⁷

Stay of Judgment.⁸ — When the defendant does not appear, some statutes require the justice to stay final judgment for a specified time after return of the writ.⁹

15. Vacating and Quashing Attachment.¹⁰ — a. *Grounds.* — The attachment may be vacated or quashed because of defects as to matters of substance,¹¹ but not for mere clerical errors,¹² or irregularities not connected with issuance of the attachment.¹³

b. *Proceedings.* — An attachment may be vacated or dissolved by

2. Ga.—Johnson *v.* W. J. Wood Stove Co., 6 Ga. App. 65, 64 S. E. 287. **Mont.**—State *v.* Eddy, 10 Mont. 311, 25 Pac. 1032. **Neb.**—Smith *v.* Johnson, 43 Neb. 754, 62 N. W. 217. **Ohio.**—Chicago & C. Coal Co. *v.* Manley, 10 Ohio Dec. (Reprint) 394.

[a] **Directions as to Sale of Attached Property.**—The statute providing that if judgment be recovered by the plaintiff the sheriff shall satisfy the same out of property attached by him, the lien of the attachment is not lost by taking a simple money judgment against the defendant without embodying therein directions for the sale of the property. The same is true as to the execution. State *v.* Eddy, 10 Mont. 311, 319, 25 Pac. 1032.

3. Hichins *v.* Lyon, 35 Ill. 150.

4. Gum Elastic Roofing Co. *v.* Mexico Pub. Co., 140 Ind. 158, 39 N. E. 443, 30 L. R. A. 700.

5. Wehlen *v.* Macke, 9 Ohio Dec. (Reprint) 565, 15 W. L. Bul. 125.

6. Reeves *v.* Chattahoochee Brick Co., 85 Ga. 477, 11 S. E. 837; Carithers *v.* Venable, 52 Ga. 389; Rogers *v.* McDill, 9 Ga. 506. See State *v.* Eddy, 10 Mont. 311, 319, 25 Pac. 1032, holding that the attachment lien is not lost by taking out a general execution, the statute providing the plaintiff shall satisfy his judgment out of the property attached.

7. Johnson *v.* W. J. Wood Stove Co., 6 Ga. App. 65, 64 S. E. 287.

8. See generally the title "Supersedeas and Stay of Proceedings."

9. Rumbough *v.* White, 11 Heisk. (Tenn.) 260; Sorrels *v.* Wiley, 6 Heisk. (Tenn.) 318.

10. See generally 3 STANDARD PROC. 747.

11. Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Kingsford *v.* Butler, 71 Hun (N. Y.) 598, 24 N. Y. Supp. 1094, 23 Civ. Proc. 228, 55 N. Y. St. 13.

[a] **Substantial defects in the affidavit** authorize a dissolution of the attachment. Borland *v.* Kingsbury, 65 Mich. 59, 31 N. W. 620; Kingsford *v.* Butler, 71 Hun 598, 24 N. Y. Supp. 1094, 23 Civ. Proc. 228, 55 N. Y. St. 13.

[b] **Insufficient service of the attachment process.** Farley *v.* Day, 26 N. H. 527.

[c] **Falsity of facts stated in the affidavit.** Bancroft & Co. *v.* Talbott, 29 Ohio St. 538.

[d] **Variance.**—An attachment will not be vacated because of a variance between the affidavit to the itemized account and the affidavit of attachment. Brasher *v.* Cuchia, 4 Tex. Civ. App. 690, 24 S. W. 85.

12. Paul *v.* Rooks, 16 Colo. App. 44, 63 Pac. 711; Dickinson *v.* Barnes, 3 Gill (Md.) 485.

13. Dickinson *v.* Barnes, 3 Gill (Md.) 485; Thomson *v.* Tilden, 24 Misc. 513, 53 N. Y. Supp. 920.

the court on its own motion,¹⁴ or on application of the defendant,¹⁵ or it may be dissolved ipso facto by the nonsuit of the plaintiff,¹⁶ or the rendition of judgment for the defendant on the merits.¹⁷ The application of the defendant may be made by motion,¹⁸ upon reasonable notice to the plaintiff,¹⁹ although it has been held that objections raising grounds dehors the record should be taken by plea in abatement.²⁰ If the motion raises objections not apparent on the record, it should be supported by affidavit,²¹ which the plaintiff may oppose with counter-affidavits.²² If the truth of the plaintiff's affidavit as to the grounds of attachment is denied by the affidavit of the defendant the burden of proof is on the plaintiff.²³

c. *Effect of Vacation or Dissolution.*—The effect of a vacation or dissolution of the attachment depends upon whether the attachment vacated is an original process or is merely ancillary to the main action; if it is the former, the action is abated,²⁴ and if the latter, the dissolution does not affect the right of the plaintiff to follow the main

14. *Kingsford v. Butler*, 71 Hun 598, 24 N. Y. Supp. 1094, 23 Civ. Proc. 228, 55 N. Y. St. 13, where the attachment is granted on insufficient pleading or process.

15. See cases cited *infra*, this section.

16. *O'Connor v. Blake*, 29 Cal. 312 (where the action was dismissed on plaintiff's nonappearance); *Brown v. Harris*, 2 G. Gr. (Iowa) 505, holding that a nonsuit destroys the attachment lien and that an order setting aside the nonsuit will not revive the lien.

17. *Ala.*—*Sherrod v. Davis*, 17 Ala. 312. *Cal.*—*Loveland v. Alvord C. Q. M. Co.*, 76 Cal. 562, 18 Pac. 682. *Mo.* *Stephenson v. Jones*, 84 Mo. App. 249. *N. Y.*—*Blynn v. Smith*, 51 Hun 643, 4 N. Y. Supp. 306.

[a] The failure of the justice to enter a judgment abating the attachment on the verdict of the jury for the defendant does not destroy or impair the legal effect of the verdict to abate the judgment and the effect of a formal judgment will be given to the verdict. *Stephenson v. Jones*, 84 Mo. App. 249.

18. *Mich.*—*Borland v. Kingsbury*, 65 Mich. 59, 31 N. W. 620. *N. Y.*—*Kingsford v. Butler*, 71 Hun 598, 24 N. Y. Supp. 1094, 23 Civ. Proc. 228, 55 N. Y. St. 13. *S. C.*—*Metts v. Piedmont & A. Life Ins. Co.*, 17 S. C. 120. *Tenn.* *McReynolds v. Neal*, 8 Humph. 12.

19. *Kirk v. Stevenson*, 59 Ohio St. 556, 53 N. E. 49.

20. *Stephenson v. Jones*, 84 Mo. App. 249; *Messner v. Hutchins*, 17 Tex. 597.

[a] **Objection to Justice Must Be by Plea in Abatement.**—An objection that the justice before whom an affidavit purports to have been made was not in fact such a justice must be presented by plea in abatement. *Lowry v. Stowe*, 7 Port. (Ala.) 483.

21. *Kirk v. Stevenson*, 59 Ohio St. 556, 53 N. E. 49; *Seville v. Wagner*, 46 Ohio St. 52, 18 N. E. 430; *Bradley v. Wacker*, 13 Ohio Cir. Ct. 530, 7 Ohio Cir. Dec. 565.

22. *Baer, Harkeimer & Co. v. Otto*, 34 Ohio St. 11; *Ward v. Ward*, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656.

[a] A denial not under oath need not be noticed. *Ward v. Ward*, 20 Ohio Cir. Ct. 136, 10 Ohio Cir. Dec. 656.

23. *Kirk v. Stevenson*, 59 Ohio St. 556, 53 N. E. 49; *Seville v. Wagner*, 46 Ohio St. 52, 18 N. E. 430; *Bradley v. Wacker*, 13 Ohio Cir. Ct. 530, 7 Ohio Cir. Dec. 565.

See generally 3 STANDARD PROC. 787; 2 ENCY. OF EV. 73.

24. *Kingsbury v. Borland*, 65 Mich. 59, 31 N. W. 620 (*overruling Hills v. Moore*, 40 Mich. 210); *Sherry v. Divine*, 11 Heisk. (Tenn.) 722.

Compare Churchill v. Goldsmith, 64 Mich. 250, 31 N. W. 187, where the attachment was not personally served on the defendant and a motion to dissolve was made before a circuit court commissioner, it was held the collateral proceeding did not oust the justice of jurisdiction.

action to judgment.²⁵ In either case, the lien of the attachment is dissolved and it becomes the duty of the attaching officer to return the property to the defendant,²⁶ unless the plaintiff appeals from the judgment of dissolution, which appeal will operate as a supersedeas.²⁷

16. Third Party Claims.²⁸—Statutes generally allow third persons who claim the property attached or an interest therein to come into the attachment suit to assert their rights.²⁹ In pursuing these remedies, the statutes must be strictly complied with.³⁰ Some statutes provide for an intervention by the claimant,³¹ and some authorize the officer serving attachment process to summon a jury to try the right of property on the filing of a claim to the attached property,³² but he cannot do so if the statute does not give him such authority.³³

Jurisdiction.—The court issuing the attachment has jurisdiction to determine the right of property even though the value of the attached property exceed the justice's jurisdiction.³⁴ If the intervention proceedings are equitable in their nature, however, the justice has no jurisdiction,³⁵ and under some statutes the claimant may be entitled to remove his claim to a higher court for determination by a jury.³⁶

Who May Intervene and When.—Where the statute provides for in-

25. **N. Y.**—Field *v.* McVickar, 9 Johns. 130; Rosenthal *v.* Grouse, 1 How. Pr. N. S. 447, 7 Civ. Proc. 135. **Ohio.**—Collins *v.* Bingham Bros., 22 Ohio Cir. Ct. 533, 12 Ohio Cir. Dec. 825. **Tenn.**—Kruger *v.* Stayton, 11 Heisk. 726; Sherry *v.* Divine, 11 Heisk. 722.

26. **Cal.**—Loveland *v.* Alvord C. Q. M. Co., 76 Cal. 562, 18 Pac. 682; O'Connor *v.* Blake, 29 Cal. 312. **Minn.**—Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. 298. **Mo.**—State *v.* Fitzpatrick, 64 Mo. 185; Stephenson *v.* Jones, 84 Mo. App. 249. **Vt.**—Johnson *v.* Edson, 2 Aiken 299.

[a] If the property has been sold by order of the court, the proceeds of such sale are discharged from the lien on dissolution of the attachment. Goldstein *v.* Sondheim, 3 Kulp (Pa.) 212.

27. **Ala.**—Sherrod *v.* Davis, 17 Ala. 312. **Minn.**—Ryan Drug Co. *v.* Peacock, 40 Minn. 470, 42 N. W. 298. **Mo.**—Stephenson *v.* Jones, 84 Mo. App. 249; Newman *v.* York, 74 Mo. App. 292.

See generally the title "Supersedeas and Stay of Proceedings," and *infra*, IV.

[a] The appeal must be taken promptly, that is within a reasonable time under all circumstances, to retain the advantage of the appeal. Whether so taken, is a question of fact. New-

man *v.* York, 74 Mo. App. 292, concurring opinion by Biggs, J.

28. As to third party claims generally, see 3 STANDARD PROC. 648, 662.

29. See generally the statutes and the following cases, and **Colo.**—Whalen *v.* McMahon, 16 Colo. 373, 26 Pac. 583. **Conn.**—Darrow *v.* Adams Exp. Co., 41 Conn. 525. **Ill.**—Stafford *v.* Scroggin, 43 Ill. App. 48. **N. J.**—Stryker *v.* Skillman, 14 N. J. L. 189. **N. C.**—Simpson *v.* Harry, 18 N. C. 202.

30. Stryker *v.* Skillman, 14 N. J. L. 189.

31. See generally the statutes and cases cited *infra*, this section.

32. Stryker *v.* Skillman, 14 N. J. L. 189.

33. Dickey *v.* Evans, 2 Litt. (Ky.) 129; Stryker *v.* Skillman, 14 N. J. L. 189.

34. Fly *v.* Grieb's Admr., 62 Ark. 209, 35 S. W. 214; Mills *v.* Thomson, 61 Mo. 415; State *ex rel.* Hirsch *v.* Silverstein & Co., 77 Mo. App. 304; Springfield Engine & T. Co. *v.* Glazier, 55 Mo. App. 95.

Jurisdiction as determined by amount in controversy, see generally the title "Jurisdiction."

35. Shea *v.* Regan, 29 Mont. 308, 74 Pac. 737. See Darrow *v.* Adams Exp. Co., 41 Conn. 525, holding the court of equity may take entire jurisdiction of the matter pending at law.

36. Simpson *v.* Harry, 18 N. C. 202, under an old statute.

tervention, any person claiming an interest in the property attached may interpose his claim³⁷ at any time prior to the trial of the main action,³⁸ and in some jurisdictions at any time before final judgment or appeal.³⁹ And a subsequent attaching creditor, claiming under a valid attachment,⁴⁰ may attack the validity of a prior attachment.⁴¹

Forthcoming Bond. — Statutes sometimes allow the third party claimant to obtain possession of the attached property by giving a forthcoming bond conditioned as provided in the statute,⁴² but he cannot obtain possession thus where the statute makes no provision therefor.⁴³

Issues, Verdict, and Judgment. — The only issue in intervention proceedings is whether or not the attached property belongs to the intervenor.⁴⁴ The verdict rendered must conform to the issue,⁴⁵ and the judgment must conform to the verdict,⁴⁶ and any requirements prescribed by the statute.⁴⁷

Appeal. — An intervenor may appeal from a judgment rendered against him in the intervention proceeding,⁴⁸ but an appeal by the defendant in the main case alone gives the intervenor no right to question the correctness of the judgment against him.⁴⁹

17. Actions on Bonds. — After defeat of a plaintiff who wrongfully sued out an attachment, the defendant may treat the process as void and sue in trespass,⁵⁰ or waive the irregularity, and sue on the bond.⁵¹ On the breach of a forthcoming bond running to the officer, the plaintiff cannot maintain an action thereon until it has

37. *Colo.*—Whalen *v.* McMahon, 16 *Colo.* 373, 26 *Pac.* 583. *D. C.*—Wallace, Elliot & Co. *v.* Maroney, 6 *Mackey* 221. *Mo.*—Mills *v.* Thomson, 61 *Mo.* 415; Wray *v.* Wrightsman, 139 *Mo.* App. 635, 124 *S. W.* 38.

38. Whalen *v.* McMahon, 16 *Colo.* 373, 26 *Pac.* 583.

39. Melius *v.* Houston, 41 *Miss.* 59; Ladd *v.* Couzins, 35 *Mo.* 513, 516; Wolff *v.* Vette, 17 *Mo.* App. 36.

40. Bank of Union *v.* Loeb, 71 *W. Va.* 494, 76 *S. E.* 883.

41. Bank of Union *v.* Loeb, 71 *W. Va.* 494, 76 *S. E.* 883.

42. Kamená *v.* Wanner, 6 *Abb. Pr.* 193, 6 *Duer* (N. Y.) 698.

See generally 3 *STANDARD PROC.* 671. As to forthcoming bonds generally, see the title "Forthcoming Bonds."

Action on bond, see *infra*, III, I, 17. 43. Kinnear *v.* Flanders, 17 *Colo.* 11, 28 *Pac.* 327, holding that a claimant of attached property cannot by giving a forthcoming bond become repossessed of the attached property pending a determination of the intervention proceedings. See *People v. Lowell*, 186 *Ill. App.* 617.

44. Mills *v.* Thomson, 61 *Mo.* 415; Springfield Engine & T. Co. *v.* Glazier,

55 *Mo. App.* 95; Cevada *v.* Miera, 10 *N. M.* 62, 61 *Pac.* 125.

45. Mills *v.* Thomson, 61 *Mo.* 415; Springfield Engine & T. Co. *v.* Glazier, 55 *Mo. App.* 95.

46. Mills *v.* Thomson, 61 *Mo.* 415.

[a] Where the judgment is for the defendant the only judgment which can be rendered on the trial of the right to property is a judgment for costs. McCormick Harv. Mach. Co. *v.* Scott, 66 *Neb.* 479, 92 *N. W.* 599.

47. McCormick Harv. Mach. Co. *v.* Scott, 66 *Neb.* 479, 92 *N. W.* 599.

48. Winship *v.* May, 7 *Colo. App.* 355, 43 *Pac.* 904.

49. Winship *v.* May, 7 *Colo. App.* 355, 43 *Pac.* 904.

50. See *infra*, III, I, 18.

51. King *v.* Watson, 51 *Colo.* 293, 117 *Pac.* 165, *Ann. Cas.* 1913B, 178; Bennett *v.* Brown, 20 *N. Y.* 99; Bowne *v.* Mellor, 6 *Hill* (N. Y.) 496; Ball *v.* Gardner, 21 *Wend.* (N. Y.) 270; Homan *v.* Brinkerhoff, 1 *Denio* (N. Y.) 184, holding that a void judgment would not maintain an action on a bond.

[a] Malice or want of probable cause in suing out the attachment need not be alleged. Pettit *v.* Mercer, 8 *B. Mon.* (Ky.) 51; Zigler *v.* Russell, 2

been assigned to him,⁵² unless he is permitted by statute to sue in his own name.⁵³ Of course, he may sue on the bond, if it runs directly to him,⁵⁴ and he may sue thereon even if no obligee is named.⁵⁵

18. Wrongful Attachment.—Where the proceedings in attachment are void, the plaintiff is a trespasser ab initio,⁵⁶ and the defendant may bring an action of conversion,⁵⁷ or trespass.⁵⁸ Sometimes an action in the nature of an action for malicious prosecution is brought,⁵⁹ in which it will be necessary to allege the facts required in such an action, such as a termination of the attachment proceedings adversely to the present defendant,⁶⁰ malice and want of probable cause.⁶¹ If the action is founded upon the wrongful and vexatious suing out of a foreign attachment, the jurisdiction of the justice who issued the attachment must be shown,⁶² and the defendant must be connected with the levy.⁶³ And in order to recover more than nominal damages, the plaintiff must allege and prove the non-return of the property or other damage suffered by him.⁶⁴ In pleading jurisdiction of the court to issue the attachment in justification, the defendant must plead facts on which such jurisdiction depends.⁶⁵

J. GARNISHMENT.⁶⁶—1. Nature of Remedy.—Garnishment proceedings are purely statutory and can be resorted to only when authorized by the statute.⁶⁷ A garnishment proceeding, when once

Ohio Dec. (Reprint) 518; *Bruce v. Coleman*, 1 Handy (Ohio) 515, 12 Ohio Dec. 265.

52. *McDowell & Co. v. Morgan*, 33 Mo. 555.

53. *Kohn v. Hinshaw*, 17 Ore. 308, 20 Pac. 629.

54. *Bowers v. Beck*, 2 Nev. 139.

55. *Embry v. Midland Land Co.* (Okla.), 151 Pac. 218.

56. *Ky.*—*Lovier v. Gilpin*, 6 Dana 321; *Robertson v. Roberts*, 1 A. K. Marsh. 247. *Mo.*—*Norman v. Horn*, 36 Mo. App. 419. *N. J.*—*McFadden v. Whitney*, 51 N. J. L. 391, 18 Atl. 62. *N. Y.*—*Kelly v. Archer*, 48 Barb. 68.

57. *Norman v. Horn*, 36 Mo. App. 419; *Kelly v. Archer*, 48 Barb. (N. Y.) 68. See generally the title "**Trover and Conversion.**"

58. *Bowne v. Mellor*, 6 Hill (N. Y.) 496. See generally the title "**Trespass.**"

59. See generally the title "**Malicious Prosecution.**"

[a] Justice has no jurisdiction of such an action. *Rice v. Day*, 34 Neb. 100, 51 N. W. 464.

60. *Zigler v. Russell*, 2 Ohio Dec. (Reprint) 518; *Bruce v. Coleman*, 1 Handy (Ohio) 515, 12 Ohio Dec. 265.

[a] That proceedings in error have been sued out need not be negatived.

Zigler v. Russell, 2 Ohio Dec. (Reprint) 518.

[b] **Sufficient Allegation.**—An averment of a judgment recovered is an allegation that the former suit was finally determined. *Zigler v. Russell*, 2 Ohio Dec. (Reprint) 518.

61. *Zigler v. Russell*, 2 Ohio Dec. (Reprint) 518.

62. *Marshall v. Betner*, 17 Ala. 832.

63. *Marshall v. Betner*, 17 Ala. 832.

64. *Blynn v. Smith*, 51 Hun 643, 4 N. Y. Supp. 306.

65. *Van Etten v. Hurst*, 6 Hill (N. Y.) 311, 41 Am. Dec. 748, an allegation that the party complied with the statute and that the justice had jurisdiction is insufficient.

66. As to garnishment generally, see 10 STANDARD PROC. 365, et seq.

67. *Ala.*—*White v. Simpson*, 107 Ala. 386, 18 So. 151. *Ga.*—*Smith v. Green*, 34 Ga. 178. *Mich.*—*Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732. *Pa.*—*Shade v. Hartman*, 11 Pa. Dist. 449; *Harrington v. Gear*, 26 Pa. Co. Ct. 274; *Lyons v. Farrell*, 11 Kulp 145.

See also 10 STANDARD PROC. 373, et seq.

[a] In Wisconsin, justices in counties having cities of the first class have no jurisdiction over actions of garnish-

begun, constitutes in a limited sense, a suit,⁶⁸ ancillary to the main action,⁶⁹ and having for its purpose the attaching of credits, effects, debts, etc., of the defendant which are in the possession or under the control of a third person, as security for any judgment the plaintiff may recover against the defendant.⁷⁰

2. **Time When Proceeding May Be Instituted.**⁷¹ — It is sometimes provided that garnishment proceedings may be had whenever an action has been commenced by summons or attachment.⁷² Other statutes, however, require that a valid attachment must have been issued,⁷³ and that a valid judgment be rendered against the principal defendant,⁷⁴ or that a valid execution be issued and returned *nulla bona*.⁷⁵

3. **Who May Be Summoned as Garnishees.**⁷⁶ — Statutes generally provide that any person, firm or corporation having in their hands or under their control, property, money, effects, or credits of the principal defendant, are subject to garnishment.⁷⁷

ment. State *ex rel.* Wixon *v.* Cleveland, 164 Wis. 189, 159 N. W. 837.

68. Ala.—Steiner *v.* First Nat. Bank, 115 Ala. 379, 22 So. 30; Moore *v.* Stainton, 22 Ala. 831; Witherspoon *v.* Barber, 3 Stew. 335. Colo.—Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266. Ill.—Bank of Commerce *v.* Franklin, 88 Ill. App. 198. Wis.—Steen *v.* Norton, 45 Wis. 412.

69. Colo.—Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266. Ind.—Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207. Mich.—Iron Cliffs Co. *v.* Lahais, 52 Mich. 394, 18 N. W. 121. Minn.—Willson *v.* Pennoyer, 93 Minn. 348, 101 N. W. 502.

70. Ala.—White *v.* Simpson, 107 Ala. 386, 394, 18 So. 151. Ark.—Smith *v.* Butler, 72 Ark. 350, 80 S. W. 580. Colo.—Nylan *v.* Renhard, 10 Colo. App. 46, 49 Pac. 266.

See generally 10 STANDARD PROC. 372.

[a] The object of the garnishment is not to seize any particular property but to discover what effects and credits of the defendant the garnishee has in his hands and to subject them to the payment of any judgment the plaintiff may recover against the defendant. Smith *v.* Butler, 72 Ark. 350, 80 S. W. 580.

71. See generally 10 STANDARD PROC. 384, et seq.

72. See the statutes.

73. Ark.—Littlejohn *v.* Lewis, 32 Ark. 423. Ga.—National Bank of Brunswick *v.* Pritchard, 4 Ga. App. 46, 61 S. E. 841. Ind.—Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330; Brown *v.* Goble, 97 Ind. 86; Johnson *v.* Ramsay,

91 Ind. 189; Williams *v.* Hitzie, 83 Ind. 303; Earl *v.* Matheney, 60 Ind. 202; Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207. Mich.—Adams *v.* Osborne, 138 Mich. 161, 101 N. W. 220.

74. Ark.—Littlejohn *v.* Lewis, 32 Ark. 423. Ga.—Field *v.* Peel, 122 Ga. 503, 50 S. E. 346, holding that a voidable judgment if acquiesced in by the party against whom it is rendered will support garnishment proceedings. Mo.—McCloon *v.* Beattie, 46 Mo. 391. Pa.—McCarty *v.* Dougherty, 4 Pa. Dist. 267; Dillon *v.* Treverton, 4 Pa. Dist. 266. Wis.—Beaupre *v.* Brigham, 79 Wis. 436, 48 N. W. 596.

75. Ga.—Ingram *v.* Jackson Mercantile Co., 2 Ga. App. 218, 58 S. E. 372, holding that garnishment process cannot issue on dormant judgment. Ill.—Bank of Commerce *v.* Franklin, 83 Ill. App. 198; Dearborn Laundry Co. *v.* Chicago & A. R. Co., 55 Ill. App. 438. Mo.—Kansas & T. Coal Co. *v.* Adams, 99 Mo. App. 474, 74 S. W. 158. Pa.—Miller *v.* Snyder, 133 Pa. 23, 19 Atl. 309; Liess *v.* Engard, 8 Pa. Dist. 608; Delany *v.* Carey, 10 Kulp 204; Mowry *v.* Thomas, 1 Lack. Co. 106. Tenn.—Miller *v.* Wilson, 86 Tenn. 495, 7 S. W. 638.

See generally 10 STANDARD PROC. 386, et seq.

[a] It is not enough that execution should have issued; it must have been placed in the hands of the officer for levy. Hodge's Heirs *v.* Anderson (N. D.), 159 N. W. 79.

76. See generally 10 STANDARD PROC. 389, et seq.

77. See the statutes, and Ark.—Woodruff *v.* Griffith, 5 Ark. 354. Ill.

4. **What Property Subject to Garnishment.**⁷⁸ — The statutes usually provide for the garnishment of credits due from a certain person, known as the garnishee, to the principal debtor, or of property subject to execution in the possession or control of the garnishee belonging to the principal debtor.⁷⁹ And generally, in all cases in which the defendant in the main action may maintain an action at law against the garnishee, a garnishment proceeding will lie.⁸⁰

5. **Proceedings To Procure.** — a. *Compliance With Statute.* — Proceedings to procure a garnishment must be in strict compliance with the statutes regulating garnishment.⁸¹

Luton v. Hoehn, 72 Ill. 81. Mich. Grinnell v. Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435; Custer v. White, 49 Mich. 262, 13 N. W. 583.

[a] An agent of the defendant's debtor is not subject to garnishment because he personally would not be subject to an action in favor of the defendant. Voorhies v. Denver Hardware Co., 4 Colo. App. 428, 36 Pac. 65.

[b] A foreign insurance company may be garnished. Grinnell v. Niagara F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

78. See generally 10 STANDARD PROC. 389, et seq.

79. See generally the statutes, and the following: Mich.—Noyes v. Foster, 48 Mich. 273, 12 N. W. 221; Sievers v. Woodburn Sarven Wheel Co., 43 Mich. 275, 5 N. W. 311. Mo.—Osborne v. Schutt, 67 Mo. 712. N. H.—Barker v. Garland, 22 N. H. 103, holding that a trustee (or garnishee) cannot be charged on a negotiable note due from him to the defendant. Pa.—Thatcher v. Beam, 14 Pa. Co. Ct. 109; Liess v. Engard, 8 Pa. Dist. 608; Baker v. Harding, 6 Pa. Co. Ct. 21.

[a] A debt due in another state from a resident garnishee is subject to garnishment. Pomeroy v. Rand, McNally & Co., 157 Ill. 176, 41 N. E. 636.

[b] Negotiable Instruments. — Notwithstanding a statute providing that no judgment can be rendered upon a liability of a garnishee arising by reason of his having a negotiable note, an order directing payment into court is not void if the garnishee's disclosure failed to show the negotiability. Harwi Hdw. Co. v. Klippert, 67 Kan. 743, 74 Pac. 254; Bell-Wayland Co. v. Nixon (Okla.), 156 Pac. 1195.

[c] Jury fees due the principal defendant are not subject to garnishment. Simons v. Wharton, 2 Clark (Pa.) 438.

[d] Property exempt from execution

(1) cannot be garnished. State *ex rel.* Lewis v. Barnett, 96 Mo. 133, 8 S. W. 767. As to what property is exempt, see the title "Judgments and Decrees, Enforcement of." (2) A debt for labor to a certain amount cannot be garnished if the defendant is a household-er. Curran v. Fleming, 76 Ga. 98; Crisp v. Ft. Wayne & E. Ry. Co., 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732. (3) An attachment of wages for board cannot issue as original process but only on a judgment under a Pennsylvania statute. Dillon v. Treverton, 16 Pa. Co. Ct. 89. See also McCarty v. Dougherty, 16 Pa. Co. Ct. 86.

[e] **How Exemption Rights Protected.**—(1) Where the statute prescribed certain interrogatories to be asked the garnishee, the justice can ask no other and the justice therefore has no jurisdiction to inquire into where the property is exempt. This then is left with the officer serving the writ. State *ex rel.* Lewis v. Barnett, 96 Mo. 133, 8 S. W. 767; State v. Barada, 57 Mo. 562. (2) In some states, however, the garnishee is required to interpose this defense (Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83), (3) or the defendant may file a claim to the fund. Garden v. Crutchfield, 112 Ga. 274, 37 S. E. 368; Cunningham v. Kansas City, Ft. S. & M. Ry. Co., 60 Kan. 268, 56 Pac. 502. (4) The decision of the court on the affidavits is a final order and may be reviewed by proceedings in error. Cunningham v. Kansas City, Ft. S. & M. Ry. Co., 60 Kan. 268, 56 Pac. 502. As to claiming and enforcing exemptions generally, see the title "Homesteads and Exemptions."

80. Bank of Commerce v. Franklin, 88 Ill. App. 198; Bartell v. Bauman, 12 Ill. App. 450.

81. Colo.—Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024.

b. *Affidavit*.—The person asking for garnishment process is sometimes required to file an affidavit in compliance with the statute;⁸² but some statutes do not require it.⁸³

The affidavit filed must be in substantial conformity to the statutory requirements,⁸⁴ and state facts authorizing the garnishment,⁸⁵ the amount of the plaintiff's claim against the defendant over and above all offsets,⁸⁶ and that affiant has good reason to believe⁸⁷ that the person to be summoned as garnishee is indebted to the defendant or has personal property of the defendant not exempt from execution, in his possession or under his control.⁸⁸

N. D.—Hodge's Heirs *v.* Anderson, 159 N. W. 79. Pa.—Lyons *v.* Farrell, 11 Kulp 145; Shade *v.* Hartman, 11 Pa. Dist. 449. Wis.—Steen *v.* Norton, 45 Wis. 412.

82. Ill.—Garrett *v.* Murphy, 102 Ill. App. 65. Ind.—Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330; Pomeroy *v.* Beach, 149 Ind. 511, 49 N. E. 370. Wis.—Jones *v.* St. Onge, 67 Wis. 520, 30 N. W. 927; Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196; Steen *v.* Norton, 45 Wis. 412.

See generally 10 STANDARD PROC. 488, et seq.

[a] The affidavit stands for the plaintiff's complaint against the garnishee and for the jurisdiction of the justice. Steen *v.* Norton, 45 Wis. 412.

[b] The affidavit is essential to the jurisdiction of the justice over the subject-matter. Steen *v.* Norton, 45 Wis. 412. But compare Hart *v.* O'Rourke, 151 Ind. 205, 51 N. E. 330, and Davis *v.* Bickel, 25 Ind. App. 378, 58 N. E. 207, holding that a judgment against a garnishee is erroneous if no affidavit is filed but it is not void and subject to collateral attack.

83. See generally the statutes, and Drinker *v.* Kopley, 43 Okla. 686, 144 Pac. 350.

84. Andrews *v.* Powell, 27 Ind. 303; Edler *v.* Hasche, 67 Wis. 653, 31 N. W. 57; Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518; Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196; Steen *v.* Norton, 45 Wis. 412.

[a] If (1) garnishee is a corporation that fact must be stated. Underwood *v.* First Nat. Bank (Tex. Civ. App.), 62 S. W. 943. (2) But it is not necessary to state whether the corporation garnishee is domestic or foreign under a statute authorizing garnishment proceedings against a corporation whether domestic or foreign. Grinnell *v.* Niagara

F. Ins. Co., 127 Mich. 19, 86 N. W. 435.

[b] *Cure of Defects*.—An affidavit is jurisdictional. If materially defective it stands as no affidavit and no appearance, or submission of the garnishee can operate to waive the defect of jurisdiction for this goes to the jurisdiction of the justice over the subject-matter. Steen *v.* Norton, 45 Wis. 412.

85. Underwood *v.* First Nat. Bank (Tex. Civ. App.), 62 S. W. 943.

[a] Where (1) the rendition of a judgment is required before garnishment proceedings can be instituted, that fact must be shown, stating the amount of the judgment. Garrett *v.* Murphy, 102 Ill. App. 65. (2) An allegation of a judgment by confession will suffice. Hudson Coal Co. *v.* Hauf, 18 Wyo. 425, 109 Pac. 21.

[b] The issuance and return unsatisfied of a valid execution must be shown if this is a prerequisite. Garrett *v.* Murphy, 102 Ill. App. 65.

86. Jones *v.* St. Onge, 67 Wis. 520, 30 N. W. 927.

87. Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518.

[a] The words that "affiant verily believes" is a substantial compliance with the statutory words that "the affiant has good reason to believe." Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518.

88. Russell *v.* Ralph, 53 Wis. 328, 10 N. W. 518; Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196; Steen *v.* Norton, 45 Wis. 412.

[a] That the goods are not exempt must be stated. Rasmussen *v.* McCabe, 46 Wis. 600, 1 N. W. 196; Steen *v.* Norton, 45 Wis. 412.

[b] That the affidavit uses the disjunctive and states that the garnishee "is indebted to or has property," etc., does not render it insufficient. Rus-

Amendment. — Statutes sometimes permit a defective affidavit to be amended.⁸⁹

The affidavit cannot be traversed under some statutes.⁹⁰

c. *Bond.* — A bond or undertaking is sometimes required by the statute.⁹¹

6. Process and Service Thereof.⁹² — a. *In General.* — In order to confer jurisdiction upon a justice of the peace in garnishment proceeding, it is necessary to summon the garnishee to appear and answer at the time and place prescribed by law.⁹³ In some jurisdictions, the garnishee summons must be issued by the justice before whom the original suit is brought;⁹⁴ but in others, it is issued by the officer having the principal summons or attachment.⁹⁵ The writ must comply with the statute,⁹⁶ and must be directed to the proper officer for

sell v. Ralph, 53 Wis. 328, 10 N. W. 518.

[c] An affidavit stating that the garnishee has "property, credits, moneys and effects" of the defendant is not objectionable for using the word "property" and thus implying that he has real property of the defendant. Russell v. Ralph, 53 Wis. 328, 10 N. W. 518.

89. See the statutes, and Wis. St., 1915, §3716. Compare Steen v. Norton, 45 Wis. 412, decided under earlier statute.

90. Cohen v. Goodrum Tob. Co., 1 Ga. App. 38, 57 S. E. 974.

91. See generally the statutes, and Davis v. Bickel, 25 Ind. App. 378, 58 N. E. 207, holding that the plaintiff having given the required bond is estopped from objecting to the absence of an affidavit where suit is brought on the bond. See also 10 STANDARD PROC. 492, et seq.

92. See generally the titles "Process;" "Service of Process and Papers;" also 10 STANDARD PROC. 493, et seq.

93. Ala.—Lawrence, Rapelye & Co. v. Ware, 1 Stew. 33. Colo.—Rice v. American Nat. Bank, 3 Colo. App. 81, 31 Pac. 1024. Del.—McClay v. Houston's Admr., 1 Harr. 529. Ga.—Mandeville v. Askew, Bradley & Co., 78 Ga. 18. Wis.—Edler v. Hasche, 67 Wis. 653, 31 N. W. 57.

[a] The Summons and Notice to a Garnishee Perform a Twofold Service. The summons is to bring him into court. This is essential to give the court jurisdiction over the person of the garnishee. The notice by which the officer is required to declare to the gar-

nishee that he attaches in his hands, etc., is the means by which the thing (property or debt) is brought into court and is the indispensable prerequisite to confer jurisdiction over the subject-matter. Swallow v. Duncan, 18 Mo. App. 622.

94. White v. Custer, 49 Mich. 262, 13 N. W. 583; Foster v. Noyes, 48 Mich. 273, 12 N. W. 221; Sievers v. Woodburn Sarven Wheel Co., 43 Mich. 275, 5 N. W. 311.

95. Nylan v. Renhard, 10 Colo. App. 46, 49 Pac. 266 (the garnishee summons in a proceeding in aid of attachment is the notice left with the garnishee that the debts of the defendant are attached; this does not give the court jurisdiction over the garnishee); Steen v. Norton, 45 Wis. 412.

[a] In Wisconsin, the affidavit is delivered by the plaintiff to the officer having the principal summons, who thereupon issues his process reciting the affidavit and summoning the garnishee to appear before the justice, and returns the affidavit and summons to him. The summons is not strictly a judicial process, but is technically a warning order only. Steen v. Norton, 45 Wis. 412.

96. Railway Co. v. Brooks, 90 Tenn. 161, 16 S. W. 77; McCormick Harvesting M. Co. v. James, 84 Wis. 600, 54 N. W. 1088; Edler v. Hasche, 67 Wis. 653, 31 N. W. 57.

[a] The debt to be garnished need not be described in the writ. Smith v. Butler, 72 Ark. 350, 80 S. W. 580.

[b] The return day of a garnishment on execution from a justice is the next law day of the justice and not the return day of the execution. Wise v. Hull, 32 Mo. 209.

service, and must be served by such officer.⁹⁷ A valid service of the garnishment process is necessary,⁹⁸ and it must be made in accordance with the rules governing service of process generally.⁹⁹ Some statutes require the officer to seize the property, or take a forthcoming bond from the garnishee.¹

b. *Notice to the Principal Defendant.*—Under some statutes notice of the garnishment must be served on the principal defendant either in person or by publication;² and where required by statute, the notice must be in accordance with the statutory provisions, and must appear in the record of the justice.³

97. Ga.—*Massengale v. McGinty*, 73 Ga. 120. Mo.—*Mangold v. Dooley*, 89 Mo. 111, 1 S. W. 126; *Fletcher v. Wear*, 81 Mo. 524; *Huff v. Alsup*, 64 Mo. 51; *Henoch v. Chaney*, 61 Mo. 129. N. H.—*Brown v. Dudley*, 33 N. H. 511, where the garnishee and principal defendant reside in different counties, the writ of garnishment should be directed to any sheriff in the state.

98. Ala.—*Lawrence, Rapelye & Co. v. Ware*, 1 Stew. 33. Colo.—*Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024. Ga.—*Massengale v. McGinty*, 73 Ga. 120. Tex.—*McFarland v. Wilder* (Tex. Civ. App.), 54 S. W. 267.

[a] The service of the summons is the commencement of the action against the garnishee. *Steen v. Norton*, 45 Wis. 412.

As to effect of appearance, see *infra*, III, J, 8, a.

99. See generally the statutes, and the title "Service of Process and Papers."

[a] Where a writ of garnishment is not served the statutory number of days before the return day, a justice of the peace has no jurisdiction. *McFarland v. Wilder* (Tex. Civ. App.), 54 S. W. 267.

[b] Where service is made on a corporation, it must be made on the officer, or agent, designated by the statute. *Grinnell v. Niagara F. Ins. Co.*, 127 Mich. 19, 86 N. W. 435.

[c] Service of process upon the daughter of a garnishee does not confer jurisdiction upon a justice of the peace over the garnishee even though such garnishee has actual knowledge of the proceedings. *Wilmer v. Picka*, 118 Md. 543, 85 Atl. 778.

1. See generally the statutes.

[a] If the officer fails to comply with the statute in this regard, the

justice loses jurisdiction of the property and the garnishee is released from liability. *Davis v. Lewis*, 16 Ohio Cir. Ct. 138, 8 Ohio Cir. Dec. 772.

2. See generally the statutes, and *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83; *Newman v. Manning*, 89 Ind. 422; *Andrews v. Powell*, 27 Ind. 303; *State v. Pauli*, 126 Wis. 65, 104 N. W. 1007.

[a] Before service on a defendant who has not appeared or answered, the justice has no jurisdiction to try an issue on the garnishee's answer and charge him thereon. *State v. Pauli*, 126 Wis. 65, 104 N. W. 1007.

[b] Service by mail may be had on order of the justice under a statute authorizing service in such a manner as the justice directs. *Steltzer v. Chicago, M. & St. P. R. Co.*, 156 Iowa 1, 134 N. W. 573, L. R. A. 1915E, 1017.

3. Del.—*Jump v. Jones*, 3 Penne. 163, 50 Atl. 539, sufficient posting shown. Ind.—*Andrews v. Powell*, 27 Ind. 303. Ia.—*Ammerman v. Vosburg*, 101 Iowa 472, 70 N. W. 620. Okla. *Missouri, K. & T. R. Co. v. Housley*, 43 Okla. 794, 144 Pac. 610, Ann. Cas. 1916B, 363. Wis.—*State ex rel. Weber v. Cordes*, 87 Wis. 373, 58 N. W. 771.

[a] Sufficient Notice.—A notice stating that "an attachment has issued" and a railroad, naming it, has been attached as garnishee is sufficient notice. *Ammerman v. Vosburg*, 101 Iowa 472, 70 N. W. 620.

[b] Effect of Misnomer in Notice of Publication.—A judgment rendered against a defendant in garnishment proceedings based upon a publication notice or posted advertisement naming another defendant in a different action is a nullity. *Missouri, K. & T. R. Co. v. Bradshaw*, 37 Okla. 313, 132 Pac. 325.

c. *Return*.⁴ — After service of the garnishment process, the officer must make a return to the justice,⁵ in conformity to any statutory requirements,⁶ and showing that service has been made in the manner prescribed by law,⁷ and that the property of the principal debtor has been attached in the hands of the garnishee.⁸

7. **Garnishment Lien.** — Garnishment being a species of attachment, service of the summons creates a lien,⁹ which differs, however, from that of an attachment in that in the former the possession of the property is undisturbed generally and the garnishee stands liable to the plaintiff for the custody of the property, while in the latter, the plaintiff obtains a lien upon the thing itself;¹⁰ or in other words, by

4. See generally 10 STANDARD PROC. 497 et seq., and the title "Returns."

5. *Steen v. Norton*, 45 Wis. 412.

[a] **To What Justice Returnable.** Under the Georgia code, 1910, §4754, where a suit is pending or a judgment has been obtained in either a justice's court or the court of a notary public ex officio justice of the peace and garnishment based thereon is sued out and served on a person residing in a militia district of the same county different from that in which suit is pending or the judgment was obtained, the garnishment may be returned to and tried either in the justice's court or the court of the notary public ex officio justice of the peace of the district in which the garnishee resides. *Western Union Tel. Co. v. Carter*, 11 Ga. App. 499, 75 S. E. 842.

[b] **Return May Be Amended.** *Maze v. Griffin*, 65 Mo. App. 377; *Cassidy Bros. Com. Co. v. Estep*, 63 Mo. App. 540.

6. *Davis v. Lewis*, 16 Ohio Cir. Ct. 138, 8 Ohio Cir. Dec. 772.

7. *Mangold v. Dooley*, 89 Mo. 111, 1 S. W. 126; *Fletcher v. Wear*, 81 Mo. 524.

[a] **Sufficient Return.**—A return reciting that the constable executed the writ by summoning the garnishees and declaring to each of them that he attached in their hands any money or property belonging to defendant, etc., is good. *Godman v. Gordon*, 61 Mo. App. 685.

[b] **A return of "executed"** indorsed on a writ of garnishment is no evidence of service and it imposes no duty or liability upon the garnishee. *Roy v. Heard*, 38 Miss. 544.

[c] **The return must show payment of garnishee's fees**, where the statute provides that a garnishee shall not be

bound to appear unless his fees for travel have been paid him and the garnishee does not appear. *Townsend v. Clark*, 113 Wis. 31, 88 N. W. 908.

[d] **Showing as to Place of Posting.** The failure of the return of a constable to state the places where the notices in garnishment were posted and the copies mailed will not affect the jurisdiction of the justice. *Pomerooy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636.

Manner of making service, see *supra*, III, J, 6, a.

8. *Swallow v. Duncan*, 18 Mo. App. 622; *Brecht v. Corby*, 7 Mo. App. 300; *Keane v. Bartholow, Lewis & Co.*, 4 Mo. App. 507. See *Sun Mutual Ins. Co. v. Seeligson*, 59 Tex. 3, holding a return to a writ of attachment which recites execution "by serving a true copy thereof upon the garnishee" in person is not sufficient to confer jurisdiction upon the justice.

9. *Smith v. Butler*, 72 Ark. 350, 80 S. W. 580.

[a] **Priority of service creates priority of lien.** *Talbot v. Harding*, 10 Mo. 350. For loss of priority of lien, see *Vorhees v. Fisher*, 8 Ohio Dec. (Reprint) 184.

10. *Talbot v. Harding*, 10 Mo. 350; *Renneker v. Davis*, 10 Rich. Eq. (S. C.) 289.

As to attachment lien, see *supra*, III, I, 13.

[a] **Though the garnishee's liability is confined in extent to the debt, or property in his hands, due or belonging to the principal defendant**, it cannot in any event exceed the amount of the judgment recovered against the principal defendant. *Jump v. Jones*, 3 Penne. (Del.) 163, 50 Atl. 539; *Pomerooy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636.

the service of the garnishment, an inchoate lien is created.¹¹

8. Proceedings To Ascertain and Enforce Liability of Garnishee.¹²

a. *Proceedings Generally.*—It is the duty of the garnishee, after due service upon him of the writ of garnishment, to appear personally,¹³ or by agent or attorney where allowed by statute,¹⁴ and submit himself to an examination under oath touching matters alleged in the affidavit.¹⁵ The garnishee should appear at the time stated in the writ.¹⁶ Under some statutes, it is the duty of the garnishee to make and file a written disclosure or answer,¹⁷ which must be clear and

11. *White v. Simpson*, 107 Ala. 386, 18 So. 151.

12. See generally 10 STANDARD PROC. 521, et seq.

13. *Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636; *Cornell v. Payne*, 115 Ill. 63, 3 N. E. 718; *Secor v. Witter*, 39 Ohio St. 218.

[a] Failure of garnishee to appear on adjourned day does not deprive the justice of jurisdiction. *Allen v. Hamburg-Bremen F. Ins. Co.*, 121 Mich. 86, 79 N. W. 915.

[b] Effect of Filing Dissolution Bond.—(1) The garnishee need not answer when a bond is filed for the purpose of dissolving a garnishment conditioned as required by statute to pay whatever judgment may be recovered without regard to the amount of money the garnishee has. *Washer v. Campbell*, 40 Kan. 398, 19 Pac. 858. (2) But it is otherwise where the statute requires a bond limiting liability to an amount representing the property set forth by the garnishee in his answer. *Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368.

As to service of writ of garnishment, see *supra*, III, J, 6, a.

14. See generally the statutes.

15. *Cornell v. Payne*, 115 Ill. 63, 3 N. E. 718. See *Grinnell v. Niagara F. Ins. Co.*, 127 Mich. 19, 86 N. W. 435; *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500.

[a] Inquiries to be made of a garnishee need not be reduced to writing and filed; they may be propounded orally. *Laughlin v. January*, 59 Mo. 283.

16. See *Jarrell v. Guann*, 105 Ga. 139, 31 S. E. 149; *National Bank of Brunswick v. Pritchard*, 4 Ga. App. 46, 61 S. E. 841.

[a] A garnishee in a justice's court (1) must answer at the term to which the summons is returnable if the term is more than ten days from the time

of service (*Jarrell v. Guann*, 105 Ga. 139, 31 S. E. 149), (2) but if the justice's court acts within ten days after service, the summons must be made returnable to the next justice's court thereafter. *National Bank of Brunswick v. Pritchard*, 4 Ga. App. 46, 61 S. E. 841.

17. See generally the statutes and the following: *Colo.*—*Nylan v. Renhard*, 10 Colo. App. 46, 49 Pac. 266. *Mich.*—*Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500, corporation defendant. *Tenn.*—*Pickler v. Rainey*, 4 Heisk. 335, although the statute does not in terms require the oath to be in writing. *Vt.*—*Lockwood v. Fletcher*, 74 Vt. 72, 52 Atl. 119.

[a] Notwithstanding the statute requires the disclosure of the garnishee in writing, if he appears and, without making a written disclosure, consents orally that judgment may be entered against him, he cannot maintain *audita querela* to have such judgment set aside. *Lockwood v. Fletcher*, 74 Vt. 72, 52 Atl. 119.

[b] A corporation (1) may answer in writing verified by oath or its proper officer may appear on the return day and answer under statute in Michigan. *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500. (2) But the justice may strike the written disclosure of a corporation from the files and order it to submit to an oral examination. *Grinnell v. Niagara F. Ins. Co.*, 127 Mich. 19, 86 N. W. 435. (3) Where a corporation is summoned as garnishee, the answer must be made either by one of its servants, or agents, who has actual knowledge of the state of its dealings with the defendant, or by an officer of the corporation to whom such knowledge will be imputed by law. *Central of Georgia Ry. Co. v. Dickerson*, 15 Ga. App. 293, 82 S. E. 942.

[c] In Alabama the person answering on behalf of the corporation must

explicit as to its statements.¹⁸ When the answer or examination is oral, the justice is required to take minutes of the examination,¹⁹ or reduce it to writing,²⁰ and file the same with other papers in the case.²¹

Remedy for Absence of or Unsatisfactory Answer.—If the garnishee fails to appear,²² or if he appears and answers and his disclosure is not satisfactory to the plaintiff,²³ the plaintiff may, under some statutes, proceed against him by action in his own name,²⁴ or the garnishee may be proceeded against by attachment as for contempt,²⁵ or a default judgment may be rendered against him.²⁶

Effect of Appearance by Garnishee.—An appearance by the garnishee will operate as a waiver of defects and irregularities, in the proceedings against himself;²⁷ but his appearance can, in no way, operate to cure jurisdictional defects affecting the subject-matter of the garnishment proceedings,²⁸ or defects in the main action.²⁹

make affidavit that he is the duly authorized agent of the corporation to make such answer. *Steiner v. First Nat. Bank*, 115 Ala. 379, 22 So. 30.

[d] **Amended Answer.**—If the amount due from the garnishee is contingent on some future happening the court may allow the garnishee to file an amended answer after the contingency has arisen. *Karnes v. Pritchard*, 36 Mo. 135.

[e] **Request To Amend Must Be Seasonable.**—After the justice has rendered his decision a request by the garnishee to amend his answer comes too late. *Rowe v. Arrington*, 1 Ala. App. 633, 56 So. 8.

[f] **A supplemental disclosure may be made by a garnishee who failed to appear on an adjourned day and is summoned to show cause.** *Allen v. Hamburg-Bremen F. Ins. Co.*, 121 Mich. 86, 79 N. W. 915.

18. *Weirich v. Scribner*, 44 Mich. 73, 6 N. W. 91; *Spears v. Chapman*, 43 Mich. 541, 5 N. W. 1038.

19. *Sutherland v. Burrill*, 82 Mich. 13, 45 N. W. 1122; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613, the fair import of this statute is that he shall reduce the examination to writing.

[a] **The garnishee need not sign the disclosure.** *Sutherland v. Burrill*, 82 Mich. 13, 45 N. W. 1122.

20. *Wis. St.*, 1915, §3721.

21. *Sutherland v. Burrill*, 82 Mich. 13, 45 N. W. 1122; *Isabelle v. Iron Cliffs Co.*, 57 Mich. 120, 23 N. W. 613.

22. *Nelson v. Blanks*, 67 Ark. 347, 56 S. W. 867.

23. *Nelson v. Blanks*, 67 Ark. 347, 56 S. W. 867.

24. *Exchange Bank v. Gulick*, 24 Kan. 359, this remedy is cumulative with that by giving notice and having a trial as to the truth of the answer.

25. See generally the statutes and *Garden v. Crutchfield*, 112 Ga. 274, 276, 37 S. E. 368.

26. As to default judgment, see *infra*, III, J, 8, e, (III).

27. *Del.*—*Carey v. Brinton*, 6 Houst. 340. *Mich.*—*Bigalow v. Barre*, 30 Mich. 1. *Tenn.*—*Miller v. Wilson*, 86 Tenn. 495, 7 S. W. 638. *Tex.*—*Walter A. Wood Mowing & R. M. Co. v. Edwards*, 9 Tex. Civ. App. 537, 29 S. W. 418.

[a] Where a garnishee voluntarily appears and answers the failure to pay his fee is not a jurisdictional error. *De Laval Separator Co. v. Hofberger*, 161 Wis. 344, 154 N. W. 387.

28. *Wells v. American Exp. Co.*, 55 Wis. 23, 11 N. W. 537, 12 N. W. 441, 42 Am. Rep. 695; *Rasmussen v. McCabe*, 46 Wis. 600, 1 N. W. 196; *Steen v. Norton*, 45 Wis. 412.

[a] The garnishee cannot, by voluntary appearance, confer jurisdiction or waive the requirements of the statute, so that he cannot consent to a reopening of the case against him. *McCormick Harvesting Mch. Co. v. James*, 84 Wis. 600, 54 N. W. 1088.

[b] Where the jurisdictional facts consisting of an unsatisfied execution does not appear, a judgment against a garnishee is erroneous notwithstanding an appearance and answer by him. *Miller v. Wilson*, 86 Tenn. 495, 7 S. W. 638.

29. *Segar v. Muskegon Shingle & L. Co.*, 81 Mich. 344, 45 N. W. 982.

b. *Appearance of Principal Defendant in the Garnishment Proceeding.*—The defendant in the original action may appear and interpose defenses in the garnishment proceedings.³⁰

c. *Traverse and Trial of Answer.*—The plaintiff may, under some statutes, traverse the answer of the garnishee;³¹ and under some, he may give notice to the justice that the answer is unsatisfactory and demand a trial of its truth.³² In either event a trial is had as in other cases.³³

d. *Claims by Third Persons.*³⁴—The statutes generally allow claimants of the property in the possession of the garnishee to protect his rights by interplea or intervention;³⁵ but a claimant who has no notice

30. *Jones v. St. Onge*, 67 Wis. 520, 30 N. W. 927, he may set up that the property in the possession of the garnishee is exempt.

[a] The principal defendant may appear specially (1) to contest the jurisdiction of the court without giving the justice jurisdiction over his person (Ark.—*Martin v. Foreman*, 18 Ark. 249. Ga.—*Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368. N. D.—*Searl v. Shanks*, 9 N. D. 204, 82 N. W. 734. Wis.—*State ex rel. Weber v. Cordes*, 87 Wis. 373, 58 N. W. 771), (2) as where he appears specially to claim an exemption in the garnished property or debt. *Burrell v. Goldstein*, 23 N. D. 257, 136 N. W. 243; *State ex rel. Weber v. Cordes*, 87 Wis. 373, 58 N. W. 771.

31. See generally the statutes, and Ala.—*Steiner v. First Nat. Bank*, 115 Ala. 379, 22 So. 30. Ga.—*Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368. Mo.—*Blackstone v. St. Louis, I. M. & S. Ry. Co.*, 44 Mo. App. 555.

[a] The plaintiff cannot, on appeal, assert as a matter of right the right to deny the answer when he failed to do so at the time stated in the statute. *Blackstone v. St. Louis, I. M. & S. Ry. Co.*, 44 Mo. App. 555.

32. *Nylan v. Renhard*, 10 Colo. App. 46, 49 Pac. 266; *Exchange Bank v. Gulick*, 24 Kan. 359; *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366.

[a] This Remedy and That by Action Is Cumulative.—*Exchange Bank v. Gulick*, 24 Kan. 359.

33. *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366.

[a] No pleadings are required in such trial. The trial, the affidavit for garnishment, the garnishee's answer, and the notice that the answer is unsatisfactory take their place. *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366.

[b] The amount of the indebtedness or the value of the property are immaterial in such trial. *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366.

[c] If the testimony is conflicting on the question of the garnishee's indebtedness, the issue should be submitted to a jury, if all the parties are before court. *Smith v. Bank of Higden*, 115 Ark. 216, 170 S. W. 1008. As to trial by jury generally, see the title "Juries and Jurors."

34. See generally. 10 STANDARD PROC. 550, et seq.

Third party claims in case of execution against property, see the title "Judgments and Decrees, Enforcement of."

35. See the statutes, and the following: Kan.—*Clark & Co. v. Wiss*, 34 Kan. 553, 9 Pac. 281. Mich.—*Hagen v. Johnson*, 126 Mich. 695, 86 N. W. 143; *Stone v. Dowling*, 119 Mich. 476, 78 N. W. 549. Miss.—*First Nat. Bank v. Fain Grocery Co.*, 87 Miss. 503, 40 So. 6. Mo.—*Schawacker v. Dempsey*, 83 Mo. App. 342; *Wolff v. Vette*, 17 Mo. App. 36.

[a] Time to Interplead.—(1) At any time before final judgment or the money has been paid over to the plaintiff the claimant may interplead. *Edwards v. Cosgro*, 71 Iowa 296, 32 N. W. 350. (2) He may interplead even on appeal. *Wolff v. Vette*, 17 Mo. App. 36.

[b] The interplea must be tried and determined separately upon what is virtually a separate record. *Wolff v. Vette*, 17 Mo. App. 36.

[c] A claimant cannot question the validity of a voidable judgment upon which the garnishment proceedings is founded, and which is acquiesced in by the party against whom it was

of the pendency of garnishment proceedings will not lose his rights to the fund by failure to interplead.³⁶

*e. Judgment or Order Against Garnishee.*³⁷ — (I.) **Manner of Charging Garnishee.** — In some jurisdictions, the court on finding against the garnishee renders an ordinary judgment against him.³⁸ But in other jurisdictions the statutes have provided various methods of charging the garnishee;³⁹ thus instead of rendering a judgment against the garnishee, he is sometimes ordered to pay the money into court;⁴⁰ this order is not enforceable by execution, and if the garnishee fail to comply with it, the plaintiff's only remedy is by action.⁴¹

(II.) **When Judgment Rendered.** — The time of rendition of judgment against the garnishee is regulated by statutes,⁴² which generally require that final judgment be first rendered in the main action,⁴³ even

rendered. *Field v. Peel*, 122 Ga. 503, 50 S. E. 346.

[d] **Waiver of Objections.**—By going to trial in the justice court on the ownership of the garnished property without objection to the garnishment proceedings the claimant will be deemed to have waived all irregularities therein. *Pedrick v. McCall*, 80 Ga. 491, 5 S. E. 633 (where the traverse to the garnishee's disclosure was not filed within the statutory time); *Donnelly v. O'Connor*, 22 Minn. 309, defects in the affidavit and summons.

[e] **Payment after dismissal of the interplea** and before appeal by the intervener will not relieve the garnishee from liability. *Citizens Bank v. Commercial Nat. Bank*, 118 Ark. 497, 177 S. W. 21.

[f] **Judgments on interplea may be appealed**, although the garnishment may be still pending. *Wolff v. Vette*, 17 Mo. App. 36.

36. *Rutherford v. Fullerton*, 89 Ga. 353, 15 S. E. 471; *Holman v. Lueck*, 137 Wis. 375, 119 N. W. 124.

37. See generally 10 **STANDARD PROC.** 567, et seq.

38. See *infra*, this section.

39. See the statutes.

[a] **In Rhode Island**, no judgment is rendered against the garnishee but he is only charged and becomes liable to pay any judgment that plaintiff may recover against the principal defendant; but the plaintiff must resort to his action to recover from the garnishee. *Eddy v. Providence Mach. Co.*, 15 R. I. 7, 22 Atl. 1116.

40. *Ark.*—*Giles v. Hicks*, 45 Ark. 271. *Kan.*—*Missouri Pac. Ry. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846; *Muse*

v. Lehman, 30 Kan. 514, 1 Pac. 804; *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366; *Board of Education v. Scoville*, 13 Kan. 17; *Kansas City, Ft. S. & M. Ry. Co. v. Cunningham*, 7 Kan. App. 47, 51 Pac. 972. *Mont.*—*Taney v. Vollenweider*, 28 Mont. 147, 72 Pac. 415. *Ohio.*—*Rice v. Whitney*, 12 Ohio St. 358. *Okla.*—*Bell-Wayland Co. v. Nixon*, 156 Pac. 1195.

As to effect of order, see *infra*, III, J, 8, e, (VII).

41. *Missouri Pac. Ry. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846; *Null v. Jones*, 33 Kan. 112, 5 Pac. 388; *Exchange Bank v. Gulick*, 24 Kan. 359; *Fitch v. Manhattan Fire Ins. Co.*, 23 Kan. 366; *Board of Education v. Scoville*, 13 Kan. 17; *Bank of Le Roy v. Harding*, 1 Kan. App. 389, 41 Pac. 680; *Bell-Wayland Co. v. Nixon* (Okla.), 156 Pac. 1195.

42. See the statutes.

[a] **In Georgia** a final judgment cannot be entered against a garnishee until a term subsequent to that at which he is required to answer; a judgment entered before that time is illegal. *Scott v. Patrick*, 44 Ga. 188.

43. See the statutes, and *Ark.* *Smith v. Bank of Higden*, 115 Ark. 216, 170 S. W. 1008, (*citing local cases*); *St. Louis, I. M. & S. R. Co. v. McDermitt*, 91 Ark. 112, 120 S. W. 831; *Norman v. Poole*, 70 Ark. 127, 66 S. W. 433. *Colo.*—*Nylan v. Renhard*, 10 Colo. App. 46, 49 Pac. 266. *Ga.*—*Kuniansky v. Hogan*, 9 Ga. App. 482, 71 S. E. 777; *Kelly v. Young*, 8 Ga. App. 551, 70 S. E. 27; *Nashville, C. & St. L. R. Co. v. Brown*, 3 Ga. App. 561, 60 S. E. 319. *Ill.*—*Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636; *Czyston v. St. Stanislaus Parish*, 131 Ill. App. 163;

where the garnishee is in default,⁴⁴ and where the defendant is a non-resident of the state,⁴⁵ although upon the latter proposition there are authorities to the contrary.⁴⁶ And if the garnishment is in aid of execution, a judgment cannot be rendered against the garnishee before the return day of the execution,⁴⁷ nor subsequently thereto unless by adjournment or postponement for that purpose.⁴⁸

(III.) Judgment or Order on Default. — Except in those jurisdictions where no judgment can be rendered against a garnishee,⁴⁹ the statutes generally provide that if the garnishee fail to appear at the proper time, or appearing, fail to make full answer to the interrogatories, a default judgment for the amount of the plaintiff's claim against the defendant and costs may be rendered against him;⁵⁰ but in some jurisdictions, on the rendition of judgment against the defendant, the justice issues a summons to the absent garnishee requiring him to show

Boyne v. Vandalia R. R. Co., 128 Ill. App. 191. Mich.—Iron Cliffs Co. v. Laihais, 52 Mich. 394, 18 N. W. 121; Laidlaw v. Morrow, 44 Mich. 547, 7 N. W. 191. Mo.—Stevenson v. Standard Adding Mach. Co., 150 Mo. App. 555, 131 S. W. 162. Okla.—Missouri, K. & T. R. Co. v. Bradshaw, 37 Okla. 313, 132 Pac. 325. Tenn.—Nashville & C. R. Co. v. Todd, 11 Heisk. 549.

[a] See also, Bushnell v. Allen, 48 Wis. 460, 4 N. W. 599, holding that a garnishment judgment in a justice's court is not fatally defective because the record does not show judgment against the principal defendant in the original action as the two records should be read together, and it is sufficient if such judgment appear from the whole record.

44. Nashville, C. & St. L. Ry. Co. v. Brown, 3 Ga. App. 561, 60 S. E. 319; Minneapolis, St. P. & S. S. M. R. Co. v. Pierce, 103 Minn. 504, 115 N. W. 549.

45. Minneapolis, St. P. & S. S. M. R. Co. v. Pierce, 103 Minn. 504, 115 N. W. 549, when the garnishee defaults he admits the possession of property belonging to the defendant and the justice has jurisdiction to authorize publication of summons.

46. Lawrence, Rapelye & Co. v. Ware, 1 Stew. (Ala.) 33.

[a] A justice's docket need not show the hour of entering judgment against a garnishee on an attachment affidavit. Weisman v. Weisman, 133 Pa. 89, 19 Atl. 300.

47. Shannon v. Allen, 4 Harr. (Del.) 326.

49. Eddy v. Providence Mach. Co., 15 R. I. 7, 22 Atl. 1116. See *supra*, III, J, 8, e, (I).

50. See the statutes, and Ark.—Norman v. Poole, 70 Ark. 127, 66 S. W. 433. Ga.—Davis v. Rhodes, 112 Ga. 106, 37 S. E. 169; Atlanta Journal v. Brunswick Pub. Co., 111 Ga. 718, 36 S. E. 929; Jarrell v. Guann, 105 Ga. 139, 31 S. E. 149; Farley v. Bloodworth, 66 Ga. 349; Scott v. Patrick, 44 Ga. 188. Minn.—Minneapolis, St. P. & S. M. R. Co. v. Pierce, 103 Minn. 504, 115 N. W. 549. Mo.—Laughlin v. January, 59 Mo. 383. N. H.—Caouette v. Young, 67 N. H. 159, 32 Atl. 157, 68 Am. St. Rep. 643; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380. Pa.—Leiss v. Engard, 8 Pa. Dist. 608, 23 Pa. Co. Ct. 335.

[a] How Amount of Judgment Determined.—Where a judgment has been entered against a defendant in garnishment proceeding in a justice's court, the justice will look to such judgment in determining the amount of the judgment to be rendered against the garnishee. Morrison v. Hilburn, 126 Ga. 114, 54 S. E. 938.

[b] The garnishee cannot defeat the default judgment by an appeal to a jury (1) in the justice court and there filing an answer denying indebtedness to the defendant. Davis v. Rhodes, 112 Ga. 106, 37 S. E. 169. (2) But see Boozer v. Fuller, 88 Ga. 295, 14 S. E. 615, holding that an appeal to a justice's jury does lie; but in this case the garnishee filed an answer and the default was granted on his failure to produce books and papers.

cause why judgment should not be rendered against him,⁵¹ or renders a conditional judgment only against him.⁵²

(IV.) Judgment Upon Answer or Disclosure. — If it appear from the answer of the garnishee when no issue is made thereon,⁵³ or from the finding of the court or jury on such issue,⁵⁴ that the garnishee is indebted to the defendant, the justice is required by statutes in some states to order him to pay the money into court, and if he does not do so at the time ordered, to render judgment against him.⁵⁵ Under other statutes, he is required to render judgment against him immediately.⁵⁶ In some jurisdictions, the garnishee is summoned to show cause why judgment should not be rendered against him.⁵⁷

Although one answer of a garnishee may authorize more than one judgment,⁵⁸ one judgment cannot be rendered upon two or more executions returned nulla bona, notwithstanding they may be at the instance of the same plaintiff against the same original defendant.⁵⁹

(V.) Form of Judgment.⁶⁰ — A judgment in favor of the plaintiff may be in his name against the garnishee,⁶¹ or it may be against the garnishee in favor of the principal defendant, to the use of the plaintiff.⁶² It should show whether it was entered for neglect or refusal

51. *Nylan v. Renhard*, 10 Colo. App. 46, 51, 49 Pac. 266, garnishment proceedings in aid of attachment. See *Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024.

52. *Steiner v. First Nat. Bank*, 115 Ala. 379, 388, 22 So. 30.

[a] The failure of the plaintiff to take a conditional judgment against the garnishee on his failure to answer does not discontinue the garnishment, and he may take such judgment at a subsequent term. *Steiner v. First Nat. Bank*, 115 Ala. 379, 388, 22 So. 30.

53. See cases cited *infra*, this note.

[a] It must clearly appear from the answer (1) that the garnishee is chargeable or a judgment against him is unwarranted. Ala.—*Wohl v. First Nat. Bank of Gadsden*, 154 Ala. 332, 46 So. 231. Ill.—*Chicago R. I. & P. Ry. Co. v. Mason*, 11 Ill. App. 525. Mich.—*Ruhl v. Ruoff Brew. Co.*, 113 Mich. 291, 71 N. W. 526; *Walker v. Detroit G. H. & N. R. Co.*, 49 Mich. 446, 13 N. W. 812; *Wenich v. Scribner*, 44 Mich. 73, 6 N. W. 91. Minn.—*McLean v. Sworts*, 69 Minn. 128, 71 N. W. 925, 65 Am. St. Rep. 556. (2) A justice is not authorized to render judgment against a garnishee solely upon an answer admitting indebtedness upon an overdue note of which third parties claim to be bona fide purchasers before maturity. *Button v. Trader*, 75 Mich. 295, 42 N. W. 834.

[b] Although the garnishee denies

indebtedness, judgment may be rendered against him if he is in fact indebted to the defendant. *Donnelly v. O'Connor*, 22 Minn. 309.

54. See *supra*, III, J, 8, c.

55. See the statutes, and *Rasmussen v. McCabe*, 43 Wis. 471.

[a] A single judgment cannot be made to cover both the order and judgment. *Rasmussen v. McCabe*, 43 Wis. 471, 476.

56. See generally the statutes, and *Kapp v. Teel*, 33 Tex. 811.

[a] If the answer discloses a certain but immature liability, a judgment with a suspension of execution until maturity of the debt will be rendered. *Burgin v. Ivy C. & C. Co.*, 127 Ala. 657, 29 So. 67.

57. *Kayser v. Farmers' & M. Bank*, 115 Mich. 688, 74 N. W. 181 (citing cases); *Heritage v. Armstrong*, 101 Mich. 85, 59 N. W. 439; *Iron Cliff Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121.

58. *Witherspoon v. Barber*, 3 Stew. (Ala.) 335.

59. *Witherspoon v. Barber*, 3 Stew. (Ala.) 335.

60. See generally 10 STANDARD PROC. 570.

61. *White v. Simpson*, 107 Ala. 386, 18 So. 151; *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173, 107 Am. St. Rep. 479, 67 L. R. A. 209.

62. *Pomeroy v. Rand, McNally & Co.*, 157 Ill. 176, 41 N. E. 636; *Natywa v. Wachowski*, 171 Ill. App. 457; *Ham v.*

of the garnishee to answer interrogatories, or for default of appearance, or upon his answer or on a verdict,⁶³ and in all the latter cases, it should be entered specially.⁶⁴

(VI.) Amount of Judgment. — Some statutes prescribe a minimum amount for which judgment against the garnishee may be rendered,⁶⁵ and a judgment cannot be rendered for an amount exceeding the jurisdiction of the justice.⁶⁶

(VII.) Effect of Judgment and Order. — The rendition of a judgment against the garnishee perfects the inchoate lien created by the garnishment process,⁶⁷ and substitutes the plaintiff as the creditor instead of the defendant.⁶⁸ So long as it is unreversed, it is conclusive as between the garnishee and the defendant,⁶⁹ and as conclusively determines the liability of the garnishee and the rights of the plaintiff as if it had been rendered in an ordinary suit *inter partes*.⁷⁰

The order that the garnishee pay the money into court which is rendered in some states, is not a final judgment,⁷¹ but amounts merely to an assignment of the claim from the original creditor, the defendant in the main action to the plaintiff in such action.⁷²

(VIII.) Opening and Vacating. — A justice of the peace has no authority after the entry of judgment to reopen the case and adjourn it to

Perry, 39 Ill. App. 341; Chicago, R. I. & P. Ry. Co. v. Mason, 11 Ill. App. 525.

63. Jones v. Tracy, 75 Pa. 417 (giving form of judgment by default for want of appearance); Layman v. Beam, 6 Whart. (Pa.) 181; Leiss v. Engard, 23 Pa. Co. Ct. 335.

64. Leiss v. Engard, 23 Pa. Co. Ct. 335; Rineheimer v. Weiss, 4 Kulp (Pa.) 279.

65. See the statutes, and Sheehan v. Newpick, 77 Minn. 426, 80 N. W. 356.

66. Witherspoon v. Barber, 3 Stew. (Ala.) 335.

[a] Although the indebtedness exceeds the justice's jurisdiction, the justice may render a judgment for an amount within his jurisdiction. Doggett v. St. Louis M. & F. I. Co., 19 Mo. 201.

67. White v. Simpson, 107 Ala. 386, 394, 18 So. 151.

As to garnishment lien, see *supra*, III, J, 7.

68. White v. Simpson, 107 Ala. 386, 18 So. 151.

69. See the following: Ala.—Planters Chemical & Oil Co. v. Waller & Co., 160 Ala. 217, 49 So. 89, 135 Am. St. Rep. 93; Georgia & A. Ry. v. Stollenwerk, 122 Ala. 539, 25 So. 258. Ga. Davis v. Rhodes, 112 Ga. 106, 37 S. E. 169, default judgment. See also Proc-

tor v. Rhodes, 112 Ga. 110, 37 S. E. 171. Ill.—Low v. Arnstein, 73 Ill. App. 215. Ia.—Smith v. Dickson, 58 Iowa 444, 10 N. W. 850; Moore v. Chicago, R. I. & P. R. Co., 43 Iowa 385. Mich. Barber v. Howd, 85 Mich. 221, 48 N. W. 539. Tex.—Eppler v. Hilley (Tex. Civ. App.), 166 S. W. 87.

[a] Not Subject to Collateral Attack.—Ohio & U. Ry. Co. v. Alvey, 43 Ind. 180; Boynton v. Fly, 12 Me. 17.

70. Austin & Sons v. Hunter, 193 Ala. 163, 69 So. 113; Steiner v. First Nat. Bank, 115 Ala. 379, 22 So. 30; White v. Simpson, 107 Ala. 386, 18 So. 151; Booth v. Brooke & Co., 6 Ga. App. 299, 64 S. E. 1103.

71. Cunningham v. Kansas City, Ft. S. & M. Ry. Co., 60 Kan. 263, 56 Pac. 502; Bell-Wayland Co. v. Nixon (Okla.), 156 Pac. 1195; Spaulding Mfg. Co. v. Witter (Okla.), 152 Pac. 1079.

Garnishee cannot appeal from such order. Board of Education v. Scoville, 13 Kan. 17.

72. Board of Education v. Scoville, 13 Kan. 17; Spaulding Mfg. Co. v. Witter (Okla.), 152 Pac. 1079.

[a] The (1) garnishee loses no rights and the creditor gains no more rights than the debtor had (Board of Education v. Scoville, 13 Kan. 17; Spaulding Mfg. Co. v. Witter [Okla.], 152 Pac. 1079), (2) but he is vested

some future day,⁷³ even if the garnishee consents thereto.⁷⁴ But he may set aside a default judgment against a garnishee and grant a new trial.⁷⁵

(IX.) **Equitable Relief Against.**⁷⁶ — A garnishee may resort to equity to enjoin the enforcement of a judgment against him if it is void,⁷⁷ or has been obtained by fraud, mistake, accident, or the like.⁷⁸ A party who controverts the garnishee's answer has a remedy by appeal from a judgment which is not void and he cannot therefore obtain an injunction.⁷⁹

(X.) **Enforcement of Judgment.**⁸⁰ — A judgment against a garnishee may be enforced by execution.⁸¹ If the property has been delivered into court on the order of the justice, a judgment in favor of the plaintiff will be satisfied by the sale of such property or so much as is necessary to satisfy the judgment.⁸²

(XI.) **Costs and Fees.**⁸³ — Statutes sometimes allow the garnishee fees for his attendance;⁸⁴ but in the absence of a statute authorizing it, a garnishee cannot recover costs in garnishment proceedings before a justice of the peace;⁸⁵ nor can he be charged with the costs of the main action.⁸⁶

f. *Discharge of Garnishee.* — (I.) **Generally.** — The garnishee will be discharged if no property belonging to the defendant is found in

with all the rights the original defendant had. **Ark.**—*Smith v. Butler*, 72 Ark. 350, 80 S. W. 580. **Kan.**—*Bank of Le Roy v. Harding*, 1 Kan. App. 389, 41 Pac. 680. **Okla.**—*Bell-Wayland Co. v. Nixon*, 156 Pac. 1195.

73. *McCormick H. M. Co. v. James*, 84 Wis. 600, 54 N. W. 1088.

74. *McCormick Harvesting Mach. Co. v. James*, 84 Wis. 600, 54 N. W. 1088.

75. **Ark.**—*Smith v. Parker*, 25 Ark. 518. **Ga.**—*Atlanta Journal v. Brunswick Pub. Co.*, 111 Ga. 718, 36 S. E. 929. **Minn.**—*Minneapolis, St. P. & S. M. R. Co. v. Pierce*, 103 Minn. 504, 115 N. W. 649. **Mo.**—*Laughlin v. January*, 59 Mo. 383.

76. As to equitable relief against judgments generally, see 15 **STANDARD PROC.** 256.

77. **Colo.**—*Rice v. American Nat. Bank*, 3 Colo. App. 81, 31 Pac. 1024. **Kan.**—*Missouri Pac. R. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846. **Neb.**—*Cobhey v. Wright*, 34 Neb. 771, 52 N. W. 713.

[a] In a jurisdiction where a final judgment cannot be rendered against the garnishee, such a judgment is void and may be enjoined. **Missouri Pac. Ry. Co. v. Reid, 34 Kan. 410, 8 Pac. 846.**

78. *Davis v. Staples*, 45 Mo. 567; *Watkins v. Gray*, 5 Mo. App. 592.

[a] The garnishee must show, to obtain relief, that it would be against conscience to execute such a judgment, that he has not been remiss in his own duties and that he has been deprived of his rights by some fraud or accident. *Davis v. Staples*, 45 Mo. 567.

79. *Eppler v. Hilley* (Tex. Civ. App.), 166 S. W. 87.

80. **Enforcement of judgments generally**, see the title "Judgments and Decrees, Enforcement of."

81. *Missouri Pac. Ry. Co. v. Reid*, 34 Kan. 410, 8 Pac. 846; *Troyer v. Schweizer*, 15 Minn. 241.

82. *Beamer v. Winter*, 41 Kan. 297, 21 Pac. 251; *Paulsen v. Hall*, 39 Kan. 365, 18 Pac. 225.

[a] The place where the property was garnished is the place where the sale should be had. *Beamer v. Winter*, 41 Kan. 297, 21 Pac. 251.

83. See generally 10 **STANDARD PROC.** 590, et seq.

84. See the statutes, and *Witherspoon v. Barber*, 3 Stew. (Ala.) 335.

85. *Voorhies v. Denver Hardware Co.*, 4 Colo. App. 428, 36 Pac. 65; *Miller v. Williams*, 30 Vt. 386.

86. *Witherspoon v. Barber*, 3 Stew. (Ala.) 335.

his hands,⁸⁷ if the plaintiff is unsuccessful in the main action,⁸⁸ or if a final judgment is rendered against the garnishee.⁸⁹ The payment of a valid judgment in the garnishment extinguishes pro tanto the debt of the garnishee to the principal defendant,⁹⁰ even if the judgment is erroneous or voidable,⁹¹ or is subsequently set aside;⁹² and it is generally provided that the garnishee shall be discharged by payment to the justice or officer before final judgment against him.⁹³

(II.) **By Giving Bond or Undertaking.**—Statutes sometimes provide for the dissolution of the garnishment and discharge of the garnishee by the giving of a dissolution bond or undertaking,⁹⁴ upon which judgment may sometimes be rendered when the indebtedness on the part of the garnishee has been ascertained and established,⁹⁵ but not

87. *Barker v. Garland*, 22 N. H. 103.

[a] **Conclusiveness.**—A judgment against the plaintiff discharging the garnishee is a final judgment and adjudges that the garnishee is not subject to process, is not the debtor of the plaintiff and has no property of the defendant as conclusively as if rendered in a suit inter partes. *Steiner v. First Nat. Bank*, 115 Ala. 379, 22 So. 30.

88. *Norman v. Poole*, 70 Ark. 127, 66 S. W. 433; *Erickson v. Duluth*, S. S. & A. Ry. Co., 105 Mich. 415, 63 N. W. 420.

89. *Burgin v. Ivy C. & C. Co.*, 127 Ala. 657, 29 So. 67, as this is a termination of the suit against him.

90. *Ala.*—*White v. Simpson*, 107 Ala. 386, 18 So. 151. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56. *Colo.*—*Drennon v. Ross*, 2 Colo. App. 181, 29 Pac. 1041. *Ill.* *Himrod v. Baugh*, 85 Ill. 435. *Me.* *Ladd v. Jacobs*, 64 Me. 347.

[a] **Payment of a judgment in a void garnishee proceeding** does not release the garnishee. *Littlejohn v. Lewis*, 32 Ark. 423; *McPhee v. Gomer*, 6 Colo. App. 461, 41 Pac. 836.

[b] **To justify the payment of money under garnishment proceedings in a justice's court**, the justice's record must show that the justice obtained jurisdiction both of defendant and garnishee, and that the garnishee was compelled to pay the debt by due process of law. *Spencer v. Iowa Mortg. Co.*, 6 Kan. App. 378, 50 Pac. 1094.

91. *Parmer v. Ballard*, 3 Stew. (Ala.) 326; *Taylor v. Benjamin*, 76 Ga. 762.

92. *Troyer v. Schweizer*, 15 Minn. 241.

93. *Ark.*—*St. Louis, I. M. & S. R. Co. v. Richter*, 48 Ark. 349, 3 S. W. 56. *Colo.*—*Nylan v. Renhard*, 10 Colo. App. 46, 49 Pac. 266. *Ind.*—*Ohio & M. Ry. Co. v. Alvey*, 43 Ind. 180, under Ohio statute. *Mich.*—*Barber v. Howd*, 85 Mich. 221, 48 N. W. 539. *Minn.*—*Troyer v. Schweizer*, 15 Minn. 241. *Mo.*—*State ex rel. Lewis v. Barnett*, 96 Mo. 133, 8 S. W. 767; *Cassidy Bros. Com. Co. v. Estep*, 63 Mo. App. 540; *Melton v. Kansas City, Ft. S. & M. R. R.*, 39 Mo. App. 194.

[a] **Even if the proceedings are irregular**, payment will discharge the garnishee. *Ohio & M. Ry. Co. v. Alvey*, 43 Ind. 180.

[b] **Payment of an exempt claim**, at the close of examination, is at the peril of the garnishee unless the circumstances create an estoppel against the principal defendant. *Crisp v. Ft. Wayne & E. Ry. Co.*, 98 Mich. 648, 57 N. W. 1050, 22 L. R. A. 732.

94. See the statutes, and *Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368; *Woodward v. Witascheck*, 38 Kan. 760, 17 Pac. 658.

95. *Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368.

[a] **The judgment cannot exceed the amount of the judgment in the original suit.** *Garden v. Crutchfield*, 112 Ga. 274, 37 S. E. 368.

[b] **If the garnished property is exempt**, no judgment on the bond can be rendered. *Linder v. Benson & Co.*, 78 Ga. 116.

[c] **A judgment on appeal renders the obligors liable on their bond.** *Washer v. Campbell*, 40 Kan. 398, 19 Pac. 858.

before.⁹⁶ This bond may also be enforced by action in some jurisdictions.⁹⁷

As to judgments against garnishee generally, see *supra*, III, J, 8, e.

96. Yeager v. Self, 121 Ala. 265, 25 So. 777; Linder v. Benson & Co., 78 Ga. 116.

[a] A judgment against the garnishee is a condition precedent.—Garden v. Crutchfield, 112 Ga. 274, 37 S. E. 368.

97. Davis v. Bickel, 25 Ind. App. 378, 58 N. E. 207; Rich v. Sowles, 65 Vt. 135, 26 Atl. 585.

As to actions on bonds generally, see the title "Bonds."

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